

Interagency Initiative to Foster Collaborative Problem Solving and Environmental Conflict Resolution

ECR SURVEY FINDINGS (Revised Draft – 5/05/05)

Background on the Interagency ECR Initiative

In August 2003, Jim Connaughton, Chairman of the President's Council on Environmental Quality contacted the U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation (the U.S. Institute) to discuss the development of a set of principles that could be used to improve environmental decision-making. He asked the U.S. Institute to plan and facilitate a meeting of top policy officials and their legal counsel to address how they can increase the use of more innovative approaches to collaborative problem solving and dispute resolution. He also wanted to create an opportunity to recognize programmatic initiatives already being undertaken by a number of departments and agencies.

The U.S. Institute and senior staff from a variety of federal departments and agencies engaged in environmental decision-making and conflict resolution developed and refined a set of basic principles that Chairman Connaughton could use to engage departmental leadership in a discussion on ways to more systematically prevent, reduce and resolve environmental conflicts more effectively.¹ On June 30, 2004, Chairman Connaughton convened a meeting of top policy officials and legal counsel from fifteen federal departments and agencies actively engaged in environmental issues. In this initial meeting, participants reviewed administration priorities and departmental initiatives already underway, and discussed the challenges associated with reducing environmental conflicts and improving environmental decision making.²

¹ **Basic Principles for Agency Engagement.** The set of basic principles for cooperative agency engagement were derived from collective professional experience and research on interest-based negotiation, consensus building, collaborative management, and environmental mediation and conflict resolution. Departmental leaders already invoke many of these principles before making environmental decisions, when developing policies and plans, managing programs, and enforcing laws and regulations.

² **Problem Statement and Policy Priorities.** This administration and those before it have long faced the challenge of balancing competing public interests and federal agency responsibilities when striving to accomplish national environmental protection and management goals. This is a fundamental governance challenge. In order to more effectively address this environmental governance challenge and change unproductive patterns, federal departmental and agency leadership must generate opportunities for constructive collaborative problem solving and help reduce environmental conflicts. Draft policy goals include:

- Sharing responsibility for environmental quality and resource management across agencies with divergent missions, with state, local and tribal governments, and in partnership with the private sector.
- Creating/revising management operations to improve environmental decision-making processes and the quality of decisions within the context of existing regulatory frameworks and consistent with governmental missions and mandates.
- Strengthening compliance with environmental laws by using more effective information and data sharing tools to achieve objectives and reduce enforcement challenges.

Basic Principles for Agency Engagement in Collaborative Problem Solving and Environmental Conflict Resolution³

- **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, voluntary 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 process directly, fully, and in good faith; be accountable to the process, all participants 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; 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

³ These principles were presented to a federal interdepartmental leadership meeting in June 2004 and will be circulated for formal departmental endorsement in 2005.

As a follow-up to the meeting, the Departmental leaders assigned senior staff to meet and share information on programs, mechanisms and resources that currently exist and to explore such questions as:

- What lessons have been learned? What improvements are being made?
- What new programs or initiatives can be added to the mix in 05/06?
- What additional resources can/should be brought to bear?

This group of interdepartmental senior staff has been working for the past six months with the assistance of the U.S. Institute to address these questions. As a first step, the group commissioned a departmental survey on collaborative problem solving and environmental conflict resolution activities.

Survey of Federal Departments and Agencies on Use of Collaborative Problem Solving and Environmental Conflict Resolution

The U.S. Institute distributed the survey in September 2004. The purpose of this survey was to collect baseline information on existing department resources and challenges and creative approaches for reducing environmental conflicts and improving environmental decision making⁴. The survey requested the following types of information:

- The location of existing departmental/agency ECR leadership (e.g., the designated dispute resolution specialists, policy office or general counsel's office).
- ECR funding in departments.
- Incentives/disincentives for using ECR in departments.
- Statutory/regulatory frameworks and authorities are involved in ECR use in departments.⁵
- Resource limitations in a particular application.
- Substantive program areas where ECR would be particularly beneficial.
- Recommendations for increased departmental use of ECR.
- Identification of additional applications for ECR.

Survey responses were completed by attorney staff, program staff and designated departmental ADR specialists to assure broader circulation and input. Designated point persons were established in each Department to gather responses. Ten departments and

⁴ For purposes of this interagency initiative and this survey, Environmental Conflict Resolution (ECR) was defined broadly to include collaborative problem solving through assisted multi-party negotiations in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. These processes differ from conventional agency decision-making by engaging affected interests and agency decision makers more directly in collaborative problem solving. Assistance from impartial third parties (whether internal or external facilitators or mediators) adds value when addressing complex, high conflict or low trust settings. ECR processes can be applied at the beginning of a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicting interests between federal, state, local, tribal and industry parties where a federal agency has ultimate responsibility for decision-making.

agencies responded to the surveys, although not all respondents addressed each of the questions. The agencies or departments who responded were:

- U.S. Department of Agriculture
- National Oceanic and Atmospheric Administration, U.S. Department of Commerce
- U.S. Department of Energy
- U.S. Department of the Interior
- U.S. Department of Justice
- U.S. Navy
- U.S. Department of Transportation (including the Federal Aviation Administration)
- U.S. Environmental Protection Agency
- Federal Energy Regulatory Commission

Survey Findings

A detailed summary of the ten survey responses is appended. The following is a brief synopsis of the general findings:

- **Location of Department ADR/ECR Leadership.** The location of ADR leadership within federal departments varies; however, many are placed within the general counsel's offices. In less than half of the departments surveyed, an individual is assigned the specific responsibility for ECR.

The majority of responding departments locate ADR/ECR leadership in offices of general counsel. The remainder are independent, are located under an Assistant Secretary or other focused agency activity. DOJ's Office of Dispute Resolution is the presidentially appointed leader for government-wide ADR and may provide technical substantive assistance to agencies or direct them to resources in other parts of the Executive Branch.

More than one-half of the departments and agencies surveyed do not have an individual specifically assigned responsibility for ECR.

- **ECR Funding.** None of the responding departments and agencies have specific dedicated up front funding for ECR project expenses or for ECR program services. ECR funding comes primarily from specific project funding on an as needed basis.

In three departments and agencies, ECR costs are generally considered administrative costs charged to other program costs. Two do not consider ECR costs part of administrative costs. DOJ's Office of Dispute Resolution administers a fund providing costs of private neutrals. The majority of respondents answering funding questions indicated that funding is generally on a project specific basis and the funds are generally used for program development, education, advocacy and projects.

- **Other Resources Available to Support ECR.** There were a variety of additional departmental resources cited as supporting ECR; chief among them was senior leadership.

Resources described include internal departmental ECR offices and specialists, website resources, some training and internal consultation, administrative law judges who provide ADR services, the U.S. Institute’s National Roster of Environmental Dispute Resolution and Consensus Building Professionals, and other parties’ funds.

- **Incentives and Disincentives for using ECR.** The specific benefits derived from the use of ECR were cited most frequently as primary incentives; however, these benefits are not widely understood. The value and need for leadership committed to ECR was underscored, as was the ongoing need for funding of both specific projects as well as internal capacity building activities.

Incentives include leadership support for some departments and agencies, policy directives, internal consultation resources and funding, and the need to reduce litigation costs, create better, long-lasting relationships, understanding and durable outcomes as well as make better decisions. *Disincentives* included lack of leadership support, funding and staff, as well as cultural resistances and lack of understanding of the benefits and sufficient evaluation data to demonstrate the value of ECR.

- **Statutory and Regulatory Frameworks relevant to ECR.** The application of ECR is quite broad. Twenty-nine different frameworks were listed in which ECR has or can be used.
- **Resource Issues Limiting Use of ECR.** Despite the many benefits derived from using ECR, the initial resources needed to embark on an effective process are often difficult to access.

Specific resource issues cited include lack of funding for costs of third-party assistance, contracted neutral services and ECR-related travel for attorneys and bureau employees, lack of party capacity, time to engage and experienced staff and resource availability, including administrative FACA staff, and cost-benefit concerns.

- **Substantive Program Areas where ECR would be Particularly Beneficial.** A broad array of programmatic areas was suggested for the expanded use of ECR in the next four years.
 - Interagency and Intergovernmental Issues
 - Tribal Consultation on Environmental Issues
 - Water Resources: joint regulatory projects with EPA involving water pollution; water rights adjudications

- Species Conservation: marine acoustics issues
 - Public Lands Management: wildland-urban interface, fuels reduction, travel management,
 - Resource Conservation: resource management planning; Natural Resources Damages Act cases; conservation easement violations
 - Transportation: major transportation infrastructure projects; transportation of nuclear waste
 - Facilities Management: permitting and licensing (e.g., hydro-relicensing); decommissioning federal facilities
 - Environmental Clean-Up and Enforcement: defensive and affirmative CERCLA cases
- **Departmental Steps to increase the use of ECR.** The majority of respondents indicated they were taking steps to increase the use of ECR in the future. These were primarily through providing more information and education on ECR, building greater capacity among staff, improving consultation through case assessment, screening and evaluation, and improving internal coordination.
 - **Additional Recommendations for Increasing Use of ECR in Departments/Agencies.** Finally, the respondents had several additional recommendations for increasing the use of ECR, chief among them were educating staff on the benefits and appropriate use of ECR and training to build skills in using and evaluating ECR.

Specific suggestions included:

- Champions: identifying agency leadership to promote ECR; championing the use of ADR internally and externally;
- ECR Information: on benefits, added value, and effective use; additional outreach to raise awareness; and demonstration and pilot projects
- Educational workshops and training on advocacy, case assessment, and strategy
- Early assessment and consultation: pre-filing sessions; case screening; consultation and convening when considering ADR options
- Case Tracking and Evaluation of ECR processes
- An Executive Order requiring agencies to use ECR and report on progress

Next Steps

Survey results will be reviewed thoroughly by the departmental participants and shared with leadership. These will be used to provide recommendations for how departmental and agency leadership can increase the use of innovative collaborative problem solving and dispute resolution to help facilitate better environmental decision-making in the federal government. Additional survey results will be included as responses become available.

APPENDIX

SUMMARY

Survey of 10 Federal Departments and Agencies on Use of Environmental Conflict Resolution

1. Within your department/agency, where is the formally assigned leadership for alternative dispute resolution (e.g. the designated dispute resolution specialist) located (e.g. in policy office or general counsel or other location)? Describe the position(s), title and responsibilities. Is the position fully funded or collateral duty?

- 5 are in the office of general counsel
- 1 (DOI) is in Assistant Secretary of Policy Management and Budget office
- 1 (FERC) independent
- 1 has no program (NOAA)
- USDA - Assistant Secretary for Civil Rights (Workplace); Forest Service's Business Operations Deputy Area (FS); Natural Resource Conservation Service (NRCS) – ADR Program within NRCS
- 1 Office of Dispute Resolution for DOJ

2. Is there another person in your department/agency specifically assigned responsibility for ECR?

- 4 – No (in case of USDA, an ADR specialist coordinates ECR matters in NRCS programs)
- 4 – Yes (in case of DOJ, Office of Dispute Resolution works with Chief of Law and Policy Section which interacts with Environmental Division Sections)
- 2 -- Integrated in with ECR focus

3. How is ECR funded?

a. Are there specific appropriations focused on ECR?

- No Departments or Agencies have specific appropriations focused on ECR.

b. Are ECR costs considered administrative costs charged to other program costs?

- Generally, yes.
- 2 – No
- In NRCS, ECR is part of overall funding for ADR program

c. Do agencies allocate appropriations for ECR by project or through a general ECR/ADR program?

- 5 – Yes by project. If there are funds, they are generally project specific
- 1 – No
- 1 - In DOJ litigated matters; Office of Dispute Resolution administers a fund providing costs of private neutrals. For administrative matters, the Office of Dispute Resolution has no specific funding.

4. What are ECR funds used for?

Most available ECR funds are used for program development and promotion, education, and project support.

5. What other resources are available to support ECR?

- Leadership
- Policy
- Website resources
- Some training
- Other parties' funds
- Institute Roster and other resources
- ALJs
- ECR is an eligible project activity that can be charged against state transportation projects
- Internal consultation
- Development of special programs (e.g. NRCS' certified agricultural mediation program)
- As the presidentially-appointed leader for government-wide ADR, the DOJ Office of Dispute Resolution may provide technical and substantive assistance to agencies interested in the ECR initiative and also direct them to resources in other parts of the Executive Branch like EPA, the Department of Interior, the U.S. Institute, etc.

6. What specific incentives/disincentives exist within your Federal agency for using ECR?

Incentives:

- Leadership support
- Policy directives
- Early assistance
- Avoidance of delays
- Litigation costs
- DOJ fund designated for procuring neutrals
- DOJ participation in many court-annexed ADR programs

- DOJ's education and regular counseling of senior officials at the Environment Division
- 1998 ADR Act requiring parties and the DOJ policy to engage in ECR whether or not parties object
- Usefulness in making transportation development process run more efficiently and effectively
- Better, long-lasting relationships
- Durable outcomes
- Better decisions
- Increased understanding between stakeholders
- Greater public investment in agency actions

Disincentives:

- Lack of knowledge and understanding of benefits and sufficient evaluation data to demonstrative value of ECR
- Lack of Leadership support
- Lack of funds for programs and projects
- ECR is not part of the "culture". Project sponsors have to make a commitment to use ECR (typically states for transportation issues)
- Contracting issues
- Lack of staff and senior management commitment
- Resistance to processes
- Lack of resources for capacity building
- No access to judgment funds in non-litigated processes
- Lack of budget incentives
- Perception that ECR may prevent meeting decision deadlines
- Difficulty of including numerous stakeholders
- Time intensive nature of ECR

7. What statutory/regulatory frameworks/authorities are involved when using ECR?

- The Federal Advisory Committee Act (FACA)
- The Administrative Dispute Resolution Act of 1996 (ADRA)
- The Administrative Procedure Act
- The Negotiated Rulemaking Act
- The National Environmental Policy Act
- The Federal Acquisition Act
- The Alternative Dispute Resolution Act of 1998
- The Graves Repatriation Act
- National Historic Preservation Acts
- The Federal Power Act
- The Natural Gas Act
- The Clean Air Act
- The Clean Water Act

- The Toxic Substances Control Act
- The Federal Insecticide, Fungicide and Rodenticide Act
- The Coastal Zone Management Act
- The Endangered Species Act
- The Fish and Wildlife Coordination Act
- The Wild and Scenic Rivers Act
- The Wilderness Act
- The Federal Lands Protection Management Act
- Section 1309 of TEA-21 for DOT
- CEQ Regulations 1500.5(c)
- The Federal Crop Insurance Reform
- Department of Agriculture Reorganization Act of 1994 (as amended by the Grain Standards and Warehouse Improvement Act of 2000)
- CPRC's ADR regulation DR 4710-001
- Forest Service's grazing mediation regulation
- NRCS ADR regulation

8. **When an ECR process is under consideration for a particular application, what specific resource issues arise that would limit its use?**

- Travel funds (attorneys, bureau employees)
- Time for engagement of decision-makers
- Costs of third party assistance and contracted neutral services
- Parties' capacity or lack of capacity to engage
- Administrative staff (e.g. FACA administration)
- The difficulty and time required for contracting a suitable expert
- Project funds pay the costs of ECR, therefore states need to weigh the value of its outcome against other important aspects of project development (DOT)
- Additional staff resource time and effort required
- Staff availability and expertise
- Cost-benefit concerns
- Access to qualified mediators or facilitators

9. **What substantive program areas (including interagency deliberation) do you think would particularly benefit from the use of ECR in the next four years (e.g. decommissioning federal facilities or wetlands mitigation)?**

- Hydro-relicensing cases
- Various permitting cases
- Natural Resources Damages Act cases
- Development of resource management plans
- Tribal consultations on ECR issues
- Defensive and affirmative CERCLA cases
- Decommissioning federal facilities
- Marine acoustics issues

- Joint regulatory projects with EPA involving water pollution
- Major transportation infrastructure projects
- Programmatic areas that deal with interagency relationships
- Wildland-urban interface, fuels reduction, travel management, water rights adjudications (FS)
- Conservation programs, including conservation easement violations (NRCS)
- Cases where parties take positions that do not seem amenable to compromise but that may be amenable to employing creative approaches toward finding common ground
- Facility licensing
- Transportation of nuclear waste

10. **Is your department/agency taking steps to increase the use of ECR? If so, please describe.**

- 3 – No
- 6 – Yes
 - Education and training programs to aid groups and staff in ECR processes (several departments/agencies)
 - Case screening for ECR appropriateness (several departments/agencies)
 - Championing the use of ADR internally and externally (several departments/agencies)
 - Evaluation of ECR processes (several department/agencies)
 - Demonstration and pilot projects (DOI)
 - CADR Website (DOI)
 - Close coordination between CADR and SOL (DOI)
 - More monitoring of Departmental environmental litigation (Navy)
 - Providing assistance and recommendations in considering ADR options (Navy)
 - Raising awareness and conducting outreach (NRCS)
 - Internal initiatives to result in a statement of principles and plan of action to further use of collaboration within agency (EPA)
 - Outreach and prefiling sessions (FERC)
 - Case convening to initiate processes (FERC)
 - Providing services (FERC; EPA)
 - Environmental Conflict Resolution Roundtable (DOT)
 - Provide regular advice and assistance to Department attorneys (DOJ's Office of Dispute Resolution and Environment Division)

What additional recommendations do you have for increasing the use of ECR in your department/agency?

- Designations of full-time BDRS with relevant background, skills and experience to assist bureau employees in identifying and assessing ECR opportunities (DOI)
- CADR office continues to identify and initiate the design of two crossing-cutting pilot or demonstrations projects per year (DOI)
- Consistent tracking and evaluation mechanisms (DOI)
- Greater focus on promoting use and making case for value added ECR
- Better dissemination of information about the utility and benefits of ECR might increase its use (USDA)
- Advocating for additional resources in order to use ECR in more situations (USDA)
- Training in ADR advocacy, case assessment and strategy (DOJ)
- An Executive Order requiring all federal agencies to use ECR and report annually on how well it is doing might be an impetus needed to increase the use of ECR in all agencies.