

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 for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving presented in Attachment A (of the OMB/CEQ ECR Policy Memo) and this policy apply generally to ECR and collaborative problem solving. This policy recognizes the importance and value of the appropriate use of all types of ADR and collaborative problem solving.”

The report format below is provided for the seventh year of reporting in accordance with this memo for activities in FY 2012.

The report deadline is February 15, 2013.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies are requested to collect this data to the best of their abilities. The 2012 report, along with previous reports, will establish a useful baseline for your department or agency, and collect some information that can be aggregated across agencies. Departments should submit a single report that includes ECR information from the agencies and other entities within the department. The information in your report will become part of an analysis of all FY 2012 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of prior year synthesis reports are available at www.ecr.gov.

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Date this report is being submitted:	January 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 Army continues to assess all environmental matters for the use of ECR. The Army uses tiered partnering and dispute resolution processes as outlined in the Federal Facility Agreements to resolve disputes. The Army also includes dispute resolution provisions in certain settlement agreements and consent decrees to address any disputes that might arise.

The Army avoids disputes through the early involvement with stakeholders. Early involvement allows the parties to identify issues early on so they can be addressed at the earliest and lowest levels possible. Frequent communication promotes trust and open communication among the parties, agencies and stakeholders.

The Army continues to provide training on ECR. The US Army Legal Services Agency (USALSA) Environmental Law Division (ELD) ECR Coordinator attended the Air Force sponsored Negotiation and Appropriate Dispute Resolution Course, the Department of Energy Attorney ECR course and various ECR training events sponsored by the DOJ Inter-Agency ADR Working Group. The USALSA ELD ECR Coordinator provided ECR training to all Army Environmental Law Specialists (ELs) during a quarterly training session. Local Army ELs participated in local ADR/ECR training. For example, the EL at one base received two days of training in collaborative problem solving in 2012. The commander and managerial staff at were also trained in these collaborative methods.

USALSA ELD projects a potential need for ECR in its Affirmative Litigation Branch in the next FY. Army ELs will continue to promote its sustainability and identify and address issues early and hold frequent discussions with stakeholders and agencies. USALSA ELD ECR Coordinator will continue to participate in the ECR Policy Forum meetings sponsored by CEQ.

Section 2: Challenges

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

	Extent of challenge/barrier		
	Major	Minor	Not a challenge/barrier
	Check <u>only</u> one		
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	X	<input type="checkbox"/>
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	X	<input type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	X	<input type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	X	<input type="checkbox"/>
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input type="checkbox"/>	X
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	X
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	X
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input type="checkbox"/>	X
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	X
k) Lack of resources for staff capacity building	<input type="checkbox"/>	X	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	X
m) Lack of budget incentives	<input type="checkbox"/>	<input type="checkbox"/>	X
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	X
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	X	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	X	<input type="checkbox"/>
r) Other(s) (please specify): Parties want to complete extensive discovery before ECR to know facts and understand range of exposure for settlement discussions. Once discovery is complete, it reduces savings in costs and incentive for ECR.	X	<input type="checkbox"/>	<input type="checkbox"/>
s) No barriers (please explain): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2012 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR “case or project” is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2012 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2012 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored ⁴	Participated in but did not sponsor ⁵
<i>Context for ECR Applications:</i>									
Policy development	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Planning	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Siting and construction	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Rulemaking	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
License and permit issuance	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Compliance and enforcement action	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Implementation/monitoring agreements	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Other (specify): CERCLA Cost Recovery Action	__2__	__2__	__4__	__0__	__0__	__4__	__0__	__0__	__4__
TOTAL	__2__	__2__	__4__	__0__	__0__	__4__	__0__	__0__	__4__
	(the sum should equal Total FY 2012 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2012 ECR Cases)				(the sum should equal Total FY 2012 ECR Cases)	

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

² A “completed case” means that neutral third party involvement in a particular matter ended during FY 2012. The end of neutral third party involvement does not necessarily mean that the parties have concluded their collaboration/negotiation/dispute resolution process, that all issues are resolved, or that agreement has been reached.

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

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

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

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2012, and indicate if ECR is being used in any of these areas. Note: An overview of substantive program areas identified by departments/agencies in FY 2011 can be found in the FY 2011 synthesis report.

List of priority areas identified in your department/agency prior year ECR Reports	Check if using ECR	Check if use has increased in these areas
CERCLA Cost Recovery Actions	X	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<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]

Army/USALSA ELD does not use an established cost benefit savings analysis template to evaluate the effectiveness of ECR, but it is clear that the time and resources utilized conducting ECR was significantly less than what would be required through full discovery and litigation. Army has used ECR for specific matters in litigation that have a potential to settle, avoiding extensive discovery and full litigation, resulting in significant resource savings.

In addition, the hours spent to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR provides Army effective dispute management and results in significant savings of time and resources. The employees' use of ADR and interest based negotiation, the early engagement of interested parties, the use of tiered partnering, and the use of ADR provisions in federal facility agreements allow Army to focus in on key issues and work through them efficiently.

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.

Other efforts by the Army to anticipate prevent and better manager or resolve environmental issues or disputes include the following.

- Tiered partnering process
- Dispute resolution procedures inserted in federal facility agreements
- Dispute resolution procedures inserted in consent decrees
- Consultation with Tribes States or Federal agencies
- Negotiations with regulators
- Town meetings or regular meetings with stakeholders, agencies, local authorities and other interested parties.

Army ELSs hold regular meetings with regulators, the public, and state and Federal agencies to showcase sustainability efforts and address environmental planning issues throughout the environmental planning process. Tiered Partnering is utilized to address installation restoration matters.

Army installation key leaders hold regular consultations with Federal and state agencies and stakeholders during the formulation of land use and natural resource planning.

Army personnel utilize ECR principles and interest based negotiation strategies in managing and resolving disputes.

Overall, Army strives to maintain ongoing relationships with tribes, the local communities, and environmental regulators at all levels. By maintaining relationships with stakeholders and regulators the Army develops relationships of trust. As a result, disputes are resolved informally without the need for more formal collaborative processes and outside neutrals.

These processes have helped Army to obtain the following.

- Permits for operational training in BLM managed lands.
- Compatible use and land management planning for military training.
- Cooperation with state and Federal agencies (US Fish and Wildlife) toward a mutually agreeable natural resource management plan.
- Conservation easements in an impact area.
- Use of a subject matter expert in tribal and cultural consultations with tribes and stakeholders regarding a programmatic agreement concerning training.
- Installation restoration matters are resolved through tiered partnering.

- Draft RCRA permit review through a technical and legal committee.

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.

This year's most notable achievement for Army is the use of ECR for a few large matters in litigation to avoid the time and expense of discovery and attempt to settle the matter or narrow the issues and scope of the litigation. In one large multiparty case, ECR allowed the parties to gather together, stay discovery and work out a difficult settlement. In two cases, settlement was not reached, but the parties were able to narrow the issues, understand each party's positions and provide a focused litigation. In another case, the mediator is being used as a facilitator between the parties, who negotiated an agreement in principal, and the regulator to establish a global final settlement.

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
In a CERCLA cost recovery action, the parties attempted to reach settlement with the use of mediation. The mediation was funded through the Department of Justice. The mediation arose in the initial stages of discovery in attempt to avoid the time and expense of discovery and litigation.
Summary of how the problem or conflict was addressed using ECR, including details of any innovative approaches to ECR, and how the for engagement in ECR were used (See Appendix A of the Policy Memo, attached)
In preparation for ECR, agency leaders and staff members at all levels were committed to engage in ECR and made themselves available. All appropriate participants participated in establishing an ECR process agreement. All participants were informed of the purpose and objectives of the process and agreed to participate within its guidelines/process. The mediation process allowed for each side to make a presentation to the mediator. Caucusing followed. This process ensured the balanced inclusion of all affected/concerned interests and participants.
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
ECR allowed the parties to postpone extensive and costly discovery and focus on issues that might bring a speedy settlement. While the ECR did not resolve those issues, the parties were able to get a better understanding of each party's positions.
Reflections on the lessons learned from the use of ECR
ECR is a welcomed alternative to litigation in that it provides a forum to set aside litigation schedules and direct limited resources toward open discussions that will allow the parties to gain a better understanding of each other's positions. ECR does require resources, but the ECR process helps to reduce the extensive resources and time otherwise required in litigation.

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

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

9. Please comment on any difficulties you encountered in collecting these data and if and how you overcame them. Please provide suggestions for improving these questions in the future.

Although no difficulties were encountered in collecting data, it was noted that Army's focus is on specific cases where Army utilized federal facility agreement dispute resolution provisions, or where ELSs utilized the tiered partnering processes that resulted in lessons learned or noticeable achievements.

Please attach any additional information as warranted.

Report due February 15, 2013.

Submit report electronically to: ECRReports@omb.eop.gov

Attached A. Basic for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving

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

Informed Commitment	Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement; ensure commitment to participate in good faith with open mindset to new perspectives
Balanced, Voluntary Representation	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
Group Autonomy	Engage with all participants in developing and governing process; including choice of consensus-based decision rules; seek assistance as needed from impartial facilitator/mediator selected by and accountable to all parties
Informed Process	Seek agreement on how to share, test and apply relevant information (scientific, cultural, technical, etc.) among participants; ensure relevant information is accessible and understandable by all participants
Accountability	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
Openness	Ensure all participants and public are fully informed in a timely manner of the purpose and objectives of process; communicate agency authorities, requirements and constraints; uphold confidentiality rules and agreements as required for particular proceedings
Timeliness	Ensure timely decisions and outcomes
Implementation	Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; parties should agree in advance on the consequences of a party being unable to provide necessary resources or implement agreement; ensure parties will take steps to implement and obtain resources necessary to agreement