

# Environmental Conflict Resolution in the Federal Government

Analysis of FY 2009 ECR Reports  
Submitted by Federal Departments and Agencies  
Pursuant to the OMB/CEQ ECR Memorandum of  
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## **Analysis of FY 2009 ECR Reports**

### **Executive Summary**

On November 28, 2005, the Office of Management and Budget (OMB) and the President's Council on Environmental Quality (CEQ) issued a joint policy memorandum on environmental conflict resolution (ECR Memorandum). The Memorandum directs federal agencies to increase the effective use of ECR and their institutional capacity for collaborative problem solving. This report synthesizes the 2009 federal agency annual reports submitted to OMB and CEQ in response to the policy memorandum.

The impetus for the ECR Memorandum was the increasing recognition of environmental governance challenges such as protracted and costly environmental litigation, unnecessarily lengthy resource planning processes, costly delays in implementing needed environmental protection measures, and conflict between stakeholders involved in environmental conflict. To address these challenges, change from “business as usual” was needed in the federal government.

The ECR Memorandum works to achieve these goals by building on existing authorities and guidance including:

- Administrative Dispute Resolution Act of 1996;
- Regulatory Negotiation Act of 1996;
- Contract Disputes Act of 1978, as amended;
- Alternative Dispute Resolution Act of 1998; Environmental Policy and Conflict Resolution Act of 1998 (P.L. 105-156);
- Executive Order 12988, “Civil Justice Reform” (February 5, 1996);
- Presidential Memorandum, “Designation of Interagency Committee to Facilitate and Encourage Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking” (May 1, 1998);
- Environmental Policy and Conflict Resolution Advancement Act of 2003 (P.L. 108-160); and
- Executive Order 13352, “Facilitation of Cooperative Conservation” (August 4, 2004).

The ECR Memorandum defines ECR as third-party assisted conflict resolution in the context of environmental, public lands, or natural resources issues. The Memorandum acknowledges, however, that 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 Memorandum requires periodic leadership meetings, quarterly interdepartmental senior staff meetings, and annual reporting by departments and agencies to OMB and CEQ on progress made each year. The meeting and reporting requirements are designed to provide advice and guidance, and to facilitate on-going information exchange on ECR. Many agencies including the most frequent users of ECR, have reported that the forums and reporting requirements have proven beneficial to advancing the goals set out in the policy memorandum.

The following departments and agencies submitted FY 2009 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Veterans Affairs (VA)
- National Oceanic and Atmospheric Administration (NOAA)
- U.S.D.A. Forest Service (USFS)
- Environmental Protection Agency (EPA)
- Federal Energy Regulatory Commission (FERC)
- General Services Administration (GSA)
- National Aeronautics and Space Administration (NASA)
- National Indian Gaming Commission (NIGC)
- Nuclear Regulatory Commission (NRC)
- The U.S. Institute for Environmental Conflict Resolution (USIECR)

Agency reports highlight the progress being made in meeting the goals of the ECR Memorandum. The following is a summary of progress as reported by federal departments and agencies for FY2009.

- ECR use in the federal government remained constant with 412 cases reported in FY 2009 compared to 419 cases in FY 2008.
- ECR is being used to reduce environmental conflicts and improve environmental decisions in mission critical areas that include among other things: National Environmental Policy Act (NEPA) issues; environmental cleanup and restoration; natural resource management on federal lands; species and habitat conservation; coastal zone management; historic preservation; tribal consultation; energy infrastructure development and management.
- Government-wide, ECR use is greatest in the areas of compliance and enforcement, planning, and monitoring and implementing of agreements. ECR is also used in the contexts of policy development, permitting, rulemaking, siting and construction.
- A critical component of this effort is documenting ECR's role in minimizing the costs of conflict and maximizing the benefits of collaboration. Agencies reported a wide spectrum of benefits from the use of ECR, including litigation costs avoided, expedited work on projects, innovative solutions, cost-effective solutions, and improved working relationships among stakeholders that help solve issues now and help manage issues in the future. Even when agreements are not reached the benefits of ECR are being highlighted, including narrowing the issues that may end up in litigation.
- Agencies report that greater use could be made of ECR to more effectively address current environmental governance challenges in their program areas. Most agencies

regularly using ECR have invested in training to build competencies in conflict resolution and collaborative-problem solving. Training is seen as a key to increasing the effective use of ECR. Trainings have focused on federal agency staff, but broader audiences of affected stakeholders have been reached including state and local governments, tribal nations, NGOs, environmental advocates, community-based groups, and environmental and natural resource attorneys.

## **I. Introduction**

The FY 2009 ECR Reports are the fourth annual reports submitted by agencies in response to the November 28, 2005 Memorandum on Environmental Conflict Resolution (ECR Memorandum) issued by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ). Among other things, the ECR Memorandum directs federal agencies to 1) increase the effective use of ECR, 2) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; 3) assure that agency infrastructure supported ECR; 4) invest in support of ECR programs; and 5) focus on accountable performance and ECR achievement.

This Analysis synthesizes and offers a government-wide perspective on the experiences reported by agencies in their FY 2009 ECR reports. It covers the following:

- the strengths and weaknesses of agency data;
- how ECR is used by agencies;
- the contexts in which ECR is used;
- how agencies are building capacity in ECR;
- how agencies are tracking and evaluating ECR;
- the challenges that agencies face in using ECR;
- collaborative problem-solving efforts that do not use third parties;
- the substantive areas in which ECR is employed, and
- specific cases highlighting the use of ECR.

This Analysis also provides context for the FY 2009 findings by referencing key elements of previous annual reports. For example, among other things, the *FY 2007 and FY 2008 Analyses* found that:

- Almost all of the reporting agencies were taking some measures to implement the ECR Memorandum.
- Agencies use ECR in a variety of contexts to further their respective missions.
- Agencies are reporting greater use and acceptance of ECR.
- 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;

### ***A. Development of the Template for the FY 2009 Report***

As was the case with the previous reports, the FY 2009 reports were prepared in response to a template of questions developed by the ECR Senior Level Forum (Forum).<sup>1</sup> The template is substantially the same as it was in FY 2008, as the Forum determined that the previously adopted

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<sup>1</sup> This Interagency Forum was convened by the US Institute for Environmental Conflict Resolution (USIECR) pursuant to the ECR Memorandum. It consists of senior level representatives from the agencies affected by the Joint Memorandum, and its purpose is to give advice and guidance and facilitate interagency exchange on ECR.

questions were yielding useful data. In addition, several members of the Forum had commented in response to the FY 2008 Template about the importance of consistency in the data collected through the template. One way of ensuring consistency, these members suggested, would be to ask similar questions from year to year.

### ***B. FY 2009 ECR Reports***

From January through May 2009, the following 14 agencies submitted FY 2009 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Veterans Affairs (VA)
- National Oceanic and Atmospheric Administration (NOAA)<sup>2</sup>
- U.S.D.A. Forest Service (USFS)
- Environmental Protection Agency (EPA)
- Federal Energy Regulatory Commission (FERC)
- General Services Administration (GSA)
- National Aeronautics and Space Administration (NASA)
- National Indian Gaming Commission (NIGC)
- Nuclear Regulatory Commission (NRC)
- The U.S. Institute for Environmental Conflict Resolution (USIECR)

DOI and DoD have a number of “sub-agencies” whose ECR activities are included in their respective reports. DOI’s nine bureaus include the Bureau of Land Management (BLM), the Fish and Wildlife Service (FWS), the Bureau of Indian Affairs (BIA), the Bureau of Indian Education (BIE); the National Park Service (NPS); the Minerals and Management Service (MMS); the Office of Surface Mining (OSM); the United States Geological Survey (USGS); and the Bureau of Reclamation (BOR), submitted their own reports to the DOI Office of Collaborative Action and Dispute Resolution (CADR). CADR then collated this information and submitted a single DOI ECR report to OMB and CEQ. DoD’s report also contains information from several agencies. DoD submitted its own report, and attached separate reports from the Departments of Navy (DON), Army (DOA), Air Force (USAF), and the Army Corps of Engineers (USACE).

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<sup>2</sup> NOAA submitted its Report on behalf of the Department of Commerce.

## II. Use of ECR

Section Five of the ECR Memorandum directs agencies to increase their effective use of ECR. The 2009 Agency ECR Reports indicate that agencies are achieving this goal.

### A. Which agencies are engaging in ECR? How frequently are they engaging in ECR?

The total number of reported individual cases for FY 2009 is 412. This figure should be viewed as an approximation, as agency representatives acknowledge that it is likely that the tracking systems in place do not record all ECR activity that is taking place throughout the federal government.<sup>3</sup> Moreover, it is clear that some multi-agency cases are reported more than once.<sup>4</sup>

ECR use in the federal government in FY 2009 remained consistent with FY 2008 levels (Table 1). As with prior years, the level of ECR use is distributed across several agencies, with EPA (131 cases) being the agency most frequently involved in ECR, followed by DoD (94 cases), DOI (92 cases), USFS (69 cases), FERC (19 cases), NOAA (6 cases) and NRC (1 case). Agencies were also asked to identify whether their cases were in progress or completed. Of the 412 cases, 256 (62%) were identified as in progress, and 156 (38%) were identified as completed

**Table 1. Distribution of ECR cases in the federal government FY 2007 through FY 2009**

	Number and Percent of FY 2007 ECR Cases	Number and Percent of FY 2008 ECR Cases	Number and Percent of FY 2009 ECR Cases
DoD	74 (23%)	82 (20%)	94 (23%)
DOI	46 (14%)	81 (19%)	92 (22%)
DOT	12 (4%)	3 (1%)	No Report Submitted
EPA	90 (28%)	142 (34%)	131 (32%)
FERC	21 (7%)	16 (4%)	19 (5%)
NOAA	8 (2%)	2 (0%)	6 (1%)
NRC	3 (1%)	1 (0%)	1 (0%)
USFS	63 (20%)	92 (22%)	69 (17%)
VA	3 (1%)	0 (0%)	0 (0%)
<b>Total</b>	<b>320 (100%)</b>	<b>419 (100%)</b>	<b>412 (100%)</b>

The 412 ECR cases for FY 2009 do not include the 40 cases in which DOJ reported using a paid neutral, or the 55 cases reported by USIECR. As cross-agency providers of ECR, the DOJ and USIECR cases should theoretically be included in the reports of other agencies. DOJ is involved in cases as the legal representative of the United States in Federal Court. The agency directly involved in the litigated matter would presumably report the conflict in its ECR report. Similarly, USIECR provides independent third-party assisted collaboration and conflict resolution services to agencies directly involved in conflict. In addition, the total number of cases for FY 2009 does not include DOE cases. DOE reports 152 collaborative processes but did not separate cases that involved third-party neutrals from those that did not involve third parties. Based on previous annual reports, however, it is likely that the overall number of DOE cases involving third party neutrals did not exceed 5-10 cases. The reported 412 cases for FY 2009 only represents

<sup>3</sup> See Discussion on Tracking of ECR, Section IV, *Infra*.

<sup>4</sup> The Missouri River Implementation Case (MRRIC) was reported by both DOI and USACE.

agreement-seeking third-party assisted cases to ensure consistent use of the ECR definition across agencies and across years.

Seven agencies reported that they did not engage in any ECR cases in FY 2009.<sup>5</sup> These agencies indicated they are infrequently faced with environmental conflict. For example, VA reports “historically, there have not been a significant number of VA projects in which [ECR] would be appropriate. GSA reported that it did not engage in ECR, but also noted in their annual reports the importance of ECR in its report, stating “A long-standing concern has been the ad-hoc nature of public notification and meeting facilitation practices across the agency. Currently differences can be found region by region and often project by project. Success with ECR and NEPA requires improved awareness on the part of our project managers and greater engagement on the part of our NEPA managers.”

***B. What is the context for ECR?***

As was noted in the previous annual reports, the categories of ECR activity within a particular agency tend to be heavily dependent on the agency’s mission (Figure 1). Agencies like EPA that engage in a significant amount of enforcement and compliance tend to use ECR in those areas. Agencies that engage in a significant amount of planning such as DOI and USFS, tend to use ECR in those areas.

Government-wide, 30% (125 cases) of ECR took place in compliance and enforcement (Table 2). This is primarily because EPA had the largest number of ECR cases and most of these fell into this category. The Planning category constituted 25% (101 cases) of all federal ECR activity. These cases come primarily from agencies with significant land management responsibilities, such as DOI, USFS, and DOD. The Implementation and Monitoring Agreements Category made up 17% of the total number of cases. This portion comes primarily from the partnering teams<sup>6</sup> established by the Department of the Navy to implement the terms of agreements to cleanup Superfund sites. Policy development accounted for 8% of all ECR in FY 2009, and licenses and permits also accounted for 8%. Siting and construction constituted 3%, rulemaking 3%, and “other” 6% accounting for the remainder of cases.

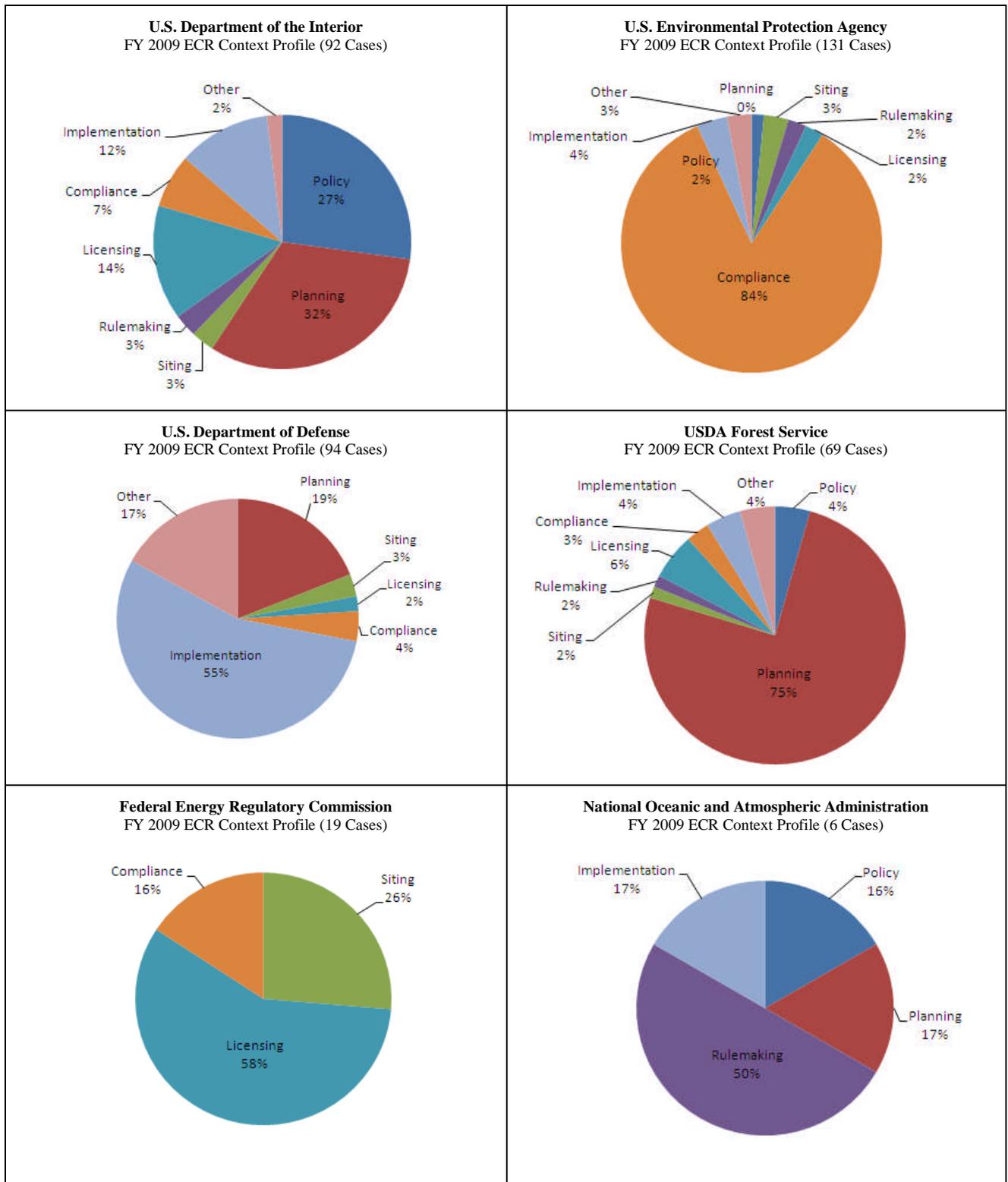
**Table 2. Context profile of ECR cases across the federal government**

	Number and Percent of FY 2009 ECR Cases
Compliance and enforcement action	125 (30%)
Planning	101 (25%)
Implementation and monitoring agreements	71 (17%)
License and permit issuance	34 (8%)
Policy development	32 (8%)
Other	25 (6%)
Siting and construction	13 (3%)
Rulemaking	11 (3%)
Total	412 (100%)

<sup>5</sup> These agencies were: HHS, GSA, NASA, NIGC, and VA.

<sup>6</sup> These partnering teams are organized in a three tier structure and chartered to address installation restoration issues. Collectively, the teams worked on 1,384 sites.

**Figure 1. ECR context profiles by agency for FY 2009**



Note: NRC reported one ECR case in the rulemaking context.

### ***C. Participant or Sponsor?***

Question three also asked agencies to identify whether they were sponsors or non-sponsor participants of particular ECR cases (Table 3). While all agencies were more likely to be sponsors than participants, the degree to which they sponsored processes appears to be dependant on their missions.

Agencies with substantial enforcement and compliance missions such as EPA reported that they engaged in ECR as a sponsor in 89% of their ECR cases. Agencies engaging in ECR in the more informal upstream processes such as planning, policy development, licensing, and permitting reported a relatively higher percentage of being involved in ECR as non-sponsor participants. USFS, for example, reported that it is involved primarily as a non-sponsor participant in 23% of its ECR cases. DOI, several of whose agencies have land management missions that are similar to USFS, reported being involved as non-sponsor participants in 20% of its ECR cases. According to USFS staff,<sup>7</sup> USFS’s relatively high percentage of involvement as a non-sponsor participant relates directly to its status as a land manager. In that role USFS is often invited to participate in processes that are initiated or sponsored by neighboring federal, state, local, and Tribal agencies.

**Table 3. Agency participation in or sponsoring of ECR cases**

	Number and Percent of Cases		Total Number Of Cases
	Sponsored	Participated but did not sponsor	
EPA	117 (89%)	14 (11%)	131
DOI	74 (80%)	18 (20%)	92
USFS	53 (77%)	16 (23%)	69
DoD	25 (54%)	21 (46%)	46 <sup>†</sup>
FERC	19 (100%)	0 (0%)	19
NOAA	6 (100%)	0 (0%)	6
NRC	1 (100%)	0 (0%)	1

† DoD reported sponsorship information on 46 of its 94 cases for FY 2009.

<sup>7</sup> Based on a conversation with Martha Twarkins, USFS, 3/14/2008

#### ***D. Decision Making Forum***

Agencies were also asked to identify the decision making forum where issues were being addressed when ECR was initiated. The choices in this part of question three were intended to generally approximate the continuum of conflict as expressed in the *FY 2006 Analysis*.<sup>8</sup>

In the continuum of conflict, cases that are in formal administrative or judicial forums are considered “downstream” cases. Cases that are in the informal phases, such as planning, and policy decisions, are considered “upstream” cases. “Federal Agency Decision” was the most upstream category in this part of question three. “Administrative Proceedings” was the category next furthest downstream, and “Judicial Proceedings” was the furthest downstream category. Cases that did not fit into any of these categories would fall in the “Other” category.

Table 4. Agency decision making forums where cases were initiated: FY 2007 through FY 2009

FY 2007 through FY 2009	Federal Agency Decision	Administrative Proceedings/ Appeals	Judicial Proceedings	Other
	<i>Number and Percent (%)</i>			
FY2007	186 (58%)	43 (14%)	30 (9%)	61 (19%)
FY2008	197 (47%)	116 (28%)	47 (11%)	59 (14%)
FY2009	186 (45%)	116 (28%)	52 (13%)	57 (14%)

Table 4 shows that 186 cases (45%) fall into the upstream “Agency Decision” category, with 70 coming from DOI. Agencies categorized 116 cases (28%) as Administrative Proceedings and Appeals, with 86 of these coming from EPA, which is consistent with its compliance and enforcement focus. Agencies categorized 52 (13%) of their cases as “Judicial Proceedings”, and 57 cases (14%) as “Other.”

At the agency level, the distribution of cases across decision-making forums has not changed significantly from FY 2007 through FY 2009 (Table 5).

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<sup>8</sup> See *2006 Analysis*, pp 12-13.

Table 4. Distribution of cases by decision making forum by agency (FY2007 through FY 2009)

FY 2007	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	14	8%	1	2%	13	43%	46	76%
DOI	34	18%	5	12%	5	17%	2	3%
DOT	11	6%	0	0%	1	3%	0	0%
EPA	32	17%	35	81%	10	33%	13	21%
FERC	21	11%	0	0%	0	0%	0	0%
NOAA	8	4%	0	0%	0	0%	0	0%
NRC	3	2%	0	0%	0	0%	0	0%
USFS	63	34%	0	0%	0	0%	0	0%
VA	0	0%	2	5%	1	3%	0	0%
<b>Totals</b>	<b>186</b>	<b>100%</b>	<b>43</b>	<b>100%</b>	<b>30</b>	<b>100%</b>	<b>61</b>	<b>100%</b>

FY 2008	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	17	8%	0	0%	17	36%	48	82%
DOI	54	27%	14	12%	8	17%	5	8%
DOT	2	1%	0	0%	1	2%	0	0%
EPA	21	11%	96	83%	19	41%	6	10%
FERC	16	8%	0	0%	0	0%	0	0%
NOAA	1	1%	1	1%	0	0%	0	0%
NRC	1	1%	0	0%	0	0%	0	0%
USFS	85	43%	5	4%	2	4%	0	0%
<b>Totals</b>	<b>197</b>	<b>100%</b>	<b>116</b>	<b>100%</b>	<b>47</b>	<b>100%</b>	<b>59</b>	<b>100%</b>

FY 2009	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	28	15%	2	2%	16	31%	48	84%
DOI	70	37%	14	12%	6	12%	3	5%
EPA	19	10%	86	74%	20	38%	6	11%
FERC	19	10%	0	0%	0	0%	0	0%
NOAA	5	3%	0	0%	0	0%	0	0%
NRC	1	1%	0	0%	0	0%	0	0%
USFS	44	24%	14	12%	10	19%	0	0%
<b>Totals</b>	<b>186</b>	<b>100%</b>	<b>116</b>	<b>100%</b>	<b>52</b>	<b>100%</b>	<b>57</b>	<b>100%</b>

### **III. Building Capacity**

Section Five of the ECR Memorandum also directs agencies to build institutional capacity for collaborative problem-solving. Agency ECR Reports show progress in building institutional capacity through the development of infrastructure; investment in ECR; the leveraging of resources; strategic planning; the development of policies; guidance and procedures; the integration of science into ECR; and education, awareness and training.

#### **Programmatic Capacity: Infrastructure, Personnel and Operations**

Almost all of the agencies that engage in ECR reported on the importance of building infrastructure and dedicating staff to increase the appropriate and effective use of ECR. Among other actions, agencies took the following measures during FY 2009:

- Continued support of a newly established Conflict-Resolution & Public Participation Center in carrying out its mandate to anticipate, prevent, and manage water conflicts (USACE);
- Investing more funding in the mediation of environmental cases than for any other type of case; (DOJ)
- Requiring conflict management elements in management performance plans ( DOI);
- Continuing to fund and support offices that are dedicated full-time to ECR (EPA, FERC, DOI, USACE);
- Sustaining an integrated conflict management program allows for linkage between ECR and work place conflict management (DOI); and
- Ongoing use of new business rules that help measure the performance of ECR-related activities. (USFS)

Overall, the reports showed that agencies that engage in ECR invest in its infrastructure. EPA, DOI, DoD, FERC, and DOJ reported that they also continue to fund full or part time ECR or ADR-related positions as well as invest in training and other ECR services.

#### **Leveraging Resources: Interagency Agreements and Partnering**

Several agencies reported on efforts to partner with other agencies to leverage resources dedicated to ECR. EPA and USIECR continued work under their interagency agreement on a range of projects, including the Coeur d'Alene Lake Management Plan. Similarly, other agencies such as DOI and USFS reported on their partnering activities with USIECR to promote ECR in their respective agencies.

FERC collaborated with the Harvard University Negotiation and Mediation Clinical Program to produce a study of the use of ADR in the energy industry. The Department of the Navy reported that it participates in 48 facilitated partnering teams that oversee the restoration efforts at 1,181 active and 367 inactive sites. Within these teams representatives from the DON, EPA, state governments, local officials, and sometimes various other groups, use collaborative methods to

craft creative and cost-effective restoration processes designed to address as many interests as possible.

Several agencies, including DOE and DoD, rely on the dispute resolution language in Federal Facility Agreements to help them resolve disagreements with other federal agencies. USACE and DOI agencies reported that they often rely on Memorandums of Understanding (MOU), and Memorandums of Agreement (MOA) with local, regional and national stakeholder groups to detail the processes that they will use to collaborate with one another.

### **Strategic Planning**

Several agencies reported on the importance of strategic planning in carrying out their ECR objectives, in accordance with Section 5 of the ECR Memorandum. EPA reported that its ECR program “furthers all five goals in EPA’s Strategic Plan: 1) clean air and climate change; 2) clean and safe water; 3) land preservation and restoration; 4) healthy communities and ecosystems; and 5) compliance and environmental stewardship.” Other examples of strategic planning related to ECR include: GPRAs goals that include ECR and ADR objectives (FERC, USFS); and being “guided by a shared mission and a 5 year strategic plan to grow the Department’s ECR capacity and utilization while transforming the Department into a more collaboration driven culture.” (DOI).

### **Policy/Guidance/Procedures**

Several agencies reported on developing policies, guidance, or procedures to further the goals of the ECR Memorandum. EPA reported that, consistent with the initiative to promote open government, Administrator Lisa Jackson issued a memorandum entitled “Transparency in EPA’s Operations,” in which she articulated a set of general principles requiring agency employees to “provide for the fullest possible public participation in decision-making.” DOI’s Minerals Management Service (MMS) reported that it has established procedures to resolve shipper disputes concerning open access and nondiscriminatory transportation services on pipelines operating on the Outer Continental Shelf. The final rule gives MMS the responsibility to administer a complaint and dispute resolution procedure that may involve third party neutrals in selective cases where oil and gas shippers claim discrimination by private entities operating pipelines on the Outer Continental Shelf. The ADR process may commence when a party calls MMS staff on a toll-free number and discusses a concern involving a qualified pipeline and one of its shippers. In 2009 MMS dealt with 7 calls of this nature.

### **Education/Awareness/Training**

All of the agencies that engage in ECR reported education, awareness and training activities. Most agencies are utilizing training to further the goals of the ECR Policy Memorandum. The FY 2009 reports showed:

- More than 100 environmental collaboration and conflict resolution training sessions were sponsored during FY 2009 by federal departments/agencies.
- Sponsors included a variety of DOI agencies (BIA, BIE, BLM, BOR, FWS, NPS, MMS, CADR, OSM, USGS, OSM), EPA, DOE, DON, EPA, FAA, FERC, TSA, USACE, USALSA, and USIECR. The trainings ranged from introductory informational sessions

delivered within a working day, to more in-depth trainings spanning several days to a week.

- The training content ranged from basic to advanced; off-the-shelf to customized; and was delivered in a range of settings, from traditional training rooms to computers. Advanced training included USIECR's offering of Multi-Party Environmental Mediation training, which is a 3-day training that includes exercises, as well as lectures on the principles of environmental mediation. Off-the-shelf training includes standard 3-4 day mediation training that is offered by several agencies. An example of a customized training is DOI's "Getting to the Core of Conflict," which focuses on conflict prevention, while also emphasizing the fundamentals of interest-based negotiation.
- Primary audiences were federal agency staff, but also included non-federal participants in some offerings.

Agencies also offered training in areas related to ECR such as: ADR in the Environmental Context; Conflict Management/Prevention/Resolution; Collaboration/Collaborative Governance; Negotiation; Facilitation; Leadership Public Participation/Public Involvement; Partnering; Conservation; Communication; NEPA; Assessments; Cross-Cultural topics and other areas related to ECR.

### **Leadership Commitment and Cultural Change**

One of the underlying themes of the ECR Memorandum is the need for a cultural change in federal agencies to "face the challenge of balancing competing public interests and federal agency responsibilities when striving to accomplish national environmental protection and management goals." Several agencies reported on activities that were designed to promote a pro-ECR culture in their agencies. For instance, USACE noted its continuing effort to foster a collaborative culture through the activities of its newly formed Conflict-Resolution and Public-Participation Center. In November 2007 the USACE Director of Civil Works, Major General Don Riley, issued a statement to all commanders in Corps regional offices that promoted the use of Shared Vision Planning and other collaborative processes and tools. This high-level endorsement of collaborative processes and tools complements Goal 2b of the USACE Campaign Plan, which directs the agency to "Implement collaborative approaches to effectively solve water resource problems." High level support for the USACE programs was also supplied in 2008, by Assistant Secretary of the Army for Civil Works J.P. Woodley who stressed that: "[USACE] will broaden [its] collaboration with others to enhance the chances of balancing water uses and making wise investments and trade-offs decisions".

DOI's CADR Office reported on the linkage of its Integrated Work Place Conflict Management System, "CORE PLUS", with ECR capacity. The DOI Report notes "[t]he Department believes managers and employees strengthen the capacity of the organization to effectively manage conflict situations with external parties and stakeholders when they are comfortable using the same tools to effectively manage conflicts and disputes that arise within the organization as well."

#### **IV. Collaboration without a Third Party**

The ECR Memorandum acknowledged that “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.” In many cases, these activities do not fit within the definition of ECR under the ECR Memorandum as they do not use third parties to resolve environmental conflict. Many agencies reported that the resolution of conflict without the use of a third party is critical in carrying out their respective missions. The contexts in which agencies utilized collaborative problem-solving without the aid of a third party included advisory committees, community outreach, interagency agreements, NEPA and environmental compliance, public participation, and unassisted negotiation.

##### **Advisory Committees**

Advisory committees are often comprised of experts and advocates that represent a diverse array of perspectives. It is clear from the ECR reports that agencies often rely on this expertise and these perspectives in seeking solutions to complex environmental problems.

DoD agencies reported that they regularly use Resource Advisory Boards (RABs) to provide DoD agencies with input. Air Force reported that it relied on the expertise of 83 RABS on a variety of environmental issues in FY 2009.

EPA reported that its Office of Enforcement and Compliance Assurance (OECA) utilizes the National Environmental Justice Advisory Council to coordinate discussions about air quality in communities, and the development of nationally consistent screening approaches for identifying environmental justice populations. EPA also reported making extensive use of the Federal Insecticide, Fungicide and Rodenticide Act Scientific Advisory Panel to obtain independent peer review and advice on novel or controversial scientific issues and the Pesticide Program Dialogue Committee to explore a wide range of pesticide policies—both substantive and procedural—with a diverse group of stakeholders.

USFS reported that “quite a few forests are actively involved in local natural resource and council Groups, as well as Provincial Advisory Committees (PACS), and Resource Advisory Committees (RACs). USACE reported that it is able to work collaboratively with stakeholders through a variety of committees and groups, including the Lower Columbia River Solutions Group; the Coastal America Partnership; the Mobile Bay National Estuary Program; and the Gulf of Mexico Program.

DOI reported that several of its agencies rely on Federal Advisory Committees to provide them with consensus-based recommendations. The BLM utilizes Regional Advisory Councils (RACs) to provide it with advice. NPS often relies on park-specific advisory committees for recommendations. The Fish and Wildlife Service is utilizing the multi-stakeholder Wind Power Advisory Committee to provide consensus recommendations for the Secretary of the Interior on developing measures to avoid or minimize impacts to wildlife and their habitats related to land-based wind energy facilities.

##### **Public Participation/Community Outreach**

Several agencies reported on their use of collaborative problem-solving in the context of community outreach and public participation. Region 2 of EPA continued to assist the Town and

Village of Fort Edward, NY, in its revitalization efforts regarding the Hudson River Polychlorinated Biphenyl (PCB) site. There are approximately four meetings per year and, while some segments of the meetings are facilitated with the purpose of reaching agreement, other segments are facilitated with the purpose of brainstorming, visioning, and considering opportunities for grants and other funding. EPA also reported that it continues to engage the public on local and national environmental issues in a number of places, including the Elizabeth River project (Virginia), the Monocacy Project (MD); and its effort relating to Climate Change (Region 1 and Region 2).

EPA also engaged in international outreach, presenting a day-long workshop in Cairo, Egypt on the value and methods of public participation to an audience of government officials and private citizens from several middle eastern nations.

FERC reported that through publications such as the FERC ADR Newsletter it continued to educate and disseminate information to the energy industry and the public on the use of ECR at the Commission. NOAA reported that its Aquaculture Program conducted outreach to stakeholders concerned about the potential environmental impacts of marine aquaculture by providing opportunities for discussions among industry, non-governmental organizations, the research community, government, and the public.

Agencies also reported using the principles of collaborative problem-solving in the context of public participation. VA reported that public outreach is “an internal component of how it conducts business.” Several other agencies, including EPA, DOI, FERC, USFS, and others also reported using collaborative problem-solving in the context of public engagement.

### **NEPA/Environmental Compliance**

Many agencies reported on engaging in collaboration with agencies and stakeholders in processes under NEPA and other environmental statutes.

USFS reported that “while working with local community groups on fire safe councils, rangers collaborate with a variety of publics during both project development and implementation...[as] a result, appeals have been successfully resolved through informal meetings.” USFS also reported that “[a] forest used a focus group to deal with heritage resource management and habitat restoration. An interagency group reached resolution through focused presentation, additional data, and discussions.” DOI reported that Congaree National Park in Georgia convened a diverse group of citizens and scientists to evaluate the long-term effects of the Saluda Dam on the park. The group reached agreement on a flow recommendation, which may be incorporated into a FERC license for the power company that operates the Saluda Dam.

Interagency Coordination Teams (ICT) in the Galveston District of the USACE are standing teams that attempt to reach consensus on all major General Investigation studies where an Environmental Impact Statement will be prepared. The ICT is chartered, and all state and federal resource agencies are invited to participate. The ICT is directly involved in the development and analysis of project alternatives and identification of sensitive or significant resources that must be addressed. Since the use of ICTs became routine, the Galveston District has not been sued over its NEPA process, and USACE has not faced protracted time delays in obtaining regulatory approval of its projects.

Other agencies, including DOI, DoD, DHS, VA, and others, also reported that they were promoting collaboration in the context of NEPA and other environmental statutes.

### **Unassisted Negotiation/ Assisted Non-Agreement Seeking Processes**

#### **Unassisted Negotiation**

Almost all agencies reported the use of unassisted negotiation to resolve environmental conflict. As VA reported in 2008, it “has a history of successfully settling enforcement actions through an informal process and without the assistance of a third party.” EPA reported that its Region 7 has adopted the practice of using pre-filing negotiations in all administrative enforcement actions seeking a monetary penalty. DOJ reported that it negotiates resolutions to well over 90% of environmental and natural resource cases. For example, DOJ attorneys negotiate resolutions to most civil environmental enforcement cases prior to filing. The result is that the court case begins with the filing of a complaint and lodging of a proposed consent decree that undergoes public review and comment.

#### **Assisted Non-Agreement Seeking Processes**

EPA reported using third parties to facilitate non agreement-seeking processes. EPA tracked these cases, and reported 80 such cases in FY 2009.

### **V. Tracking and Evaluating ECR**

Agencies were asked to describe the methods and measures by which they are tracking the use of ECR and evaluating its effectiveness, as directed by section 4(b) and Section 5(a)(3) of the ECR Memorandum. Agencies responded by noting how they track ECR, survey its participants, and assess the outcomes of ECR cases.

#### **Tracking ECR Cases**

As was the case with the 2006 through 2008 reports, the 2009 reports show that agencies are most successful at tracking ECR that occurs in formal administrative or judicial proceedings. Formal proceedings are tracked regardless of whether ECR is taking place, through agency or judicial docketing systems. These systems make it easier to track ECR when the parties to a case choose alternative dispute resolution to resolve their differences. The Interior Board of Land Appeals, for instance, uses its docketing system to track ECR in implementing its ADR pilot program. FERC reports that since 2000 its Dispute Resolution Service (DRS) has tracked its ADR activities and workload, inclusive of ECR activities, in a database and has developed a case evaluation survey to measure participant feedback. Also, the DoD Army Environmental Law Division maintains a database that captures a description of the type of ECR and the ultimate outcome. Similarly, DOJ reports tracking ECR through the procurement process it uses to hire external mediators.

Additionally, agencies such as DOI and USFS reported that the act of completing their respective Annual ECR Reports has enhanced their capability of tracking ECR activity. Despite the success of the Report Template in engaging field offices, the tracking of ECR in the more upstream

settings<sup>9</sup> remains in the developmental phase in most agencies. In these settings, which would encompass planning, policy development, siting and construction, rulemaking, and the implementation of upstream agreements, there do not appear to be any agencies that require centralized reporting of ECR other than that which is required for the annual ECR Report.

EPA reported that it has four methods for gathering data about the use of ECR: its Conflict Prevention and Resolution Services contract; its interagency agreement with USIECR; its network of headquarters office and regional staff members who are designated to assist with the ECR annual reporting process, and the CPRC's request and services tracking system, in which CPRC staff log requests received for ADR/ECR services and record the services that are provided in response.

## **Evaluation**

Several agencies reported progress in evaluating the performance of ECR. For example:

- The USIECR reported that it integrates evaluation feedback into case briefings that document the outcomes and lessons learned from collaborative processes. In early 2010, USIECR will post an interactive map on its website which will geographically highlight ECR projects throughout the country.
- The USACE Institute for Water Resources completed a survey instrument, which is based on the USIECR MAES instruments. The survey is being designed to evaluate the use of collaborative modeling for planning and conflict resolution which may include the use of a third party neutral. The survey will document the process characteristics, output, and outcomes of collaborative processes, including shared learning, trust and relationship building, acceptability of the decision, and the ease of implementation (lack of resistance/objection).
- FERC entered into an agreement with the Harvard Negotiation & Mediation Clinical Program (HNMCP) to study alternative dispute resolution (ADR) in the energy industry, inclusive of ECR, in three regulated energy sectors: electricity, hydropower and natural gas. The study will help FERC better understand how energy companies view ECR as a tool for energy conflict prevention and resolution and what measures can be taken to improve the capacity and entry points for ADR/ECR in energy and environmental-related decision-making and problem-solving processes. The three top recommendations coming out of the Study were: 1) foster a stronger mandate for ADR; 2) incorporate ADR earlier or upstream in commission proceedings; and 3) establish best practices across the Commission offices for more frequent use of ADR.
- EPA and DOI also reported on their jointly sponsored Systematic Evaluation of Environmental and Economic Results (SEEER). SEEER involves the study of particular ECR cases to evaluate the economic and environmental effects of ECR. According to the EPA report "SEEER is the first known systematic effort to compare the environmental and economic results of ECR to its alternatives." EPA reported further that "[p]reliminary results from applying SEEER to a limited set of cases suggest possible savings, potential environmental benefits, increased organizational effectiveness, and more durable agreements from using ECR compared to the alternative.

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<sup>9</sup> See *2006 Analysis*, pp 12-13, for discussion on upstream and downstream use of ECR.

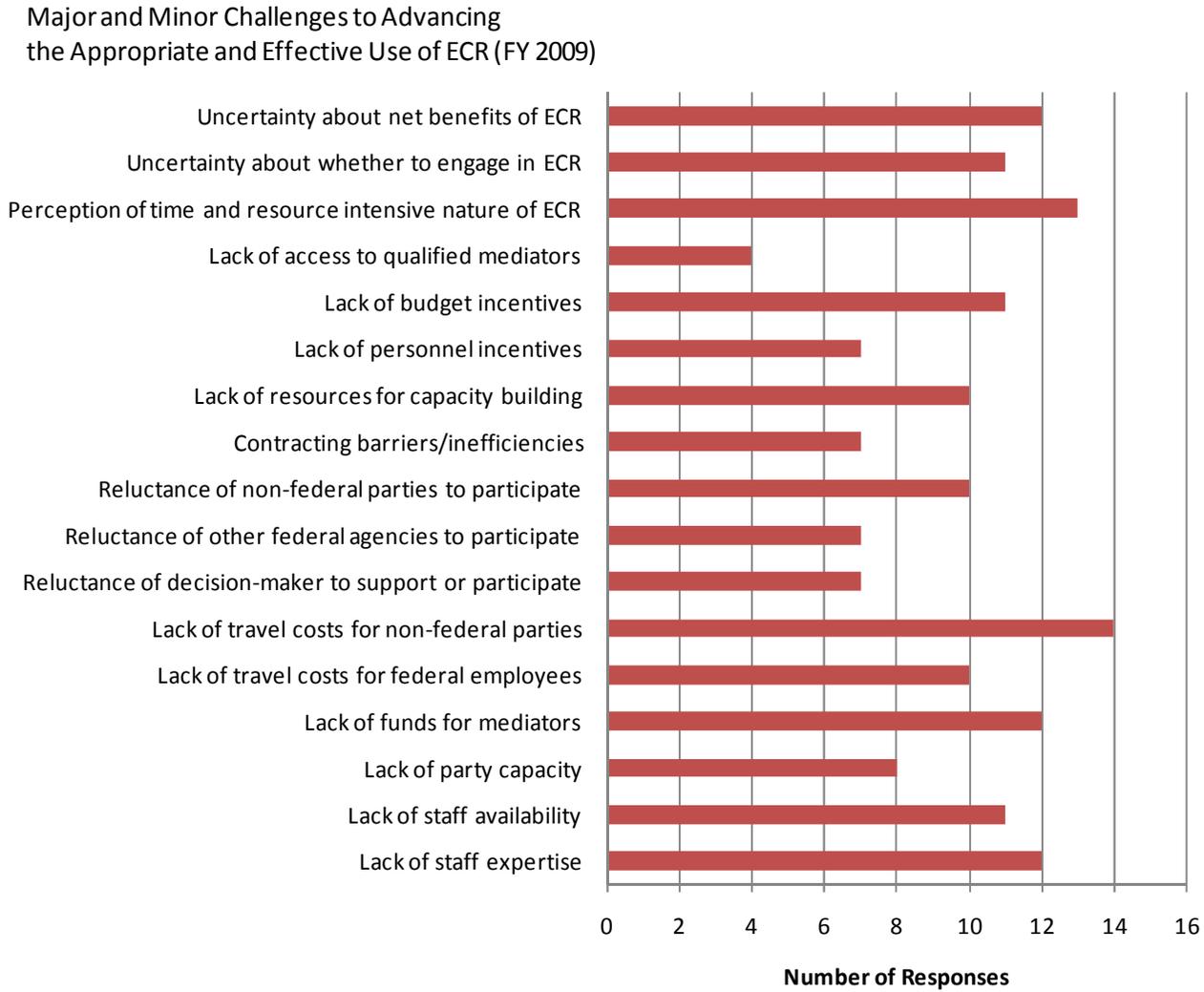
## **VI. Challenges to Engaging in ECR**

Question 2 of the FY 2009 template asked agencies to rate a list of potential challenges to ECR as either “major,” “minor,” or “not applicable.” The responses to this question were generally similar to the responses indicated in 2007 and 2008.

Fourteen agencies considered the “lack of travel costs for non-federal parties” as either a minor or major challenge. This was the most frequently cited challenge for FY 2009. Thirteen agencies reported “perception of the time and resource intensive nature of ECR” as a challenge, and twelve agencies deemed “lack of staff expertise”, “lack of funds for mediators”, and “uncertainty about the net benefits of ECR” as challenges. (Figure 2).

Responses from all reporting agencies, including those from DOJ, USIECR, and DoD are included in the above analysis.

Figure 2. Major and minor challenges to ECR in FY 2009.



## VII. Substantive Programs where ECR is Used

### Programmatic Areas that Can Benefit from ECR

Agencies were asked in Question 4 if they continue to use ECR in any of the priority areas that they identified in their previous annual ECR reports. They were also asked if usage had increased in these areas, and if they had identified new priority areas during FY 2009.

In response to question 4, several agencies reported increased use of ECR in existing priority areas (Table 5). In addition, several agencies identified new priority areas where ECR can be of assistance. As Table 5 shows, the reports highlight the diversity of applications of ECR across the federal government, as well as ECR's continued use in areas that are traditionally associated with environmental conflict:

	Priority areas where ECR was applied during FY 2009	Increased use in at least one priority area
DoD	<p><i>Priority areas where ECR was applied during FY 2009:</i> BRAC, intra-Navy and intra-DOD conflicts that arise from different interpretations and applications of laws, regulations, and policies, navigation, flood risk management, coastal zone management, hydropower, water supply, recreation, emergency management, ecosystem restoration, Superfund, Environmental litigation CERCLA, expediting NEPA and permitting processes, Section 106 consultations of the National Historic Preservation Act, land use/encroachment, using formal dispute resolution between lead and cooperating agencies throughout the NEPA process, but particularly prior to the publication of the DESI and FEIS. Expediting the NEPA and permitting process for the proposed move of Marine Corps/CVN to Guam.</p> <p><i>New priority areas identified during FY 2009:</i> SHPO programmatic agreements, NEPA/BRAC processes use public comment periods and advisory boards but in some disputes ECR is being considered, and executing DON's environmental restoration program.</p>	✓
DOE	<p><i>Priority areas where ECR was applied during FY 2009:</i> Groundwater issues, conflicts in environmental cleanup decisions, relationships with regulators, multi-issue and multi-party environmental disputes, hazardous waste facility permit modifications, NEPA, public engagement activities, NPDES permits, environmental cleanup decisions, and natural resources damage liability settlement.</p>	
DOJ	<p><i>Priority areas where ECR was applied during FY 2009 and where new priority areas were identified:</i> Continues to be used in full range of environmental enforcement and defensive cases.</p>	✓

DOI	<p><i>Priority areas where ECR was applied during FY 2009:</i>  Natural resource and environmental litigation, project and resource planning, stakeholder involvement in planning and decisions, land use, off-road vehicle use, wild and scenic river studies, grazing permits, habitat conservation, administrative appeals, natural resource damage assessments, species recovery, land conveyances, timber sales, wildlands fire management, Endangered Species Act, NEPA, adaptive management, water rights adjudication, hydropower licensing, fees to Trust Status, False Claims Act Litigation, three party MOAs for Marine Mammals, collaborative policy making for science and technical areas, collaborative decision making for project operations, comprehensive conservation planning for National Wildlife Refuges, Fish species recovery and conservation, tribal consultation, rulemaking and policy formulation, royalty and other revenue disputes, administrative appeals or orders to pay, multi-party revenue appeals, compliance and enforcement, and grazing disputes.</p> <p><i>New priority areas identified during FY 2009:</i>  Water policy issues, renewable energy, and ESA.</p>	✓
EPA	<p><i>Priority areas where ECR was applied during FY 2009:</i>  National Environmental Policy Act, Superfund Program, regulation development, inter-agency disputes, and wetlands program.</p> <p><i>New priority areas identified during FY 2008:</i>  Climate change and environmental justice.</p>	✓
FERC	<p><i>Priority areas where ECR was applied during FY 2009:</i>  Natural gas facility certificate applications, hydropower licensing/relicensing applications, liquefied natural gas facility authorization applications, and electric transmission siting authorization applications.</p>	
NOAA	<p><i>Priority areas where ECR was applied during FY 2008:</i>  ECR used along with NEPA process, which involved “siting and construction”</p>	✓
NRC	<p><i>New priority areas where ECR can be applied:</i>  Proposed depleted uranium rulemaking.</p>	
USFS	<p><i>Priority areas where ECR was applied during FY 2008:</i>  Protracted and costly environmental litigation, unnecessarily lengthy project and resource planning processes (planning delays), costly delays in implementing needed environmental protection measures, forgone public and private investments when decisions are not timely or appealed (administrative appeals) lower quality outcomes when environmental plans and decisions are not informed by all available information and perspectives, deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.</p>	✓

USIECR	USIECR works with multiple federal agencies and provides assistance across a spectrum of substantive areas of regulation or management. These include: (1) Watershed and river basin collaborative management; (2) Planning for and managing species and habitat conservation under the ESA where multiple agencies and stakeholders are involved; (3) Addressing conflicts over multiple-uses on public lands and adjacent public and private lands (including recreation); (4) Federal highway planning; shipping (ports development, rail freight, multi-modal transportation); and (5) Integrating collaboration and conflict resolution into NEPA review processes and decision making.	✓
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### VIII. Cases

The cases that agencies supplied in response to question 8 of the 2009 Template have several common themes. They tend to show that ECR helps minimize the costs of conflict and maximize the benefits of collaboration. Agencies reported that in these cases projects moved quicker, solutions were cost-effective, litigation costs were avoided, and working relationships were improved. The reports show that even when agreements were not reached ECR helped to narrow issues that might possibly end up in litigation.

The following are examples of comments made by agencies about the value of ECR as it pertained to specific cases:

*Reduced tension in a high conflict/low trust setting, resulting in good faith communication and the effective balancing of all parties' interests...promoted a shared understanding of the issues and provided an effective forum to explore options for the next steps (Department of Navy- Naval Air Station Key West Aircraft Noise Case, FL)*

*Helped speed up resolution of the issues and ensure better protection of water quality (US Air Force- Air Force Academy's MS4 Permit Case)*

*Resulted in a completed programmatic agreement that allows the Army to proceed with its privatization plan in a much more efficient manner (US Army Legal Services Agency - Housing Privatization and State Historic Preservation Office Compliance Case)*

*Resulted in a more effective groundwater investigation, which saved both site and ODEQ resources (DOE - National Energy Technology Lab Data Sharing with Oregon Department of Environmental Quality, OR)*

*Resulted in an expedited process and a permit that was accepted by the public (DOE - Sandia Site Permitting Process, NM)*

*[ECR process] will potentially end a decades-long conflict between the NPS and FAA and establish a final rule on air tour operations at Grand Canyon (Department of Interior - Management Plan for Over Flights at Grand Canyon National Park, AZ)*

*A litigated outcome would be more expensive, time-consuming and uncertain. Trial in a comparable case had lasted more than a year and cost the Government millions of dollars without any assured water right (Department of Justice - Black Canyon of Gunnison National Park Water Rights Case, CO)*

*Allowed this project to move through the regulatory process, saving litigation and regulatory expenses (Federal Energy and Regulatory Commission - Kansas Wind Power Case, KS)*

*Improved early public involvement in and understanding of the processes associated with travel management...Allowed for a better and broader understanding of forest-user needs and desires (USDA Forest Service - Cibola National Forest and National Grasslands Travel Management Case, NM, TX, OK)*

*Ensured injured resources would be restored in a timely fashion as opposed to litigation (NOAA National Ocean Service - Commencement Bay Superfund Site, WA)*

*In the words of participants, an array of social, economic, recreational, natural resource and environmental benefits will result from the process, including: “Wildlife/scenic/threatened and endangered species of special values protected and enhanced” and “Increased work for Forestry related business, including mills.” (USIECR - Collaborative Management Planning Forums for the Dinkey North and South Areas of the Sierra National Forest, CA)*

Detailed case write-ups provided by agencies are provided in Appendix C.

## **IX. Conclusion**

The data submitted provides greater insight into how ECR is used throughout the Federal government. The reports show that:

- across the federal government the level of ECR use was consistent between FY 2008 and FY 2009. Departments reporting consistent increases in use from FY 2007 through FY 2009 include the Department of Defense and the Department of Interior.
- the context of ECR use is clearly related to agency mission. Regulatory agencies use ECR more in enforcement cases, land and natural resource management agencies use ECR more frequently in upstream contexts such as planning and policy development. Agencies whose missions focus primarily on areas other than natural resources and the environment tend to make more limited use of ECR.
- Even where ECR does not prevent litigation agencies still perceive it as an important tool in resolving conflict. As the Department of the Army reported FY 2008 Report “[e]ven if the ECR does not result in a settlement of the matter, it might result in narrowing the issues, or getting a better more accurate assessment of the litigation risk.”

The reports also show that agencies continue to take measures to build capacity in ECR such as:

- investing in training
- building infrastructure, and
- evaluating the performance of ECR.

Similar to the previous annual reports, agencies identified resource-related challenges as the biggest and most frequent impediments to undertaking ECR. Resource-related challenges such as lack of sufficient funding and time, and the resource-intensive nature of ECR, were the most frequently cited major challenges. None of the agencies that engage in ECR found access to qualified mediators was a major challenge.

Agencies reported continuing to use ECR in such priority areas as NEPA, environmental cleanup and restoration, natural resource conflict on federal land, species and habitat conservation, hydropower and natural gas, coastal zone management, historic preservation, tribal consultation, property rights, and conflicts under the Clean Water Act.

Finally, agencies reported using unassisted collaborative problem-solving in a variety of settings, including: advisory committees, partnerships, direct negotiation, federal facility agreements, licenses and permits, and public participation.

In sum, the fourth annual ECR Reports build on the information submitted in the three previous annual reports. On the whole, they show that agencies are making significant progress in increasing the use of ECR in accordance with the ECR Memorandum.

## Appendix A. ECR Report Template for FY 2009

### *FY 2009 ECR Policy Report to OMB-CEQ*

On November 28, 2005, the Director of the Office of Management and Budget (OMB), and the Chairman of the President's Council on Environmental Quality (CEQ) issued a policy memorandum on environmental conflict resolution (ECR).

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year. This joint policy statement directs agencies to increase the effective use and their institutional capacity for ECR and collaborative problem solving.

ECR is defined in Section 2 of the memorandum as:

*“third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. The term “ECR” encompasses a range of assisted negotiation processes and applications. These processes directly engage affected interests and agency decision makers in conflict resolution and collaborative problem solving. Multi-issue, multi-party environmental disputes or controversies often take place in high conflict and low trust settings, where the assistance of impartial facilitators or mediators can be instrumental to reaching agreement and resolution. Such disputes range broadly from administrative adjudicatory disputes, to civil judicial disputes, policy/rule disputes, intra- and interagency disputes, as well as disputes with non-federal persons/entities. ECR processes can be applied during a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicts between federal, state, local, tribal, public interest organizations, citizens groups and business and industry where a federal agency has ultimate responsibility for decision-making.*

*While ECR refers specifically to collaborative processes aided by third-party neutrals, there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that federal agencies enter into with non-federal entities to manage and implement agency programs and activities. The Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving presented in Attachment A (of the OMB/CEQ ECR Policy Memo) and this policy apply generally to ECR and collaborative problem solving. This policy recognizes the importance and value of the appropriate use of all types of ADR and collaborative problem solving.”*

The report format below is provided for the fourth year of reporting in accordance with this memo for activities in FY 2009.

The report deadline is January 15, 2010.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies can collect this data to the best of their abilities. The 2009 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 2009 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of prior year synthesis reports are available at [www.ecr.gov](http://www.ecr.gov).

Name of Department/Agency responding:

\_\_\_\_\_

Name and Title/Position of person responding:

\_\_\_\_\_

Division/Office of person responding:

\_\_\_\_\_

Contact information (phone/email):

\_\_\_\_\_

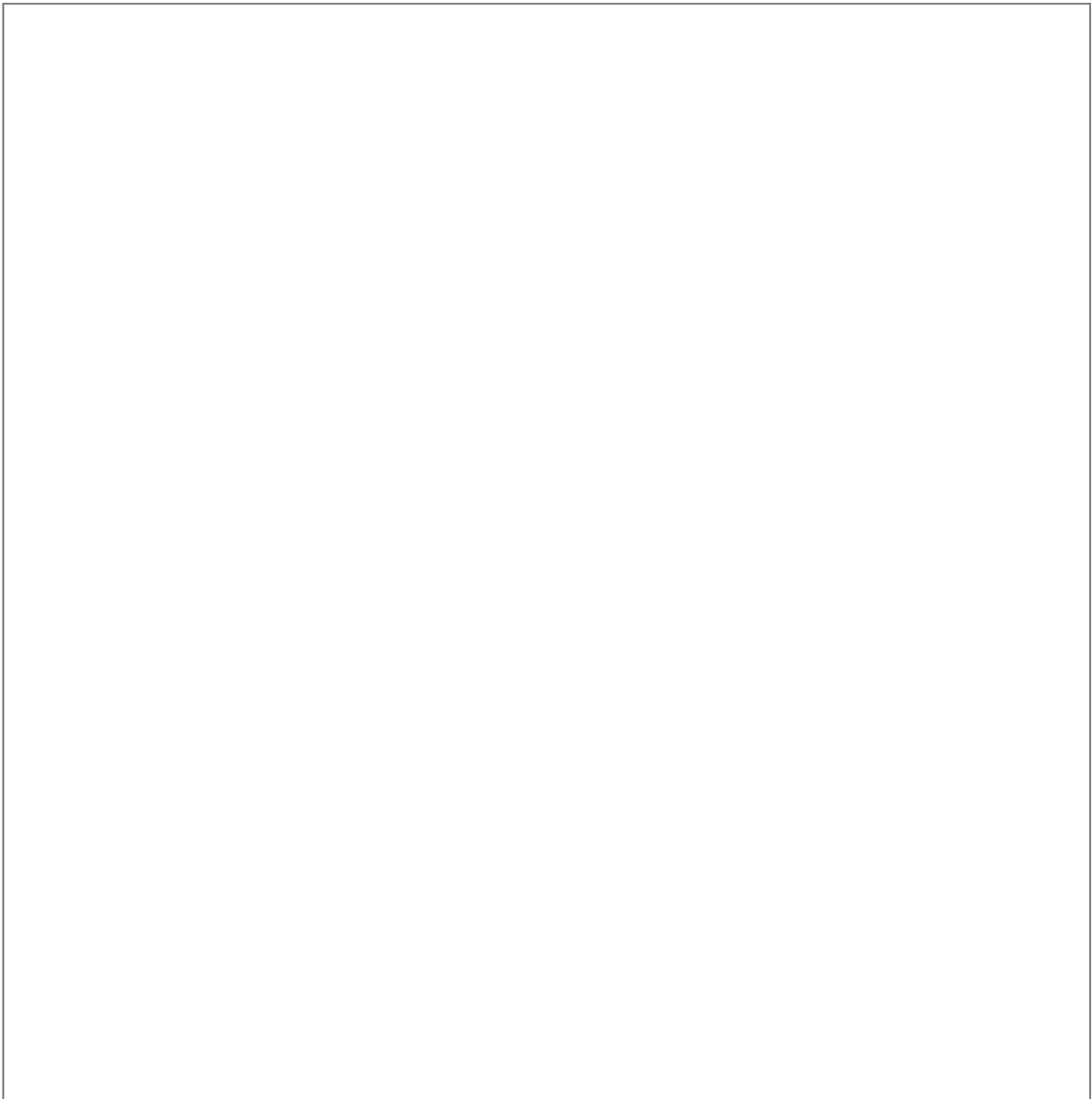
Date this report is being submitted:

\_\_\_\_\_

## Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2009, including progress made since 2008. 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.]



## 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
	<b>Check <u>only</u> one</b>		
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
k) Lack of resources for staff capacity building	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m) Lack of budget incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r) Other(s) (please specify): _____	<input type="checkbox"/>	<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 2009 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR “case or project” is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

	Cases or projects in progress <sup>10</sup>	Completed Cases or projects <sup>11</sup>	Total FY 2009 ECR Cases <sup>12</sup>	Decision making forum that was addressing the issues when ECR was initiated:					Of the total FY 2009 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored <sup>13</sup>	Participated in but did not sponsor <sup>14</sup>	
<i>Context for ECR Applications:</i>										
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Other (specify): _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>TOTAL</b>	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
	(the sum should equal Total FY 2009 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2009 ECR Cases)					(the sum should equal Total FY 2009 ECR Cases)	

<sup>10</sup> A “case in progress” is an ECR case in which neutral third party involvement began prior to or during FY 2009 and did not end during FY 2009.

<sup>11</sup> A “completed case” means that neutral third party involvement in a particular matter ended during FY 2009. The end of neutral third party involvement does not necessarily mean that the parties have concluded their collaboration/negotiation/dispute resolution process, that all issues are resolved, or that agreement has been reached.

<sup>12</sup> “Cases in progress” and “completed cases” add up to “Total FY2009 ECR Cases”.

<sup>13</sup> Sponsored - to be a sponsor of an ECR case means that an agency is contributing financial or in-kind resources (e.g., a staff mediator's time) to provide the neutral third party's services for that case. More than one sponsor is possible for a given ECR case.

<sup>14</sup> Participated, but did not sponsor - an agency did not provide resources for the neutral third party's services for a given ECR case, but was either a party to the case or participated in some other significant way (e.g., as a technical expert advising the parties).

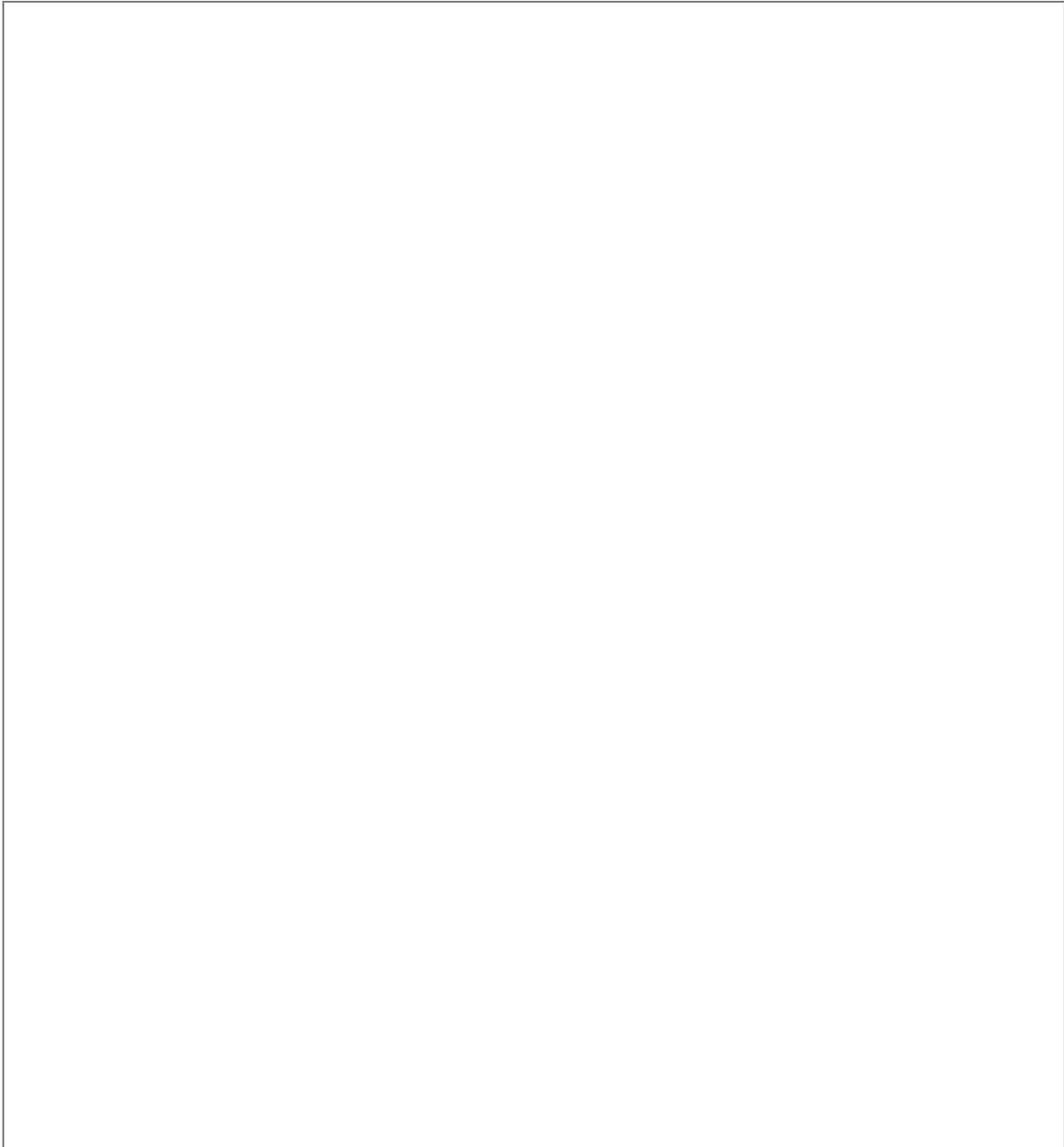
4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2009, 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 2008 can be found in the FY 2008 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
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
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_____	<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 2009	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]

6. Describe other significant efforts your agency has taken in FY 2009 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.

A large, empty rectangular box with a thin black border, intended for the user to provide details about their agency's efforts in FY 2009.

#### 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.

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8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2009). 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
Summary of how the problem or conflict was addressed using ECR, including details of how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)
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
Reflections on the lessons learned from the use of ECR

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

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

Report due January 15, 2010.

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

## **Appendix B. Agency ECR Case Examples**

### **U.S. Army Corps of Engineers**

Third-party facilitation for an Individual Permit Application/Environmental Impact Statement for a bypass on Eglin Air Force Base (South Atlantic Division).

The project was a proposed roadway on federal lands that are managed for federally listed species, specifically the flatwoods salamander and the red cockaded woodpecker. Third-party assistance was needed during the scoping phase of the proposed EIS because all alternatives proposed by the applicant were in conflict with habitat management and USFWS was prepared to issue a jeopardy opinion at the conclusion of the EIS.

This ECR case utilized the principles of informed commitment; balanced, voluntary representation; information process; openness; and timeliness.

The key beneficial outcome was the development of alternatives that could be studied in the EIS that were unlikely to result in a jeopardy opinion. These alternatives were not reached through “work group” meetings. Sound alternatives only came from third-party facilitation.

The use of ECR prevented lengthy negotiations on EIS alternatives and likely avoided the issuance of a “jeopardy” Biological Opinion from FWS.

#### **Northwestern Division**

The following case has been included in the previous two ECR reports. Each year we record how ECR has been used to achieve different accomplishments and complete different phases of ongoing programs on the Missouri River. In 2007 we reported on the Missouri River Recovery Implementation Committee (MRRIC), in 2008 we added the Missouri River Ecosystem Restoration Plan (MRERP), and this year we add the Missouri River Authorized Purposes Study (MRAPS).

**MRRIC:** The Missouri River Recovery Implementation Committee established in WRDA 2007 to advise the Secretary on MRERP and MRAPS is composed of 70-members representing basin States, Federal Agencies, Tribes, and interest groups. MRRIC meetings and workgroups are facilitated by a third party neutral hired through the USIECR.

**MRERP:** In 2009 the MRERP study was at the stage where an overall purpose and needs statement needed to be completed so that the study could move forward in the feasibility study process. Without the jointly agreed upon purpose and needs for restoration of the basin (achieved with third-party assistance) there would be an inherent danger that stakeholders within the basin would reject the study objectives and the results in the future.

**MRAPS:** The Missouri River Authorized Purpose Study is an additional pre-planning effort started in FY09. This study is a review of all the authorized purposes on the Missouri River: Flood Risk Management, Navigation, Hydropower, Water Supply, Irrigation, Water Quality, Recreation, and Fish and Wildlife. This study is likely to be contentious based on historic and current differences among interest groups and basin states.

MRRIC: ECR set the stage and opportunity for stakeholders to meet in the basin on a repeating basis to discuss the study objectives and needs. The 3rd party neutral facilitator works to achieve informed commitment, group autonomy, accountability, openness, and develop an informed process between cooperating agencies.

MRERP: USIECR hired 8 local Public Policy Institutes (PPI) to identify and invite participants for 8 Public Scoping focus group meetings throughout the Missouri River Basin. The PPIs made specific selections based on their roles in the community and ties to the resources of the Missouri River. This included a facilitated visioning exercise.

MRAPS: MRAPS is utilizing the USIECR and a third party neutral to conduct a basin assessment of interest/concerns and assist in developing a public engagement strategy for the study.

MRRIC: The development of agreed-upon and approved purpose and needs statement by the group for the MRERP study was a significant step forward in the Recovery program and for the MRRIC collaborative process. More generally, the use of ECR is allowing a large group of multiple agencies and various interests to work in a facilitated framework. This forum and ECR facilitation is a very positive step for the basin, bringing various interests and states together to better learn about each others' issues and perspectives and explore options for joint support.

MRERP: Valuable information was gathered at the focus group meetings due to the participants' intimate ties to and knowledge of the Missouri River. The PPIs created an environment for genuine input, in-depth discussion, and participants left encouraged.

MRRAPS: While only study preparation tasks were completed in FY09, the process of utilizing ECR to do a basin assessment and assist in developing a public engagement strategy should result in a collaborative process to evaluate existing authorized purposes and infrastructure.

MRERP: Lessons include a heightened awareness of the public's desire to be educated, informed, and engaged; and the need to not over utilize technology at the expense of engaging meeting participants.

MRRIC: Because USIECR allowed MRRIC to be involved in selecting a third party neutral facilitation group, there is strong support for the facilitation group. Another lesson is to be patient with the process and let facilitators lead the groups through the process.

### **U.S. Army Legal Services Agency**

RCI privatization of housing project. One Army installation was mandated to privatize its housing on the base. A number of the homes included in the plan were historic buildings. The base had to obtain a programmatic agreement with the State Historic Preservation Office (SHPO). Initial discussions were not moving the project forward. The SHPO did not concur with the privatization plan. After about six months of failed negotiations, the base sought a third party neutral to mediate a signed programmatic agreement.

The third party neutral held discussions with the Army and the SHPO to identify and resolve the issues.

The ECR resulted in a completed programmatic agreement that allows the Army to proceed with its privatization plan in a much more efficient manner.

Turning to a third party neutral to assist in communications between the Army and the SHPO allowed the parties to work through the issues and generate an agreed upon plan.

### **Department of the Navy**

Earlier this year the citizens and local government near Naval Air Station Key West (NASKW) became very concerned about the impact of aircraft "noise" on some of the local residents. Meetings between the parties became increasingly unproductive, leading to a unanimous "cease and desist" resolution issued by the Monroe County Board of Commissioners on March 18, 2009. Shortly after this resolution was passed the DON ADR Program Office began working with NASKW on possible ADR strategies. After lengthy negotiations with the Board and the county attorney, the parties agreed to use an outside facilitator to conduct a conflict assessment, negotiate a meeting agenda, and facilitate a meeting to promote productive discussion of aircraft noise and related issues. The conflict assessment was conducted during the week of May 4 – 8, 2009 by the Associate Director of the Florida Conflict Resolution Consortium, and the facilitated meeting was held on May 12, 2009.

The facilitated meeting resulted in a constructive dialogue covering many of the issues in contention, allowing both sides to better understand the other's perspective. At the conclusion of the meeting the parties agreed to continue the dialogue and look at developing a process for addressing some of the issues in the future. The agenda was negotiated during the course of the conflict assessment and published prior to the meeting, insuring that the parties were fully informed in a timely manner about the meeting's general purpose and specific objectives. The agenda consisted of a facilitated discussion of issues such as aircraft noise, a Naval Audit Service Interim Report, an Environmental Assessment/Environmental Impact Study, and future land use. From NASKW's perspective the facilitator did an excellent job developing the agenda and facilitating the meeting.

With the facilitator's assistance the May 12, 2009 meeting gave the parties an opportunity to assess the current state of discussions between Monroe County and NASKW. This facilitated meeting also promoted a shared understanding of the issues and provided an effective forum to explore options for the next steps.

A structured ECR process can effectively reduce tension in a high conflict/low trust setting, resulting in good faith communication and the effective balancing of all parties' interests.

## **U.S. Air Force**

The Environmental Protection Agency (EPA) was concerned about potential impacts of housing construction/development at the U.S. Air Force Academy (USAFA) on the Municipal Separate Storm Sewer Systems (MS4) permit. EPA wanted to insure that stormwater prevention best management practices (BMPS) were maintained throughout the process. This dispute was ongoing when the Air Force Center for Environmental Excellence (AFCEE) in San Antonio, TX, offered to act as a neutral third party to help EPA and USAFA identify the critical issues and resolve any conflicts.

AFCEE conducted meetings with the parties. The parties agreed on a plan to insure compliance with the terms of the permit. USAFA agreed to have a water quality/stormwater expert conduct increased site inspections and make sure the terms of the MS4 permit were understood. Any issues were communicated to the developer and were addressed to the satisfaction of EPA within a very short timeframe. For the first thirty days, the inspections were conducted daily.

Stormwater BMPs were employed throughout the project. The daily inspection served both an educational and compliance goal. ECR helped speed up resolution of the issues and insure better protection of water quality.

The process was helpful in identifying the real issues and concerns so that the inspection solution addressed the timing and responsiveness issue as well as the BMPs.

## **Department of Energy**

Office of River Protection (State of Washington): A third-party neutral helped parties in a protracted negotiation reach a partial tentative settlement and avoid litigation. Negotiations regarding missed milestones in the Hanford TPA began in the spring of 2007 resulting in a tentative agreement in the summer of 2008. The third-party neutral aided all parties in identifying the issues most important to them.

Pantex Site Office (Texas): The Pantex Core Team has relied on third-party facilitators since 2001. The Core Team, comprised of the Department's Pantex Site Office, the site's contractor, the Texas Commission on Environmental Quality, and the U.S. Environmental Protection Agency, meets on an as-needed basis to resolve environmental cleanup issues. In 2009, the Core Team dealt with the need to quickly develop a mutually acceptable definition of a key term by independently researching the issue and then reconvening, with the aid of a facilitator, to reach agreement on the definition. Use of a third-party neutral helped the Core Team focus its work.

U.S. v. Union Pacific Railroad Company (Oklahoma): *U.S. v. Union Pacific Railroad Company* is the result of a CERCLA enforcement action regarding an oil refining facility in Oklahoma City, Oklahoma. DOE contractors at Pantex sent waste oil to the site in the mid-1980's. Union Pacific has filed an amended answer and counterclaim for contribution against DOE and other federal and private entities. Settlement discussions are ongoing, and the trial is set for January 2010. In the meantime, the parties have decided to use a mediator to resolve the outstanding issues.

Westinghouse Electric Co. v. U.S. (Missouri): *Westinghouse Electric Co. v. U.S.* is the result of a CERCLA contribution action against DOE and several private corporations concerning the cleanup of a metal and uranium manufacturing site in Missouri. The plaintiffs' sole remaining claim is one for CERCLA cost recovery. The parties have decided to use a mediator to proceed.

West Valley Demonstration Project (New York): In FY 07, the State of New York filed a lawsuit in federal district court concerning a long-standing dispute between DOE and the State of New York relating to respective obligations for cleanup and disposal of radioactive wastes at New York's West Valley Demonstration Project Site in West Valley, New York. With the assistance of a mediator, the parties were able to resolve some of the plaintiffs' claims, resulting in a proposed consent decree, which was filed with the court (in October 2009), but not approved, pending the outcome of a 30-day public comment period by the State of New York. The comments are still being addressed by New York.

### **Department of the Interior (DOI)**

Visitors from all over the world come to the Grand Canyon to take in its magnificent landscape. Visitors arrive by a variety of means: by foot, car, mule, train, and by air. Grand Canyon visitors seek to traverse the rim, canyon or Colorado river and experience the landscape, and the preference over how best to experience the park varies with the individual. As in many national parks, these preferences can sometimes compete. Some park visitors greatly value the soundscape distinct to the Grand Canyon – its solitude and sense of space – whereas others seek to experience the visual majesty of the landscape from the window of a plane or helicopter. But to some visitors on the ground, the buzzing sounds of passing planes and helicopters diminish their enjoyment of the natural soundscape and sense of solitude. These impacts to the natural soundscape and differences in preferred visitor experience eventually led to heightened conflict between the NPS, Federal Aviation Administration (FAA) and a variety of interest groups representing tribal and local governments, congressional representatives, and aviation, business, conservation and recreation groups.

In 1987, the National Parks Overflights Act (Public Law 100-91) directed the FAA and NPS to work together to substantially restore natural quiet to Grand Canyon National Park, and to take necessary steps to protect public health and safety from adverse effects associated with aircraft overflights. Previous efforts to achieve this mandate had met with technical hurdles, in terms of developing new analytical and noise modeling capabilities, and practical challenges, in terms of generating broad support for the specific methods for accomplishing the goal of restoration of natural quiet.

In response to the National Parks Air Tour Management Act (P.L. 106-181) passed in April of 2000, NPS and FAA established the National Parks Overflights Advisory Group (NPOAG) in 2001 to provide advice, information and recommendations to NPS and FAA on implementation of the National Parks Overflights Act at parks nationwide.

In February of 2004, the two agencies committed to resolving the overflights noise issues together. With help from the U.S. Institute for Environmental Conflict Resolution, they developed a mission statement and formed interagency work groups to focus on technical, legal and administrative aspects of the new partnership. In the spring of 2004 they concluded that the best way to reach a broadly-accepted, feasible solution to this complex problem would be to involve stakeholders. As a result, the Grand Canyon Working Group was formed under the auspices of NPOAG as discussed further below.

NPS and FAA initiated the ongoing collection of ambient sound data in 2005 that would be used to analyze the current situation and future options. The methodology for data collection and analysis and technology used to collect data were made available to the working group.

In January of 2006, NPS and FAA issued a Notice of Intent to initiate scoping on an Environmental Impact Statement (EIS) – Special Flight Rules Area in the Vicinity of Grand Canyon National Park. The working group, through facilitated ADR processes, worked through a facilitator to assist the agencies in developing alternatives for the EIS. The final meeting of the workgroup commenced in July 2009, and the Draft EIS is due out for public comment in 2010.

To assess the feasibility of a collaborative process with stakeholders, the U.S. Institute contracted to design and conduct a stakeholder assessment process. The agencies wanted to better understand the needs of stakeholders, and the potential for using a collaborative process to develop a solution to overflight noise issues at Grand Canyon that would meet all legal requirements and enjoy the support of interested and affected stakeholders, as well as the general public.

The stakeholder assessment was used to inform the development and efforts of the Grand Canyon Working Group under the National Parks Overflights Advisory Group. The Grand Canyon Working Group was formed to:

- Participate in the review of the overflights noise analysis;
- Address issues related to overflights noise and safety;
- Seek meaningful, realistic and readily implementable solutions;
- Develop recommendations by consensus, if possible; and
- Function as an aviation rulemaking committee for the development of recommended aviation regulations, if necessary.

The Grand Canyon Working Group focused on assisting the agencies in developing alternatives for the Draft EIS through all of the basic ECR Principles. Examples of these principles in action include:

- Informed commitment – the lead agencies (NPS and FAA) were committed to engage stakeholders to address their frustration at long term inaction and to address the requirements of the National Parks Overflights Act. Stakeholders were drawn into the process in hopes that interests that were perceived to go unheeded in the past by either or both of the lead agencies would be heard.
- Balanced, voluntary representation – a stakeholder analysis was used to identify stakeholders and clarify their interests and perceptions.

- Group autonomy – products that the GCWG developed were not subject to revision by the NPOAG.
- Informed process – the workgroup was taken on a field trip to see how ambient sound data was being collected and analyzed.
- Accountability – the workgroup reported to the NPOAG, and the NPOAG was responsible to respond to a federal judge regarding the requirements of the National Parks Air Tour Management Act.
- Openness – media and the public were allowed to attend workgroup meetings. However, discussions were kept off the record to promote open discussion amongst workgroup members. Products of the workgroup were made available to the public on a website.
- Timeliness – a schedule was developed for the EIS, and the workgroup designed meetings to meet the deadlines of the EIS.
- Implementation – the workgroup was encouraged to think freely and create alternatives that met shared interests. However, it was made clear that, short of consensus, decisions would be made by the agencies, and the agencies might select an alternative that fell short of some or all stakeholder interests.

Uncertainty was a major point of conflict for many of the stakeholders in this case. Because of the lack of movement on establishing a known cap on flights, routing and timing for flights, air tour policies, definitions of terminology, and acceptable data with which to analyze impacts to visitation, there was a constant struggle amongst stakeholders to lobby purely for the positional aspects of their interests. Initiating the facilitated ECR process allowed all stakeholders to start expressing respective interests in a collaborative problem solving environment. Disagreements persisted over a number of areas, but the Grand Canyon Working Group provided a forum for mutual understanding and collectively built draft alternatives that better accounted for the individual stakeholder interests. The workgroup has been able to become better informed of the alternatives under consideration and have direct impact on the direction air tours will take at Grand Canyon, which has greatly reduced uncertainty stakeholders have in potential future directions for managing overflights at Grand Canyon National Park.

With a Draft EIS nearing completion, NPS and FAA are moving closer to establishing a final rule on air tour operations at Grand Canyon and potentially ending a decades-long conflict between the agencies.

Stakeholders who previously felt outside the decision-making process and/or took obstructionist tacks to the conflict were brought into the workgroup and able to provide constructive input to alternative development. In some areas, agency and stakeholder interests were able to reach consensus.

To be successful and render sustainable decisions, the ECR process has to be set up from the beginning in a manner that can withstand changes in administrations and leadership. In this case, politically appointed leadership in the Department of the Interior shifted stance and participation in the workgroup after changes in the Administration. This shift impacted the organization of groups participating at the DOI level and coordination between agencies. Constant change in

leadership can create inefficiencies in communication and decision-making, which can lead to increases in time and money spent. This negates one of the presumed benefits of ECR.

NPS found that it is necessary to have participation from the Regional Office. In this case, it is the Regional Director that will eventually sign off on the EIS. Having participation from the Region will strengthen buy-in from the Regional Director when the time comes for his signature.

Depending on the case and if possible, it may be important to retain decision-making authority. The Grand Canyon Working Group sought to achieve consensus, but if consensus wasn't reached, it was understood that the agencies would make the decision on the preferred alternative. There never was full consensus on a number of issues under consideration. When the group is no longer being efficient at striving to consensus, there is an art to knowing when to pull the plug on discussions and make a decision.

Certain stakeholders were able to stall the decision-making process prior to initiating ECR. Whereas "stronger" directives failed to initiate action, the ECR process brought these stakeholders into a process that moved more methodically towards making decisions and producing action.

In order for any ECR to be successful and produce long term outcomes, each participant should feel that the process benefitted them during and after the process is complete. This will also leverage the ability to work with the same groups in the future.

## **Department of Justice**

Parties used mediation to achieve global resolution of a 30-year water rights case for the Black Canyon of Gunnison National Park in Colorado. This was Colorado's largest water rights case ever, with more than 380 parties that included five federal agencies. Conflicts over water allocation can become intractable, and this litigation was particularly contentious. The mediated settlement will protect the Black Canyon of Gunnison National Park for future generations.

The parties spanned a range of interests including farmers, developers; large water-user organizations; hydro-power marketing entities; city, county and state governmental entities; and environmental groups. The US met with major parties and convinced 35 of them to try mediation for three months before resuming litigation. The individuals supporting the use of mediation thought at the time that if the mediation could advance negotiation, the parties would continue to focus on settlement rather than getting bogged down in their many legal and scientific disputes. The US defined objectives for the initial mediation that emphasized issues capable of resolution and avoided those that were not.

The key outcome was a long-lasting settlement to protect the natural resources of Black Canyon of Gunnison National Park consistent with the interests of other federal agencies and major parties. The US proposed mediation because a litigated outcome would be expensive, time-consuming and uncertain. Trial in a comparable case had lasted more than one year and cost the Government millions of dollars without any assured water right.

To help the parties consider mediation, it was important to meet with them to build relationships and trust. Developing a common scientific understanding of water flow was especially important. The Department gave its John Marshall Award for Alternative Dispute Resolution to the attorney representing the US in the mediation.

## **Environmental Protection Agency**

Coeur d'Alene Lake in Idaho is a thriving center of a regional economy that includes northern Idaho and eastern Washington. The Coeur d'Alene Tribe occupies a reservation located at the southern end of the lake but has identified a significantly larger area around the lake as its aboriginal lands. The city of Coeur d'Alene sits adjacent to the lake, and there has been a significant investment in lakeside homes, resorts, and recreation.

From one perspective the conflict addressed through this project had roots in 19th century mining, processing, and smelting activities in the Coeur d'Alene River Basin, known as the Silver Valley. The upper and middle portions of the basin were a major mining region, and mining activities caused up to 83 million tons of heavy metals contaminated sediments to be conveyed down tributary streams and rivers into Lake Coeur d'Alene. A portion of the sediment continued downstream, but much of it, 75 million metric tons, remains on the lake bottom. In 1983 the U.S. Environmental Protection Agency (EPA) listed the Bunker Hill Mining and Metallurgical Complex on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund). EPA initially focused its cleanup efforts on a 21 square mile area divided into two operable units. In 1998, EPA announced it would use its remedial authorities, by performing a remedial investigation and feasibility study, in a third operable unit, or OU-3. The Lake was physically located within OU-3 but there was strong state and local opposition to identifying it as a Superfund site due in part to concerns about "stigma." In 2002 EPA took the approach of leaving the lake out of the Selected Remedy for OU-3, concluding that a lake management plan (LMP) created outside CERCLA would be acceptable. The agency left open the possibility of further action under CERCLA if an effective plan was not established and implemented.

Largely in response to CERCLA activity, management of the lake to protect water quality became a focus of efforts by the State, Tribe, and other stakeholders in the mid-90s, and an initial version of a LMP emerged. This plan did not provide adequate funding and proved ineffective. At the same time a legal dispute over lake jurisdiction reached the U.S. Supreme Court, and in 2001 the Court ruled that the Tribe had jurisdiction over the southern one-third of the lake. This outcome profoundly changed tribal, state, and local relations and contributed to ongoing disagreements about how to manage the lake. The State and Tribe were unable to reach agreement on a second LMP in 2004 that reflected shared jurisdiction despite making some progress.

The lack of an effective LMP increasingly became a concern to EPA Region 10 and to the downstream State of Washington, in light of its obligations under CERCLA and the continued presence of contaminated mining sediments on the lake bottom. In 2006, EPA Region 10's Acting Regional Administrator with the support of the Office of Environmental Cleanup and the

Office of Water and Watersheds approached the State and the Tribe about seeking formal mediation support from the Conflict Prevention and Resolution Center (CPRC) and the U.S. Institute for Environmental Conflict Resolution (USIECR). EPA served as a convener with the State and Tribe on this effort and all the parties committed to provide some financial support for the effort. All the parties plus the USIECR agreed to support the external assessment of prospects for using ECR to support development of an acceptable LMP. USIECR then facilitated the selection process for the mediator, which involved the State, the Tribe, and EPA Region 10. CPRC provided funds for this effort throughout both phases.

Phase I of this project was an assessment was conducted by J. Michael Harty of Harty Conflict Consulting & Mediation. This phase involved extensive interviews and concluded with a written report, options, and recommendations to all assessment participants in January 2007. The State, Tribe, and EPA agreed to pursue mediated negotiations toward a LMP based on the recommended approach, and this second phase began in April 2007 with Harty as mediator. The basic approach was to reach agreement on a draft LMP using a consultation and input process, and then to build broad support for funding by effectively “marketing” the draft to key constituencies with opportunities for modifications if needed to ensure support. The negotiation structure included explicit requirements for the State to consult with local jurisdictions, as well as specific opportunities for reporting to and gathering feedback from other stakeholders such as local businesses as the draft LMP was developed. The possibility of EPA using its CERCLA regulatory authorities in the event that a LMP was not adopted, and effectively implemented served as a clear, mutual alternative that was unlikely to meet key interests.

This project reflects a nuanced approach to the principles for engagement, in particular the timing and expression of certain principles. EPA made an informed commitment to the process at the outset, participating in Phase I at the Regional Administrator level and establishing clear participation and reporting for Phase II. The assessment process in Phase I provided an opportunity for balanced, voluntary participation of key interests in shaping understanding of sources of past conflict, options, and recommendations. As noted below in “lessons learned” the principle of balanced, voluntary representation was weighed against other factors and led to a tiered-approach to inclusion that was deemed critical for achieving agreement on a draft LMP. This tiered approach reflected differences in direct authority over lake water quality and management, and relied on extensive consultation as well as opportunities for direct discussions with the Tribe, State, and EPA. Some local jurisdiction representatives expressed consistent dissatisfaction with this interpretation of inclusion. Despite this dissatisfaction, there was strong support for the LMP within the business community. This was the direct result of the Tribe, State, and EPA providing regular communications with stakeholders.

Group autonomy, informed process, accountability, and openness influenced decision making about process design and implementation in Phase II. EPA participated actively in direct discussions with the Tribe and State but process decisions were made as a group, with the mediator working on behalf of the process. A history of disagreement over technical information indicated there should be a high priority on bridging differences among the Tribe, State, and EPA, in order to speak consistently with other stakeholders. Sharing data with other stakeholders was an important step to overcome historic distrust. The Tribe, EPA, and State consistently

addressed their differences within the negotiation framework, demonstrating their accountability in the negotiation process.

The most concrete outcome from this project is agreement on a LMP between the State and Tribe. In 2009, the focus continued on getting the LMP adopted by both the State and the Tribe. EPA participated actively in the negotiations and supported, but did not sign, that agreement due to its regulatory role. Regular communications with involved stakeholders, such as the business community and conservationists, throughout the process proved invaluable in securing support for the joint adoption of the LMP by the State and the Tribe. More importantly, a slightly revised version of that LMP received sufficient support from local jurisdictions and other stakeholders to prompt initial funding by the Idaho Legislature and the Coeur d'Alene Tribal Council in 2009 for the implementation of the LMP. The Governor of the State of Idaho and the Tribal Chairman jointly transmitted the adopted LMP to EPA, reflecting the success of the ECR effort. EPA does not need to approve the LMP, but was pleased to express support for this successful joint effort by the Tribe and the State to protect and restore their lake.

This is a significant step beyond the unfunded plan from a decade earlier, and reflects increased acceptance of shared jurisdiction over the lake. In 2009, the State and the Tribe continued their joint water quality monitoring efforts of Coeur d'Alene Lake for the second year in a row. EPA reviewed and approved the joint Monitoring Plan and Quality Assurance Project Plan, and will continue providing laboratory support for the analysis of water quality samples. A less concrete but significant outcome was establishment of effective working relationships to support lake management among the State, Tribe, and EPA. It is difficult to reliably predict outcomes absent this ECR effort, but there was a distinct possibility of EPA asserting federal jurisdiction under CERCLA, possibly as a result of legal action by a third party. This step likely may have caused complications in federal, state, local, and tribal relations, and disruptions in valuable regional economic activity centered on Coeur d'Alene Lake.

This project offers an interesting lesson in the need to carefully analyze the role of inclusiveness and balance it against other factors in developing a process design. In particular, the assessment suggested that agreement on a LMP was more likely to be achieved if the negotiation of a draft LMP were limited to the State, the Tribe, and EPA. While "balanced, voluntary representation" is a useful principle for ECR, complex disputes such as that over Lake Coeur d'Alene may require a willingness to balance inclusion with other factors in developing recommendations for a process design that is most likely to lead to a sustainable outcome. In this case, some local jurisdictions were dissatisfied about the mediation structure, but eventually were able to negotiate provisions for future lake management that have contributed to overall LMP support.

### **Federal Energy Regulatory Commission**

In FY 2008, the Commission's DRS mediated a settlement between two groups of utilities competing to build a 765-kV power line to carry Kansas wind power to out-of-state markets. The Commission had indicated in conjunction with its proceeding establishing regulations implementing its electric transmission siting authority that:

The Commission believes that it is incumbent on project sponsors and states to work together to site facilities at the state level, as this would be the most expeditious way to site the facilities. To

that end, the Commission will make its Dispute Resolution Service available if parties to a state siting proceeding desire assistance to facilitate the resolution of issues at the state level. (*Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order Denying Rehearing, 119 FERC ¶ 61,154 at P 36.)

The mediator engaged the parties in a collaborative decision-making process through which they ultimately agreed to share the \$800 million project. This enabling the project to move forward without further delay which would have resulted from competing proposals.

Having the parties collaborate on a solution that was in the interest of all parties, allowed this project to move through the regulatory process and saving litigation and regulatory expenses. Had the companies proceeded through the adjudicative process: 1) it would likely have taken years not months to reach resolution; and 2) one group would have probably “won” while the other group would have “lost”; alternatively, the needed facilities may never have been constructed. As a result of ECR and the assistance of a third-party neutral, the project will provide alternative energy resources access to an improved energy grid.

This mediation process demonstrated that when parties collaborate and work together toward a common goal with a third-party neutral, timely results can be achieved, eliminating the need for more expensive and time-consuming adjudicative processes.

## **U.S.D.A. Forest Service**

### ***Cibola National Forest***

The Forest acquired the services of the US Institute for Environmental Conflict Resolution (US Institute) to identify key groups and individuals with interests in travel management. Using the results of some preliminary surveys, the Forest and US Institute then developed public involvement strategies to maximize effective public involvement in proposal development and analysis.

The US Institute led a variety of public travel management workshops to identify key public use patterns, needs, and desires on Kiowa-Rita Blanca National Grasslands and Mountainair Ranger District. On the Magdalena Ranger District travel management project, the US Institute conducted an analysis to identify key interested and affected publics and their attitudes, beliefs, and practices associated with activities that could be affected by changes in motor vehicle use designations on the Forest.

Early public involvement in and understanding of the processes associated with travel management was improved. The Agency also obtained a better and broader understanding of forest-user needs and desires. All these outcomes will hopefully result in a better proposed action that addresses the most important resource issues, public needs, and management needs.

Using ECR signals to the public that they will have increased involvement in project development and additional influence in decision-making. Once started along the path of ECR as a tool to develop projects and make decisions, it would be counter-productive to revert to the

historical model of Forest Service planning and decision-making. ECR requires decision-maker support and leadership to be effective.

## **National Oceanic and Atmospheric Administration**

### **National Ocean Service**

Commencement Bay is the harbor for Tacoma, Washington, located at the southern end of Puget Sound. Beginning in the early 1900s, intertidal areas and tideflats of the Puyallup River Delta were filled in and meandering streams were channelized, resulting in the eight waterways (Hylebos, Blair, Sitcum, Milwaukee, St. Paul, Middle, Thea Foss, and Wheeler-Osgood) that presently lead into the bay.

Industrial and commercial activities are located on or adjacent to each of the waterways. They include pulp and lumber mills, shipbuilding and ship repair facilities, shipping docks, marinas, chlorine and chemical production facilities, concrete production facilities, aluminum smelting facilities, oil refineries, food processing plants, automotive repair shops, railroad operations, and numerous other storage, transportation, and chemical manufacturing companies. Contaminants originate from both point and nonpoint sources

In October 1991, the trustees formally initiated the damage assessment and restoration planning process.

In 2009, two settlements, the last of 12 separate natural resources damage settlements entered into as a result of the Hylebos Waterway settlement negotiations program, became final. The program, developed by the NOAA case team, employed a sophisticated state-of-the-art cross-habitat habitat equivalency analysis (HEA); the first trustee-led formal liability allocation created for a multi-party NRD site; and the first instance of restoration credits trading as a settlement incentive. The entire package was made available for public review and comment.

Although no third party was used, this case used party-to-party negotiation among adverse parties to reach agreements. Rather than litigation, NOAA and Co- Trustees pursued a path of negotiation in the attempt to help ensure injured resources would be restored in a timely fashion.

With the approval of these two settlements in FY09, Petroleum Reclaiming Services and the Occidental Chemical Corp., the Commencement Bay Natural Resource Trustees, under the leadership of the NOAA case team, have concluded settlements with all willing parties on the Hylebos Waterway portion of the complex Commencement Bay Superfund Site. Petroleum Reclaiming Services has agreed to pay \$638,391.06 in natural resource damages and to reimburse \$111,608.94 in damage assessment costs. The damages will be deposited in the Trustees' restoration account to be applied to one or more habitat restoration projects the Trustees are constructing. Occidental has agreed to develop the 18.5 acre Sound Refining mudflats restoration project on the Hylebos Waterway. The project will consist of the cessation of log rafting (floating log storage) on the site; the removal from the site of injurious concentrations of wood waste, derelict vessel remains, and other debris; and the placement of a

thin layer of clean sand/silt to promote the recolonization of the benthic community. The project will be completed with the placement of a system of pilings and floating booms – essentially fencing the site off from the waterway – to prevent future log rafting or vessel abandonment on the site. Occidental has also agreed to pay \$50,000 in Trustee project oversight costs and to reimburse \$1.6M in damage assessment costs. The Commencement Bay Trustees have now reached settlements with 52 individual parties, recovered \$14,540,137.17 in natural resource damages, \$5,414,399.83 in damage assessment costs, \$250,000.00 in project oversight costs, and generated the restoration of 94.77 acres of estuarine and riparian habitat.

The party negotiations used to reach settlements in this case potentially saved NOAA time and money that would have been used if litigation had that been the course of action pursued. NOAA risked higher costs in litigation, and injured resources may not have been restored.

While the settlement negotiations with the responsible parties did not employ third-party neutrals, the inter-trustee negotiations that were part of the process were greatly aided by the formal Trustee Council organizational structure and decision-making procedures. The Trustee Council process adheres to the Basic Principles in Attachment A in that it reflects informed agency commitment to the damage assessment process, consists of balanced representation of all affected trustees through self-selected representatives, employs consensus-based decision-making based on fully shared information, requires full, direct and good-faith participation, ensures all participants are fully informed and arrives at timely decisions, and ensures that decisions are legally and practically implementable.

## **U.S. Institute for Environmental Conflict Resolution**

### *Collaborative Management Planning Forums for the Dinkey North and South Areas of the Sierra National Forest (CA)*

Protracted and costly litigation and project delays have plagued management plans for the Sierra National Forest, and many national forests nationwide. In the last decade, controversy surrounding the Sierra National Forest has focused on timber and vegetation management, and the implications for threatened and endangered species, old-growth forest stands, fire mitigation, and ecosystem health.

In an effort to address these challenges the Sierra National Forest teamed with the U.S. Forest Service's Pacific Southwest Research Station to undertake an adaptive management study. This effort, part of the Kings River Project, spawned challenges from conservation groups concerned about the study's scale, reach, and impacts.

In 2009 the Sierra National Forest, with the assistance of the U.S. Institute for Environmental Conflict Resolution, launched a 5000-acre project focused on the Dinkey North and South areas of the forest. The purpose of the collaborative project, known as the Dinkey Planning Forum, was to design and implement vegetative treatments to help restore a healthy, diverse, fire-resilient forest and a more naturally functioning ecosystem, in addition to addressing other issues

identified by affected interests. The smaller-scale of the Dinkey project and other lessons learned from the Kings River Project, helped set the stage for a productive collaborative process.

After more than a decade of litigation and stalled actions, regional and national Forest Service staff and other affected stakeholders were ready and committed to working collaboratively to find a mutual-gains solution to the conflicts that had divided them.

A third-party facilitator selected by the stakeholders was brought on board to guide the process. The presence of a third-party helped normalize the conflict, broker representative participation of all affected interests, and create a constructive forum for collaboration. Stakeholder participation included forestry and timber industries, wildlife, habitat, and ecosystem interests, fire safety interests, and adjacent landowners.

During the process, stakeholders engaged in joint fact finding, made site visits, and vetted and approved a group of independent scientists who served as technical advisors during deliberations. The integration of credible independent science was pivotal to the success of the process.

As a result of the process, the participants reached a collaborative agreement on a proposed action that balanced the competing demands of public and firefighter safety, species and habitat management, and ecosystem restoration. This agreement marks a significant shift from the contentious history of the Kings River Project. In a post-process evaluation, participants (representing government, environmental, industry, community, and special advocacy interests) indicated agreement was reached on all or most key issues. The majority of respondents noted they are confident the agreement can be implemented, and that it will effectively solve the conflict.

In the words of participants, an array of social, economic, recreational, natural resource and environmental benefits will result from the process. These include:

- *“Stalemate between Forest Service and environmental groups resolved in this case. Possible model for region-wide resolution.”*
- *“Protect wildlife habitat, California spotted owl, and the Pacific fisher. Ecological restoration, fire resilient forest, reduce fire threat/fuel load.”*
- *“Fuel reduction work will occur in an area with high recreational use and other social/economic values. This is very positive.”*
- *“Increase work for Forestry related business, including mills.”*
- *“Wildlife/scenic/threatened and endangered species of special values protected and enhanced.”*

Litigation was the likely alternative if the collaborative problem-solving was not initiated. In comparison, most respondents reported the collaborative process was less expensive and the outcomes achieved represent a more informed public action/decision. The proposed project will now undergo an environmental analysis under NEPA.

This case reflects the generally accepted working principles of ECR, that critical process inputs (e.g., representative participants engaged, appropriate facilitator guides process, relevant trusted information integrated into deliberations) combine to create desired process activities (e.g., participants collaborate to better understand each other's issues, seek options and solutions that meet the common needs of all participants) to reach collaborative outcomes (e.g., agreement on forest management) and impacts (e.g., improved forest health, reduced risk of fire, habitat and species protection, industry and other interests addressed).

This and other successful cases serve as a good reminder to public managers and those who convene and sponsor ECR processes that having the generally accepted working principles of ECR in place helps maximize the likelihood of success.

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