

FY 2010 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 fifth year of reporting in accordance with this memo for activities in FY 2010.

The report deadline is February 15, 2011.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies are requested to collect this data to the best of their abilities. The 2010 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 2010 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.

Name of Department/Agency responding:	US Army Legal Services Agency
Name and Title/Position of person responding:	Carrie Greco, Litigation Attorney
Division/Office of person responding:	Environmental Law Division
Contact information (phone/email):	703 696-1566 carrie.greco@conus.army.mil
Date this report is being submitted:	Jan 2011

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2010, including progress made since 2009. 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.]

Consistent with Army Policy, Environmental Law Division (ELD) personnel and Environmental Law Specialists (ELS) continue to incorporate Environmental Conflict Resolution (ECR). ELD's senior management was briefed on the FY09 ECR report.

ELD personnel support the ECR policy. Each case/matter is reviewed for its potential for ECR. ELD personnel coordinate with the Department of Justice (DOJ) on the ECR process. DOJ personnel contracted to fund the third party costs and draft and negotiate ECR agreements. Five matters were proposed for ECR, of which 2 matters were completed in FY10 and 3 are ongoing and will continue into FY 11. ECR resources were readily available to ELD personnel to manage these ECR matters. Funding for document reviews and travel to ECR sessions were made available.

ELS have incorporated the ECR process in their environmental programs. At the installation level, leadership is committed to collaborative problem solving. ELS engage all participants, providing timely open communications and accountability, resulting in an informed process that prevents large scale conflicts from occurring. Processes that have engaged the public and environmental stakeholders include Installation Strategic Planning processes, Restoration Advisory Boards, and consultations on cultural and natural resources issues. This has resulted in stakeholder confidence in Army processes and proposed plans.

ELS ensure ECR policies are reflected in Interservice Agency Agreements and Partnership Agreements. Disputes in implementing those agreements are resolved pursuant to the ECR provisions.

ECR representative attended the ECR Conference. Further ECR training opportunities were identified and proposed to ELD management, but due to tight budgets, USALSA could not authorize funding for training in FY10. Specific environmental programs (BRAC, ERA) are being reviewed for funding options.

Section 2: Challenges

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

	Extent of challenge/barrier		
	Major	Minor	Not a challenge/barrier
	Check only one		
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input type="checkbox"/>	X
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input type="checkbox"/>	X
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input type="checkbox"/>	X
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	X
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	X
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	X	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	X
k) Lack of resources for staff capacity building	<input type="checkbox"/>	X	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	X
m) Lack of budget incentives	<input type="checkbox"/>	<input type="checkbox"/>	X
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	X
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	X
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	X	<input type="checkbox"/>
r) Other(s) (please specify): _____	<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 2010 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.]

Context for ECR Applications:	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2010 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2010 ECR cases indicate how many your agency/department Sponsored ⁴ Participated in but did not sponsor ⁵	
				Federal agency decision	Administrative proceedings/appeals	Judicial proceedings	Other (specify)	Sponsored ⁴	Participated in but did not sponsor ⁵
Policy development	0	0	0	0	0	0	0	0	0
Planning	0	0	0	0	0	0	0	0	0
Siting and construction	0	0	0	0	0	0	0	0	0
Rulemaking	0	0	0	0	0	0	0	0	0
License and permit issuance	0	0	0	0	0	0	0	0	0
Compliance and enforcement action	0	1	1	0	0	1	0	0	1
Implementation/monitoring agreements	0	0	0	0	0	0	0	0	0
Other (specify): CERCLA Cost Recovery _____	3	1	4	0	0	4	0	0	4
TOTAL	3	2	5	0	0	5	0	0	5
	(the sum should equal Total FY 2010 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2010 ECR Cases)				(the sum should equal Total FY 2010 ECR Cases)	

¹ A "case in progress" is an ECR case in which neutral third party involvement began prior to or during FY 2010 and did not end during FY 2010.

² A "completed case" means that neutral third party involvement in a particular matter ended during FY 2010. The end of neutral third party involvement does not necessarily mean that the parties have concluded their collaboration/negotiation/dispute resolution process, that all issues are resolved, or that agreement has been reached.

³ "Cases in progress" and "completed cases" add up to "Total FY2010 ECR Cases".

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

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

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2010, 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 2009 can be found in the FY 2009 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
Superfund Litigation	X	<input type="checkbox"/>
Compliance Actions/Orders	X	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2010	Check if using ECR	
Cultural and Natural Resources Consultations	<input type="checkbox"/>	
ISO 14001 Certification and EMS Implementation	<input type="checkbox"/>	
Partnerships with State and Federal Agencies, utilization of facilitators and elevation to management for further discussion.	<input type="checkbox"/>	
_____	<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]

Cases utilizing ECR are reported on the ELD Case Database, along with a description of the type of ECR and the ultimate outcome. ELS are tracking environmental matters for potential for ECR, but have not identified any ECR matters to report.

Through ECR, Army has avoided the costs and manpower required for litigation or protracted dispute resolution, but Army has not developed a specific method to track these savings. Tracking is difficult because the savings differ from case to case, and because most environmental matters take a number of years to be resolved, tracking would require a multi-year analysis. One possible option is to implement for all US agencies an ADR cost tracking reporting requirement similar to the contingent liability reporting requirement already in place.

For matters already in litigation, moving the case to ECR results in transferring the transaction costs from litigation costs to ECR costs. The amount of savings incurred through ECR depends on the extent that ECR uses a less time and manpower than the litigation track, i.e., a less intensive document exchange process, shorter or less frequent mediation sessions instead of multiple court hearings and/or extended trial, one concise and thorough position paper instead of numerous lengthy briefs.

In the Army's FY10 reported cases, Army avoided extended and expensive litigation and was offered the opportunity to participate in a slower process to more thoroughly address and potentially resolve issues that block ultimate resolution/settlement. This resulted in a settlement/resolution that the parties owned and reflected the parties' interests.

6. Describe other significant efforts your agency has taken in FY 2010 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.

ELS proactively identify potential stakeholders and stakeholders' interests and collaborate with stakeholders at an earlier stage in the process addressing their interests and involving them in the decision making process. ELS report that this process prevents issues from developing to a point where ECR is necessary. Below are many examples.

ELS utilize ECR provisions in prior agreements to resolve issues that arise in implementing the agreements.

ELS strive for a successful environmental partnership with the local regulators through regular dialogue where honesty and openness are encouraged.

ELS held meetings with regulators and stakeholders and brought interested parties together to address restoration objectives and resolve outstanding issues.

ELS partnering with local governments and communities regarding common goals of environmental sustainability avoided any issues that would warrant the use of ECR.

ELS engaged the stakeholders in the Installation Strategic Planning process and a Restoration Advisory Board. Public review of the installations activities has not resulted in any recognized issues that would warrant ECR.

Before involving the stakeholders in the scoping and planning process of the outset of a NEPA EIS project, installation staff members conducted risk communication workshops to prepare for potential issues and topics.

Community concerns related to BRAC proposed actions were resolved through a NEPA public involvement process and communication relations program.

An ELS initiated collaboration in the NEPA scoping process, involving the stakeholders earlier in the development of alternatives to the proposed actions.

Installation personnel identified past deficiencies in its cultural resource consultation processes. Issues were not being properly submitted to consultation processes. To address this problem, Army hosted a training and consultation session that focused on cross-cultural communication and how to develop successful consulting process. Stakeholders were invited to attend, and a number did attend.

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.

One case forged through issues of confidentiality in drafting the ECR agreement. The private parties preferred to keep conversations confidential, but due to the unitary executive theory, the US cannot separate conversations from agency to agency.

Another case used a Federal magistrate judge who assisted the parties in resolving some of the bigger issues that had created an impasse. Once those issues were resolved, the case could be settled.

In another case, ECR was used a number of times to move through the barriers to settlement. Non parties who were threatening to initiate a second litigation on a related matter were brought into the ECR process so both cases could be resolved. ECR also allowed the parties the time and ability to work out new terms in the settlement agreement. Overall, the ECR avoided litigation in 2 significant cases and saved the United States millions of dollars in litigation fees.

Another ELD matter was transferred to ECR, allowing the parties additional time to identify and discuss the issues.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2010). Please limit the length to no more than 2 pages.

Name/Identification of Problem/Conflict

Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance, and how the ECR effort was funded

Superfund litigation that was very document intensive and the potential for extensive use of expert witnesses drove up the potential litigation costs. In addition, communication challenges between counsel made it difficult to move forward without approaching the judge for assistance. ELD personnel recommended the case for ECR. After numerous mediation sessions a resolution was reached, but other factors caused it to be reopened numerous times. Additionally, a nonparty threatened another sister suit. Eventually, all parties were added to the mediation and through several sessions, an agreement was reached. The parties relied on the mediation process to assist in resolving the many issues that arose throughout the process.

The process took 2 years, with multiple mediation sessions.

The mediation was funded through DOJ.

Summary of how the problem or conflict was addressed using ECR, including details of any innovative approaches to ECR, and how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)

Expert reports/position papers were submitted to streamline the issues. All of the parties were allowed to voice their own issues and interests. Each party had different issues. The mediator addressed the parties individually, covering each issue and then they worked collectively through the issues.

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

Through ECR, the parties were able to communicate more efficiently. Various interests/issues were addressed, and the parties felt they had an opportunity to be heard. The free flow of information helped the parties resolve issues and promoted opportunities to move closer to settlement. The resulting agreement was acceptable to all because it was generated by the parties rather than directed to them by a judge.

Reflections on the lessons learned from the use of ECR

The use of ECR improved communication among the parties, allowed each party to be heard. The result was a more efficient, less costly process and an ultimate agreement that was acceptable to everyone.

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

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

None.

Please attach any additional information as warranted.

Report due February 15, 2011.

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

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

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

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