

FY 2012 ECR Policy Report to OMB-CEQ

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

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

ECR is defined in Section 2 of the memorandum as:

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

While ECR refers specifically to collaborative processes aided by third-party neutrals, there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that federal agencies enter into with non-federal entities to manage and implement agency programs and activities. The Basic 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 sixth year of reporting in accordance with this memo for activities in FY 2012.

The report deadline is February 15, 2013.

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

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| Name of Department/Agency responding: | Department of the Navy |
| Name and Title/Position of person responding: | Robert Manley, Acting Assistant General Counsel (ADR) |
| Division/Office of person responding: | Office of the General Counsel / ADR Program Office |
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| Date this report is being submitted: | 1 February 2013 |

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2012, including progress made since 2010. If no steps were taken, please indicate why not.

[Please refer to the mechanisms and strategies presented in Section 5 of the OMB-CEQ ECR Policy Memo, including but not restricted to any efforts to a) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; b) assure that your agency's infrastructure supports ECR; c) invest in support or programs; and d) focus on accountable performance and achievement. You are encouraged to attach policy statements, plans and other relevant documents.]

The Department of the Navy (DON) has had a strong Alternative Dispute Resolution (ADR) Program Office for several years. Staffed with three attorneys, it handles a wide variety of ADR issues facing the DON, including environmental matters. The DON ADR Program Office works with appropriate DON commands responsible for environmental issues. Training materials and external links to ECR courses are published on the web at <http://www.adr.navy.mil/content/sect106consult.aspx> and <http://ecr.gov/Training/Training.aspx>.

The DON has demonstrated a long standing capacity for ECR in the area of installation restoration. The DON currently participates in 46 facilitated partnering teams that oversee the restoration efforts at 1,173 active environmental restoration 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.

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 checked="" type="checkbox"/> | <input type="checkbox"/> |
| b) Lack of staff availability to engage in ECR | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| c) Lack of party capacity to engage in ECR | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| d) Limited or no funds for facilitators and mediators | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| e) Lack of travel costs for your own or other federal agency staff | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| f) Lack of travel costs for non-federal parties | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| g) Reluctance of federal decision makers to support or participate | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| h) Reluctance of other federal agencies to participate | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| i) Reluctance of other non-federal parties to participate | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| j) Contracting barriers/inefficiencies | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| k) Lack of resources for staff capacity building | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| l) Lack of personnel incentives | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| m) Lack of budget incentives | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| n) Lack of access to qualified mediators and facilitators | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| o) Perception of time and resource intensive nature of ECR | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| p) Uncertainty about whether to engage in ECR | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| q) Uncertainty about the net benefits of ECR | <input type="checkbox"/> | <input checked="" 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 2012 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR "case or project" is an instance of neutral third party involvement 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 | Completed Cases or projects | Total FY 2012 ECR Cases | Decision making forum that was addressing the issues when ECR was initiated: ¹ | | | | Of the total FY 2012 ECR cases indicate how many your agency/department | |
|--------------------------------------|--|---|-------------------------|---|-------------------------------------|----------------------|-----------------|---|-------------------------------------|
| | | | | Federal agency decision | Administrative proceedings /appeals | Judicial proceedings | Other (specify) | Sponsored | Participated in but did not sponsor |
| Policy development | — | — | — | — | — | — | — | — | — |
| Planning | — | — | — | — | — | — | — | — | — |
| Siting and construction | — | — | — | — | — | — | — | — | — |
| Rulemaking | — | — | — | — | — | — | — | — | — |
| License and permit issuance | — | — | — | — | — | — | — | — | — |
| Compliance and enforcement action | — | — | — | — | — | — | — | — | — |
| Implementation/monitoring agreements | 46 | — | 46 | — | — | — | 46 ² | — | — |
| Other (specify): _____ | — | — | — | — | — | — | — | — | — |
| TOTAL | 46 (the sum should equal Total FY 2012 ECR Cases) | — (the sum should equal Total FY 2012 ECR Cases) | 46 | — (the sum of the Decision Making Forums should equal Total FY 2012 ECR Cases) | — | — | 46 | — (the sum should equal Total FY 2012 ECR Cases) | — |

¹ The DON has 46 facilitated partnering teams, organized in a three-tier structure, which address installation restoration issues. Collectively, the teams work with 1,173 active environmental restoration sites. The concept of initiation is not appropriate for these matters given the long standing existence of the teams.

² These 46 facilitated partnering teams collaborate to implement environmental restoration regulations.

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2012, and indicate if ECR is being used in any of these areas. Note: An overview of substantive program areas identified by departments/agencies in FY 2010 can be found in the FY 2010 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 |
|---|--------------------------|---|
| Addressing Intra-Navy and Intra-DOD conflicts that arise from different interpretations and applications of laws, regulations, and policies | <input type="checkbox"/> | <input type="checkbox"/> |
| Using formal dispute resolution between lead and cooperating agencies throughout the NEPA process, but particularly prior to the publication of the DEIS and FEIS | <input type="checkbox"/> | <input type="checkbox"/> |
| Resolving storm water toxicity standards in NPDES permits | <input type="checkbox"/> | <input type="checkbox"/> |
| Expediting the NEPA and permitting process for the proposed move of Marine Corps / CVN to Guam | <input type="checkbox"/> | <input type="checkbox"/> |
| Avoiding contentious, unproductive consultations under Section 106 of the National Historic Preservation Act | X | <input type="checkbox"/> |
| Addressing Coastal Zone Management Act issues, particularly problems with NOAA regulations implementing the Act | X | <input type="checkbox"/> |
| Resolving takings claims generated by AICUZ noise issues | <input type="checkbox"/> | <input type="checkbox"/> |
| Environmental Restoration Program | X | <input type="checkbox"/> |
| List of additional priority areas identified by your department/agency in FY 2012 | Check if using ECR | |

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]

As the Systematic Evaluation of Environment and Economic Results (SEEER) project at EPA and DOI demonstrates, it is possible to collect and analyze data pertaining to the use of ECR. However, the analysis under the SEEER Project has a significant expense of about \$10K to \$20K per case. The DON has not adopted such a system at this time.

6. Describe other significant efforts your agency has taken in FY 2012 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR as presented on the first page of this template.

One DON facility reported working together as a DON environmental staff team to create a level of confidence and trust in the Navy's environmental programs so that the regulators understand that the team intends to do what is right, and that DON does not intend to avoid its legal obligations. Sharing "good news" stories with the regulators and inviting them to ship visits, especially the USNS COMFORT (a hospital ship), has helped these outside entities comprehend the Navy's peace-keeping/international disaster recovery mission. Much of our nation's population has no exposure to military service, so they don't comprehend the DON mission. Educating the regulators about the good that our men and women in uniform do on a daily basis has helped the regulators better understand both the DON mission and that innocent mistakes can happen even when reasonable steps are taken.

This same DON facility reported a specific instance where an NGO sued and threatened to sue several entities regarding night lighting, which distracts juvenile fledging seabirds. Rather than wait to be contacted by U.S. Fish and

Wildlife Law Enforcement, the DON environmental staff team started a complete base-wide effort to remove or redirect night lighting so that it provided the least amount of spillover lighting. At each step of the process, the team kept U.S. Fish and Wildlife Service Law Enforcement advised, noting when they spotted a troubling light source, why it was on, and what was being done to reduce the spillover. The team received an email asking that they advise the commanding officer of the installation of the law enforcement officer's thanks for being a positive example for the community. Other shore-front entities (luxury resort, local power provider, local athletic association with night football) were under court-managed orders, and were consequently paying settlement fees. By noting the concern and immediately engaging with the regulator, DON became the model rather than the target.

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.

Midwest Navy Bases Pledge to Reduce Waste, Emissions, Energy Use in 2012

"GREAT LAKES, Ill. (NNS) -- Navy installations in the Midwest made their New Year's resolutions early, partnering with the U.S. Environmental Protection Agency (USEPA) Dec. 5 in a voluntary program to reduce their environmental impacts in the areas of waste production, air emissions, and energy use.

The commanding officers of Naval Support Activity (NSA) Crane, Ind., Naval Station (NAVSTA) Great Lakes, Ill., and NSA Mid-South, Tenn., all registered on behalf of their bases for the USEPA's Federal Green Challenge program, a national initiative that challenges federal agencies throughout the country to lead by example in reducing the federal government's environmental impact.

"We signed on to this voluntary program to do our part to reduce our impact on the environment," said Mark Schultz, environmental program director for Navy Region Midwest and Naval Facilities Engineering Command (NAVFAC) Midwest. "We were already working hard to minimize the impact our operations have on the environment, but partnering with the EPA's technical experts will help us finalize some specific goals and work throughout the coming year to reach them."

Federal offices or facilities start their participation in the program by choosing a focus in waste, electronics, or purchasing and then choosing a second focus area from any of the six areas that are part of the Federal Green Challenge. Members commit to a reduction goal of at least five percent per year in their two focus areas: waste, water, purchasing, electronics, energy, or transportation.

NSA Crane pledged to focus on reducing its waste generation and energy consumption by at least five percent, and NAVSTA Great Lakes chose to focus on reducing waste and transportation-related impacts by at least five percent.

NSA Mid-South also promised to focus on waste and energy in 2012, setting specific goals of increasing base-wide recycling by 10 percent and reducing aerosol use by 10 percent.

"I'm proud of, but not surprised by, the leadership role taken by the region and installation environmental team," said NAVFAC Midwest Commanding Officer Capt. Scott Bernotas. "Each of these bases has really committed to the idea of sustainability and environmental stewardship. It shows in their energy conservation, which leads the Navy and Marine Corps average, and the number and quality of environmental initiatives the team puts forward every year."

This initiative is one of many throughout the Navy and Marine Corps which will enable the Department of the Navy to achieve Secretary Ray Mabus' energy goals to improve our energy security and efficiency afloat and ashore, increase our energy independence, and help lead the nation toward a clean energy economy."¹

8. ECR Case Example: None reported.

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.

The DON ADR Program Office incorporated the 2012 survey questions into an online database, and worked with the Assistant General Counsel (Energy, Installations and Environment) to solicit world-wide responses from throughout the DON.

Please attach any additional information as warranted.

Report due February 15, 2013.

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

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

¹ http://www.navy.mil/submit/display.asp?story_id=64544 (last accessed 1/23/13).

**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 |