# Analysis of FY 2007 ECR Reports Submitted by Federal Departments and Agencies Pursuant to the OMB/CEQ Joint Memorandum of November 28, 2005

**October 2008**

**Office of Management and Budget**
**Council on Environmental Quality**

## Analysis of FY 2007 ECR Reports

### Executive Summary

The FY 2007 ECR Reports are the second annual reports submitted to OMB and CEQ in response to the November 2005 Joint Memorandum on Environmental Conflict Resolution[1] (Joint Memorandum) issued by the Office of Management and Budget (OMB) and the President's Council on Environmental Quality (CEQ). This report synthesizes and analyzes the federal department and agency reports submitted to the Environmental Conflict Resolution (ECR) Forum.

This report shows an increasing use of ECR and the continued use of ECR in the early phases of decisionmaking. ECR also played a valuable role in resolving conflicts at the later stages when administrative or judicial recourse was sought.

The FY 2006 reports were reviewed and synthesized in the OMB/CEQ A*nalysis of the FY 2006 Annual ECR Reports* (*FY 2006 Analysis*). Among other things, the *FY 2006 Analysis* found that:

- agencies use environmental conflict resolution (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;
- almost all of the responding agencies reported that ECR has or could help minimize negative effects associated with poorly managed or escalating environmental conflict;
- more than half of the reporting agencies believed ECR could be used more frequently; and
- almost all of the reporting agencies were taking some measures to implement the Joint Memorandum.

The following departments and agencies submitted FY 2007 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of Health and Human Services (HHS)
- Department of Homeland Security (DHS)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Transportation (DOT)
- Department of Veterans Affairs (VA)

[1] The Memorandum directs federal agencies involved in implementing the National Environmental Policy Act (NEPA) and other environmental laws to "increase the effective use of environmental conflict resolution and build institutional capacity for collaborative problem-solving."

- National Oceanic and Atmospheric Administration (NOAA)[2]
- 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 Capital Planning Commission (NCPC)
- National Indian Gaming Commission (NIGC)
- Nuclear Regulatory Commission (NRC)
- Tennessee Valley Administration (TVA)
- The U.S. Institute for Environmental Conflict Resolution (USIECR)

In response to a template of questions developed by the ECR Senior Level Forum,[3] the federal departments and agencies reported 320 individual cases of ECR in FY 2007 as defined by the Joint Memorandum.[4] Of those 320 cases, EPA was the agency most frequently using ECR (90 cases).[5] DoD (74 cases), USFS (63 cases), DOI (46 cases), FERC (21 cases), DOT (12 cases), NOAA (8 cases), VA (3 cases), and NRC (3 cases) also engaged in ECR in FY 2007. Many (though not all) of these cases were also reported by DOJ (43 cases with paid neutrals) and USIECR (40 cases), as they provide conflict resolution services for other federal agencies. Seven agencies reported that they did not engage in any ECR cases in FY 2007. It is apparent from their reports that some of these agencies are infrequently faced with environmental conflict. The HHS report notes, for instance, "at most, HHS has 1 or 2 cases per year [of environmental conflict]." Similarly, DHS noted "[dedicated ECR capacity] may not be appropriate or reasonable where environmental conflicts are uncommon."

Government-wide, 25% [6]of the reported cases took place in enforcement and compliance. Twenty-three percent of ECR cases involved monitoring and implementing agreements. Planning was the third largest category of ECR use at 20 percent of the total. Policy development accounted for 12 % of all ECR in FY 2007, with licenses and permits (7%), rulemaking (2%), siting and construction (2%) and "other" (8%) accounting for the remainder of cases.

Agencies were also asked to select the decision-making forum in which their ECR cases resided at the time ECR was initiated. The choices were "agency decision," "administrative proceedings and appeals" and "judicial proceedings." Almost 60 percent (186 of 320) of the cases fell into the agency decision category. Agencies categorized 43 cases as administrative proceedings and appeals, with 35 of these coming from EPA. Agencies categorized 30 of their cases as judicial

[2] NOAA submitted its Report on behalf of the Department of Commerce.

[3] This interagency forum was convened by the US Institute for Environmental Conflict Resolution (USIECR) pursuant to the Joint Memorandum. It consists of senior executives of the agencies affected by the Joint Memorandum, and its purpose is to give "advice and guidance and facilitate interagency exchange on ECR."

[4] The Table does not include cases reported by DOJ or USIECR as those cases are presumably reported by the agencies directly involved in those respective conflicts. The table also does not include cases submitted by DOE as DOE did not provide information relating to numbers of cases**.**

[5] EPA was also involved in 44 other cases that used a third party but were not agreement-seeking.

[6] All percentages and numbers in the report are approximate.

proceedings. EPA (10 case) and DoD (13 cases) reported 23 of these cases. Agencies categorized 61 cases as "other." The majority of cases in this category are 45 "facilitated partnering teams" reported by DoD. The 13 cases EPA categorized as "Other" were described as "state standards" and "voluntary programs." These results are indicative of agency efforts to resolve environmental conflicts sooner rather than later.

The 320 cases reported for FY 2007 represent an approximate 50-70 case increase over the 250-270 cases reported in FY 2006. Possible explanations for this increase include the following. First, there was likely more ECR activity in FY 2007 than in FY 2006. Second, the FY 2007 template was more focused on the reporting of numbers of cases than was the FY 2006 template, which could have resulted in underreported ECR activity in FY 2006.[7] Third, agencies have improved in their ability to collect ECR data since FY 2006.

Agencies also reported on their efforts to build capacity to engage in ECR, consistent with Section Five of the Joint Memorandum. All agencies that engage in ECR on a regular basis reported investing in training. Several agencies, including DOE, DOI, EPA, FERC, and USFS, reported that they had integrated ECR into their strategic plans and GPRA plans. Agencies also reported engaging in out-reach, and in building infrastructure to support ECR. This indicates a continued commitment to agency investment in ECR since FY 2006.

Agencies also identified challenges to undertaking ECR. The most common challenge reported was characterized as resource-related. Additional resources for building capacity and for using ECR should further increase ECR in the future.

Agencies also identified a number of occasions where they used collaborative problem-solving without the aid of a third-party neutral to resolve environmental conflict. Several reported using advisory committees for the purpose of gaining expert assistance on tough and sometimes controversial issues. Other agencies reported that the language in federal facility agreements set up a dispute resolution process that helped them resolve conflict. Direct negotiation with other parties to resolve conflict was also often relied upon.

Agencies reported continuing to use ECR in such priority areas[8] 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.

In sum, the second annual ECR Reports build on the information submitted with the FY 2006 ECR Reports. They reaffirm many of the conclusions and patterns identified in the *FY 2006 Analysis*. On the whole, agencies are making significant progress in meeting the goals of the Joint Memorandum.

[7] Question Three of the FY 2006 template asked for "quantifiable indicators" of ECR use in a question that invited a narrative response. The FY 2007 template, on the other hand, requested numerical data on ECR use.

[8] Agencies were asked in Question 4 of the template to identify priority areas in which ECR was being used.

## Table of Contents



## Table of Tables



## Table of Figures

## I. Introduction

The FY 2007 ECR Reports are the second annual reports submitted by agencies in response to the November 28, 2005 Joint Memorandum on Environmental Conflict Resolution (Joint Memorandum) issued by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ). [9] The FY 2006 reports were reviewed and synthesized in the OMB/CEQ A*nalysis of the FY 2006 Annual ECR Reports* (*FY 2006 Analysis*) available at http://ecr.gov/pdf/Analysis06ECRReportsfinal.pdf. Among other things, the *FY 2006 Analysis* found that:

- agencies use environmental conflict resolution (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;
- almost all of the responding agencies reported that ECR has or could help minimize negative effects associated with poorly managed or escalating environmental conflict;
- more than half of the reporting agencies believed ECR could be used more frequently; and
- almost all of the reporting agencies were taking some measures to implement the Joint Memorandum.

This Analysis synthesizes and offers a government-wide perspective on the experiences reported by agencies in their FY 2007 ECR reports. It covers the following:

- how agencies collected data for their reports;
- 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.

[9] The Memorandum directs all federal agencies to "increase the effective use of environmental conflict resolution and build institutional capacity for collaborative problem-solving."

### *A. Development of the Template for the FY 2007 Report*

As was the case with the FY 2006 reports, the FY 2007 reports were prepared in response to a template of questions developed by the ECR Senior Level Forum (Forum).[10] In the Spring and Summer of 2007, the Forum met to discuss the lessons learned by agencies in preparing their FY 2006 ECR reports. The *FY 2006 Analysis* had found that "[t]he unevenness in how data was reported for the first annual reports made it difficult to compare agency responses. Further, the lack of ECR tracking systems made it difficult for some agencies to collect information." The *FY 2006 Analysis* also found that the "template did not ask agencies…to describe the barriers they face in attempting to undertake ECR." In addition, several agencies suggested in their FY 2006 reports that the FY 2007 template includes unassisted collaborative activity that does not fit the definition of ECR in the Joint Memorandum.[11]

The Forum responded to these points by revising the template for FY 2007 (attached as Appendix A). Improvements to the template include: (1) a revision (question three) that requests numerical data on ECR use across multiple dimensions, including case/project status, the forum in which the case resided when ECR was initiated, the context for ECR application, and whether the agency participated in or initiated the ECR process; (2) a new question (question two) that asks agencies to rate 18 potential barriers to ECR as "major", "minor," or "not applicable"; (3) a revision which asks agencies to "describe efforts…to [prevent or resolve conflicts] that do not fit [within the Joint Memorandum's definition of ECR]; and (4) further revisions (questions eight and nine) which ask agencies to provide information on notable achievements and cases. Other questions in the FY 2007 template are essentially extensions of questions from the FY 2006 template, including question one (building capacity), question four (noting priority areas where ECR is taking place), and question five (the tracking and evaluation of ECR activity).

### *B. FY 2007 ECR Reports*

From January through May 2008, the following 19 agencies submitted FY 2007 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of Health and Human Services (HHS)
- Department of Homeland Security (DHS)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Transportation (DOT)
- Department of Veterans Affairs (VA)

[10] This Interagency Forum was convened by the US Institute for Environmental Conflict Resolution (USIECR) pursuant to the Joint 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."

[11] The Memorandum defines ECR as "third-party assisted conflict resolution and collaborative problem-solving in the context of environmental, public lands, or natural resource issues or conflicts, including matters relating to energy, transportation, or land use."

- National Oceanic and Atmospheric Administration (NOAA)[12]
- 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 Capital Planning Commission (NCPC)
- National Indian Gaming Commission (NIGC)
- Nuclear Regulatory Commission (NRC)
- Tennessee Valley Administration (TVA)
- The U.S. Institute for Environmental Conflict Resolution (USIECR)

DOI and DoD are the two departments that have a significant number of "sub-agencies" that engage in ECR. The ECR activity of DOI's nine bureaus and services is reflected in its report. DoD's report includes separate reports for the Departments of Navy (DON), Army (DA), Air Force (USAF), and the Army Corps of Engineers (USACE).

## II. Use of ECR

### *A. How data was collected*

Agencies used a variety of strategies to collect and prepare the information necessary to respond to the questions in the FY 2007 template. USFS, for example, disseminated the template to all 155 of its field units, asking them to complete the entire template and send it back to the USFS ECR Point of Contact. DOI, through its Office of Collaborative Action and Dispute Resolution (CADR), disseminated the template to its bureaus. Several bureaus then sent it to field and regional offices, while others completed the template at the headquarters level, with some input from field offices. The DOI offices and bureaus then sent their reports back to the CADR office, which collated the information and analyzed it from a Department-wide perspective. FERC completed the questionnaire at the headquarters level. EPA used a hybrid strategy, compiling a list of ECR cases that it maintains centrally through its Conflict Prevention and Resolution Center (CPRC), and asking its headquarters and regional offices if they were aware of any ECR activity that was not on this list. EPA also sent template questions to headquarters offices and regions where it was particularly useful to have agency-wide responses. For each agency, it appears that the methodology selected was tailored to the particular structure of the organization. Since ECR takes place at the field level in USFS it made sense for its field units to respond to the template. Agencies such as FERC on the other hand, handle their ECR activity at the headquarters level, and can efficiently obtain the data necessary to complete the template at that level.

Not all agencies completed the template in the same manner. While most agencies submitted complete reports, several agencies submitted partially completed templates. The 2008 Template has been revised to emphasize the need to submit complete responses.

[12] NOAA submitted its Report on behalf of the Department of Commerce.

### *B. Which agencies are engaging in ECR? How frequently are they engaging in ECR? What is the context for ECR?*

The total number of reported individual cases is 320.[13] This figure is an approximation for two reasons. First, there are cases in the dataset that have been reported by more than one agency. The Missouri River Recovery Implementation case (MRRIC)[14], for example, was reported by DOI agencies as well as by the US Army Corps of Engineers (USACE). Second, two agencies (DOE and USACE) that reported engaging in ECR underreported their total number of cases by failing to complete question three of the template. The figure of 320 cases therefore serves more as a general frame of reference than a precise indicator of ECR cases that took place in FY 2007.

The 320 cases are spread throughout nine departments and agencies, with EPA being the agency most frequently involved in ECR (90 cases).[15] DoD (74 cases), USFS (63 cases), DOI (46 cases), FERC (21 cases), DOT (12 cases), NOAA (8 cases), VA (3 cases), and NRC (3 cases) also engaged in ECR in FY 2007. Seven agencies reported that they did not engage in any ECR cases in FY 2007.[16] It is apparent from their reports that some of these departments and agencies are infrequently faced with environmental conflict. The HHS report notes, for instance, "at most, HHS has 1 or 2 cases per year [of environmental conflict]." Similarly, DHS noted "[dedicated ECR capacity] may not be appropriate or reasonable …where environmental conflicts are uncommon." Figure 1 illustrates the distribution of ECR cases throughout the federal government.

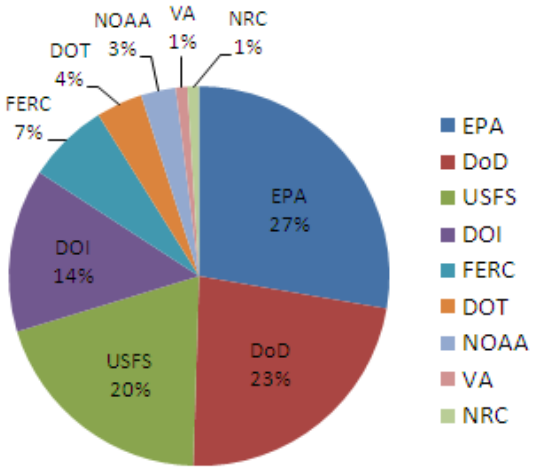


Figure 1. Distribution of ECR cases throughout the federal government (FY 2007).

[13] This figure does not include the 43 cases in which DOJ reported using a paid neutral, or the 40 cases reported by USIECR, as the cases reported by these agencies are presumably also 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 services to agencies directly involved in conflict.

[14] MRRIC is a collaborative forum for stakeholders in the Missouri River Basin to participate in developing a shared vision and comprehensive plan for the restoration of the Missouri River ecosystem.

[15] EPA was also involved in 44 other cases that used a third party but were not agreement-seeking.

[16] These agencies were: HHS, DHS, GSA, NASA, NCPC, NIGC, and TVA.

In question three of the FY 2007 template agencies were asked to identify the context for their ECR cases by grouping them into eight categories (Table 1).

Table 1. Context for FY 2007 ECR Applications

| | Percent of FY 2007 ECR Cases by Context |
|---|---|
| Policy | 12% |
| Planning | 20% |
| Siting and Construction | 3% |
| Rulemaking | 2% |
| License and Permit Issuance | 7% |
| Compliance and Enforcement Action | 25% |
| Implementation/Monitoring Agreements | 23% |
| Other | 8% |
| Total | 100% |

Government-wide, 25% of ECR took place in compliance and enforcement (Comp/Enf).[17] This is primarily because EPA had the largest number of ECR cases and most of these fell into this category. The monitoring and implementing agreements category (Agreements) constituted 23% of all federal ECR activity. This portion comes primarily from the 46 partnering teams[18] established by the Department of the Navy to implement the terms of agreements to cleanup Superfund sites. Planning was the third largest category of ECR use at 20 percent of the total. These cases come primarily from the two agencies with significant land management responsibilities, DOI and USFS, which were involved in a combined total of 45 cases involving land use or other types of planning in 2008. Policy development (Policy) accounted for 12 % of all ECR in FY 2007, with licenses and permits (Permits) (7%), rulemaking (Rules) (2%), siting and construction (3%) (Siting) and "other" (8%) accounting for the remainder of cases. The "FY 2007 Federal ECR Context Profile" illustrates how ECR was distributed amongst the various contexts for ECR in FY 2007 (see table above).

As was noted in the *FY 2006 Analysis*, the categories of ECR activity within a particular agency tend to be heavily dependant on the agency's mission. For instance, as a land management agency with over 150 field units, USFS is involved in a number of planning efforts at any given time. USFS is also responsible for issuing permits and licenses for various types of uses on its land. It is not surprising, therefore, that planning and permitting would constitute 75% of the USFS's ECR activity (Figure 2).

[17] The profile does not reflect cases reported by DOJ or USIECR, as those cases should be contained in the reports of the agencies that were directly involved in these cases.

[18] 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.

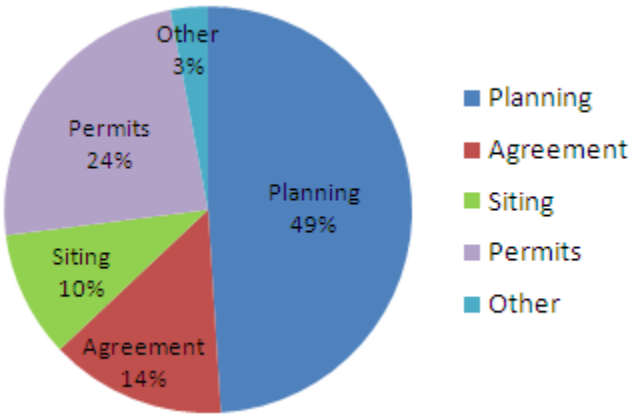


Figure 2. USFS ECR context profile for FY 2007 (63 Cases)

ECR Context profiles for other agencies reveal similar links between ECR activity and mission focus. As an independent agency that regulates the interstate transmission of natural gas, oil, and electricity, one of FERC's primary missions is the enforcement of its rules. It is also involved in issuing permits, and in reviewing the siting of energy facilities. Figure 3 below reflects FERC's various roles.

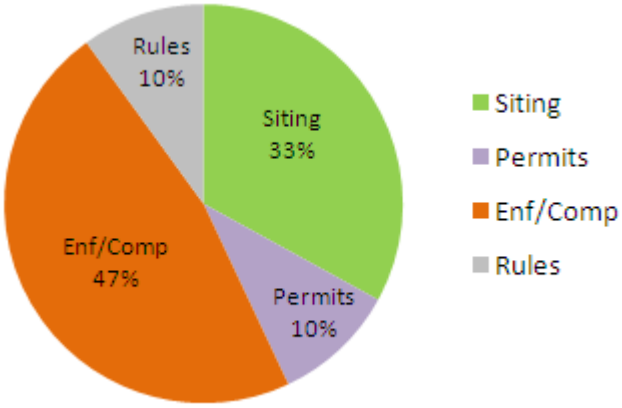


Figure 3. FERC ECR context profile for FY 2007 (21 Cases)

Agencies were also asked to identify whether their cases were in progress or completed. Of the 287 cases that were identified with respect to this question,[19] 176 were identified as in progress, and 105 cases were identified as completed.

[19] Some agencies did not report all their cases in response to this question, which is why the number of cases identified as in progress or completed (287) is less than the overall number of cases (320).

### *C. Participant or Initiator?*

Question three also asked agencies to identify whether they were participants or initiators in particular ECR cases. Based on follow up conversations with individuals responsible for preparing their agency reports, it appears that the term "initiated" has been defined by most agencies as being synonymous with "sponsoring" or "leading" the ECR process. In fact, EPA suggested in its report that the term "sponsoring" be substituted for the term "initiated" in future reports and should be defined as "the party that leads and provides most of the resources for the ECR process."

With this understanding of the term "initiated" in mind, the reports show that government-wide, departments and agencies were more likely to initiate rather than exclusively participate in a typical ECR case which engages a third party neutral. The degree to which departments and agencies led a process, however, appears also to be dependant on their mission. Departments and agencies with substantial enforcement and compliance missions such as FERC and EPA reported that they engaged in ECR as initiators in 80 to 90 percent of their ECR cases. Agencies engaging in ECR in the more informal upstream processes such as planning, policy development, licensing, and permitting reported a higher percentage of being involved in ECR as participants rather than as initiators. USFS, for example, reported that it is involved primarily as a participant in 45% of its ECR cases. DOI, several of whose agencies have land management missions that are similar to USFS, reported being involved as participants in 35% of its ECR cases. According to USFS staff,[20] USFS's relatively high percentage of involvement as participants relates directly to their status as land managers. In that role they are often invited to participate in processes that are initiated or sponsored by neighboring federal, state, local, and Tribal agencies.

### *D. Decision Making Forum*

Agencies were also asked to identify the decision making forum where issues were being addressed when ECR was initiated (Table 2). The choices in this part of question three were intended to generally approximate the continuum of conflict as expressed in the *FY 2006 Analysis.*[21] "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.

[20] Based on a conversation with Martha Twarkins, USFS, 3/14/2008
[21] See *2006 Analysis, pp 12-13.*

Table 2. Agency summary of the decision making forums where the FY 2007 ECR cases originated.

| | Federal Agency Decision | | Administrative Proceedings/ Appeals | | Judicial Proceedings | | Other | |
|---|---|---|---|---|---|---|---|---|
| | *Number and Percent (%)* | | | | | | | |
| 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% |
| **Totals** | **186** | 100% | **43** | 100% | **30** | 100% | **61** | 100% |

Table 2 shows that almost 60 percent (186 of 320) of cases fall into the "Agency Decision" category. Ninety-seven of these cases come from USFS and DOI. This is consistent with other data reported from these agencies, which show that these agencies tend to be involved in ECR mainly at the informal upstream phases of environmental conflict. Agencies categorized 43 cases as Administrative Proceedings and Appeals, with 35 of these coming from EPA which is consistent with their compliance and enforcement focus. Agencies categorized 30 of their cases as "Judicial Proceedings." EPA (10 cases) and DoD (13 cases) reported 23 of these cases. DOJ reported 43 cases (not depicted in this chart) in which ECR was employed using paid neutrals, and noted there were even more cases in which a federal magistrate or other court official was used to mediate litigated environmental conflicts. It is possible that agencies have underreported their involvement in judicial proceedings, or that they have characterized these cases as something other than judicial proceedings in their reports. Agencies categorized 61 cases as "Other." Forty-five of these cases are DoD's facilitated partnering teams.[22] The 13 cases EPA categorized as "Other" were described as "state standards" and "voluntary programs." Figure 4 illustrates how ECR cases were spread throughout the various decision making forums in FY 2007.

[22] These partnering teams are organized in a three tier structure (local/installation, state and regional) and chartered to address installation restoration issues. Collectively, the teams worked on 1,384 active and inactive sites in 2007.

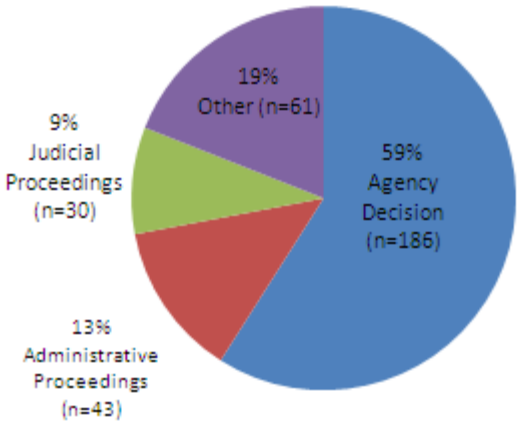


Figure 4. Distribution of decision making forums where the FY 2007 ECR cases originated.

### *E. How does Reported Usage for FY 2007 compare to FY 2006?*

Agencies reported engaging in approximately 50-70 more cases of ECR in FY 2007 (totaling 320) than they did in FY 2006 (totaling 250-270). This represents approximately a 15 to 25 percent increase. There are at least three possible reasons for this.

First, there was likely more ECR activity in FY 2007 than in FY 2006. EPA staff indicates that this is the most oft cited reason for its 13% increase in ECR activity from FY 2006 to FY 2007.[23] DOJ ADR Counsel states that the 33% increase in DOJ's reported cases could have been due to the FY 2006 ADR training that was provided to a significant number of DOJ attorneys who work on environmental matters.[24] The training reminded trainees (DOJ attorneys) of the potential of ECR which might have led to it being applied in a greater number of cases. However, DOJ ADR Counsel cautioned that the increase could also be due in part to the fact that more of its cases in FY 2007 were better suited to applying ECR than in FY 2006.

Another reason for a higher number of reported cases in FY 2007 is that the FY 2007 template specifically inquired as to the number of cases.[25] As a result, agencies were likely to have underreported ECR activity in FY 2006.

A third reason for an increase in reported ECR activity is that agencies have improved in their ability to collect ECR data. Staff from two of the agencies with the largest increases, DOI (84%) and USFS (100%), have indicated that the exercise of disseminating the FY 2006 Report template to regional and field units put agency personnel on notice to look out for ECR activity so that it could be properly reported in the FY 2007 template.[26]

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[23] Based on a conversation with Dr. Will Hall of EPA, 3/14/2008. EPA's data collection process for identifying ECR use in FY 2007 was essentially unchanged from the process used in the FY 2006 data. For FY 2006, EPA reported 117 agreement-seeking and non-agreement seeking cases. For FY 2007, EPA reported 134 agreement-seeking and non agreement-seeking cases.

[24] Based on conversation with Jim Payne, DOJ, March 2008.

[25] Question Three of the FY 2006 template asked for "quantifiable indicators" of ECR use in a question that invited a narrative response. The FY 2007 template, on the other hand, requested numerical data on ECR use.

[26] Based on conversations with David Emmerson, DOI, April 2008, and Martha Twarkins, USFS, April 2008.

## III. Building Capacity

The first question on the FY 2007 template asked agencies to describe the steps they have taken to build programmatic and institutional capacity for ECR in FY 2007. Agencies were asked to "refer to the mechanisms and strategies in section 5 of the Joint Memorandum which includes efforts to: integrate ECR objectives into agency strategic planning; develop agency infrastructure to support ECR programs; and focus on accountable performance and achievement."

### *A. Strategic Planning*

Several agencies reported that they had integrated ECR into their strategic plans. EPA's Strategic Plan and the EPA Administrators Action Plan both explicitly recognize the importance of using collaborative approaches such as ECR to "break through institutional and other barriers, produce more effective and durable decisions, and boost the potential for agreement." DOE has identified ECR as a strategy to support its strategic goal of "managing the legacy [of environmental contamination]." In FERC's Strategic Plan it encourages the use of alternative dispute resolution procedures. DOI's current Strategic Plan includes two collaborative action performance measures. DOT's strategic plan refers specifically to resolving environmental conflict consistent with the November 2005 Joint Memorandum. Other agencies reporting the inclusion of ECR or collaboration-related language in their Strategic Plans include USFS and USACE. Each of these actions furthers the goals of Section Five of the Joint Memorandum.

### *B. Training*

All of the agencies that engage in ECR on a regular basis reported that they had invested in training to build capacity in ECR and collaborative problem-solving, in conformance with Section Five of the Joint Memorandum. In FY 2007 FERC provided introductory and advanced training on a wide variety of ADR-related topics. The National Conservation Training Center of DOI's Fish and Wildlife Service is attempting to build institutional capacity in collaborative problem-solving by "combining traditional training focused on knowledge or 'technical skills' with structured decision-making workshops focused on experiential learning or 'practice.'" The DOI CADR office reported delivering conflict management training to over 500 senior executives in FY 2007. CADR also delivered other training more specifically geared to ECR, such as multi-party negotiations, in FY 2007.

In FY 2007, through conflict resolution trainings, workshops, and informational services around the country, USIECR staff engaged more than 500 representatives of federal, state, and local governments, tribal nations, NGOs, environmental advocates, community-based groups, and environmental and natural resource attorneys. These sessions make ECR a more recognized and used tool for resolving environmental conflicts. Examples of this work include:

- Conflict management trainings provided on behalf of the Air Force Negotiation Center of Excellence (NCE) as part of its efforts to develop negotiation, collaboration, and problem-solving skills as core competencies throughout the Air Force.

- Collaborative skills orientations to prepare stakeholders to participate in a National Park Service negotiated rulemaking to address off-road vehicle use on the Cape Hatteras National Seashore in North Carolina.

- Customized training in multiparty negotiations provided at the request of the Department of Defense as part of its sustainable military readiness efforts, and at the request of the Department of Interior's Office of the Solicitor and its Office of Collaborative Action and Dispute Resolution.

- The third annual Native Skills Exchange Workshop designed to bring together individuals who work in tribal governments and Native communities, as well as members of the U.S. Institute's Native Dispute Resolution Network, to share skills and current practices for effective engagement in collaborative dispute resolution processes.

In early FY 2008, USIECR also started offering standing open-enrollment courses at its offices in Tucson, Arizona, and in Washington, D.C. The open-enrollment courses currently offered or under development are: (1) collaboration competencies for agency staff, (2) multiparty negotiation, (3) interest-based negotiation, (4) government-to-government consultation (with tribal governments), (5) introduction to managing environmental conflicts, and (6) NEPA collaboration.

### *C. Infrastructure*

Also consistent with Section Five of the Joint Memorandum, several agencies reported taking measures to strengthen their ECR infrastructure. These included:

- The USACE, which has established an ECR expertise in its Institute for Water Resources.
- EPA's continuing support of its ECR infrastructure, which includes 8.5 FTEs dedicated exclusively to ECR, the provision of over $5 million annually in services under its contract with an ECR vendor, as well as other initiatives related to infrastructure.
- DOI's linkage of the rollout 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." In addition, several DOI agencies reported building collaboration competency standards into individual employee performance plans.

Two agencies reported on efforts to develop technological tools to enhance their ability to engage in ECR. USACE's Institute for Water Resources sponsored a Conference on "Computer Aided Dispute Resolution," which brought together a diverse cross section of conflict management professionals and technical experts to discuss the use of technology in the context of ECR. DOI's Bureau of Land Management reported that it is implementing the use of an on-

line comment process to expand public participation in the development of a resource management plan in western Oregon.

### *D. Outreach*

Several agencies reported engaging in outreach activities in their efforts to build ECR capacity consistent with Section Five of the Joint Memorandum. These include:

- Presentations given by EPA CPRC staff at various conferences and meetings, as well as regular bi-weekly presentations on ECR to new EPA employees.
- FERC's "lunch and learn" series, which features presentations on various ECR topics throughout the year.
- DOI's "DOI Dialogue" Series, which features 3 to 4 presentations each year on topics of interest to DOI program managers and the ECR community.
- EPA's international outreach program, which included presentations to officials of the governments of Thailand and China.

EPA, DOI, and USIECR also reported on their involvement in the development of the recently issued *NEPA Collaboration Handbook.*[27] As noted in the reports, this CEQ-led publication emphasizes the importance of using in the NEPA process many of the concepts embodied in the *Basic Principles for Agency Engagement in ECR.*

### *E. Other Capacity-Building Initiatives*

Other capacity-building initiatives include the development or enhancement of internal working groups to discuss ECR (VA, DHHS), as well as the development of web sites and web pages that include ECR-related information (DOJ, VA, DOI). In addition, GSA reported that as part of its recent focus on strengthening its NEPA program, it views "ECR as potentially playing a key role in the public interface portions of NEPA procedures."

## IV. Tracking and Evaluating ECR

Question five of the template asked agencies to describe the methods and measures by which they are tracking the use and outcomes of ECR, as directed by section 4(b) and Section 5(a)(3) of the Joint Memorandum.

### *A. Tracking ECR Activity*

The reports show that agencies are most successful at tracking ECR that occurs in formal administrative or judicial proceedings. The reports show that 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 involving environmental conflict

[27] This Handbook is available at http://www.nepa.gov/nepa/nepanet.htm

select 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. Similarly, DOJ reports tracking ECR through the procurement processes it uses to hire external mediators.

The tracking of ECR in the more upstream settings [28] 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. Some agencies, however, did report that they were considering measures that would enhance their ability to track these processes and the ECR Forum will be addressing reporting and tracking mechanisms and techniques in the coming months. The National Park Service (NPS), for instance, tracks all of its NEPA-related activity through its on-line Planning, Environment, and Public Comment (PEPC) website. The NPS is considering revising the intake form on this site to allow it to capture information on the use of third party neutrals. In addition, USFS and DOI report that the exercise of disseminating ECR Report templates on an annual basis has generally improved the ability of these agencies to track and collect ECR data.

### *B. Evaluating ECR Performance*

Several agencies reported progress in evaluating the performance of ECR. USIECR, for example, reported that by the end of FY 2007 it had begun disseminating findings from the Multi-Agency Evaluation Study (MAES) (available at http://www.ecr.gov/Resources/MultiAgencyEvaluation.aspx) that was initiated in FY 2005. In MAES, participants and mediators were asked to complete surveys at the conclusion of an ECR process. The surveys contained a variety of questions on topics relating to the process, including questions that measured participants' level of trust with other participants prior to, and at the conclusion of, a process. USIECR reported that the findings from the dataset of 52 cases "shed light on how ECR performs, identifies key factors that contributed to ECR success, and distill feedback from participants and practitioners that can be used to improve further conflict resolution processes." EPA and DOI contributed cases to MAES and also noted in their reports that MAES was a valuable tool in evaluating the perceptions of participants in ECR processes.

EPA and DOI also reported on another initiative designed to measure the success of ECR processes. EPA and DOI jointly sponsored the Systematic Evaluation of Environmental and Economic Results (SEEER). SEEER involves the rigorous study of particular ECR cases to evaluate the economic and environmental effects of ECR. According to the EPA report "SEEER's goal is to quantify the results of ECR. The SEEER project 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."

[28] See *2006 Analysis*, pp 12-13, for discussion on upstream and downstream use of ECR.

## V. Challenges to Engaging in ECR

Question 2 of the FY 2007 template asked agencies to rate a list of potential challenges to ECR as either "major," "minor," or "not applicable." Each potential challenge received 15 or more agency responses. In some cases, departments and agencies indicated particular challenges were both major and minor. For some potential challenges, several departments and agencies either did not complete question two in its entirety, or only partially completed this question.

Lack of resources was seen as a major challenge by several agencies. For instance, the "perception of the time and resource-intensive nature of ECR", the "lack of budget incentives", the "lack of funds for mediators", the "lack of resources for capacity building", the "lack of staff availability", and the "lack of staff expertise" were deemed major challenges by several agencies (Figure 5).

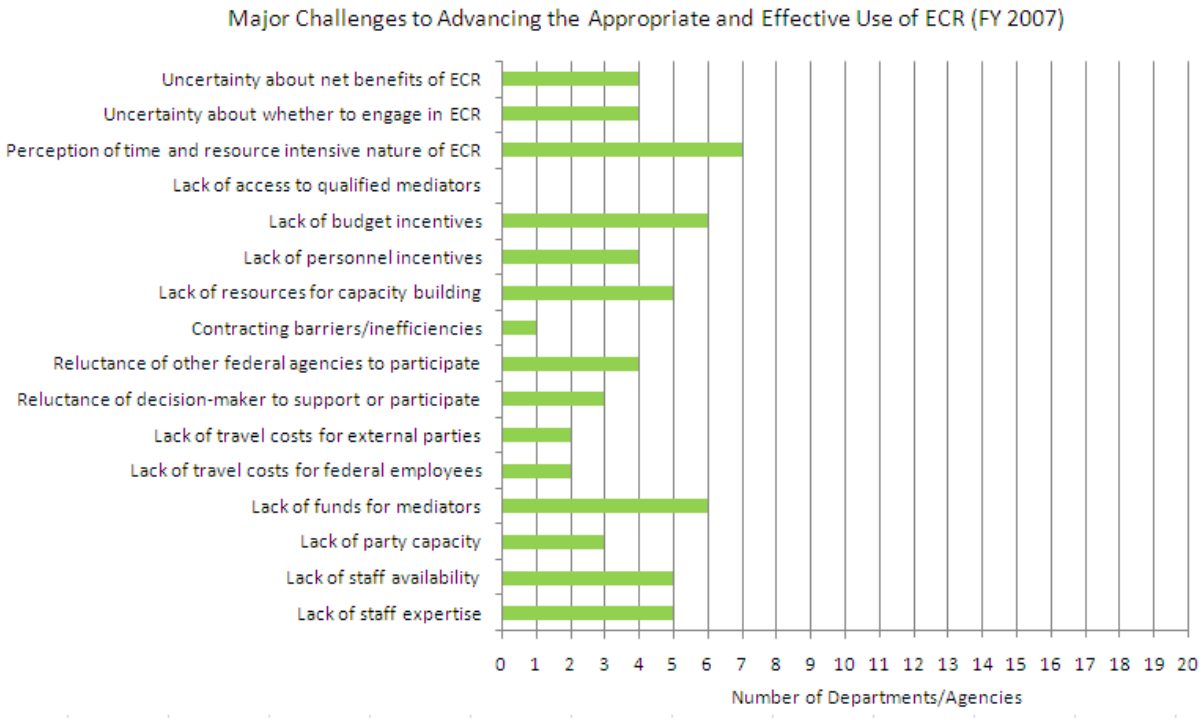


Figure 5. Major challenges to the use of ECR as identified by agencies/departments.

Figure 6 below highlights the categories that agencies/departments most frequently identified as either a major or a minor challenge. For instance, "uncertainty about whether to engage in ECR", "perceptions of the time and resource intensive nature of ECR", "reluctance of other federal

agencies to participate", "lack of staff expertise", and resource constraints were among the most commonly cited challenges/barriers.

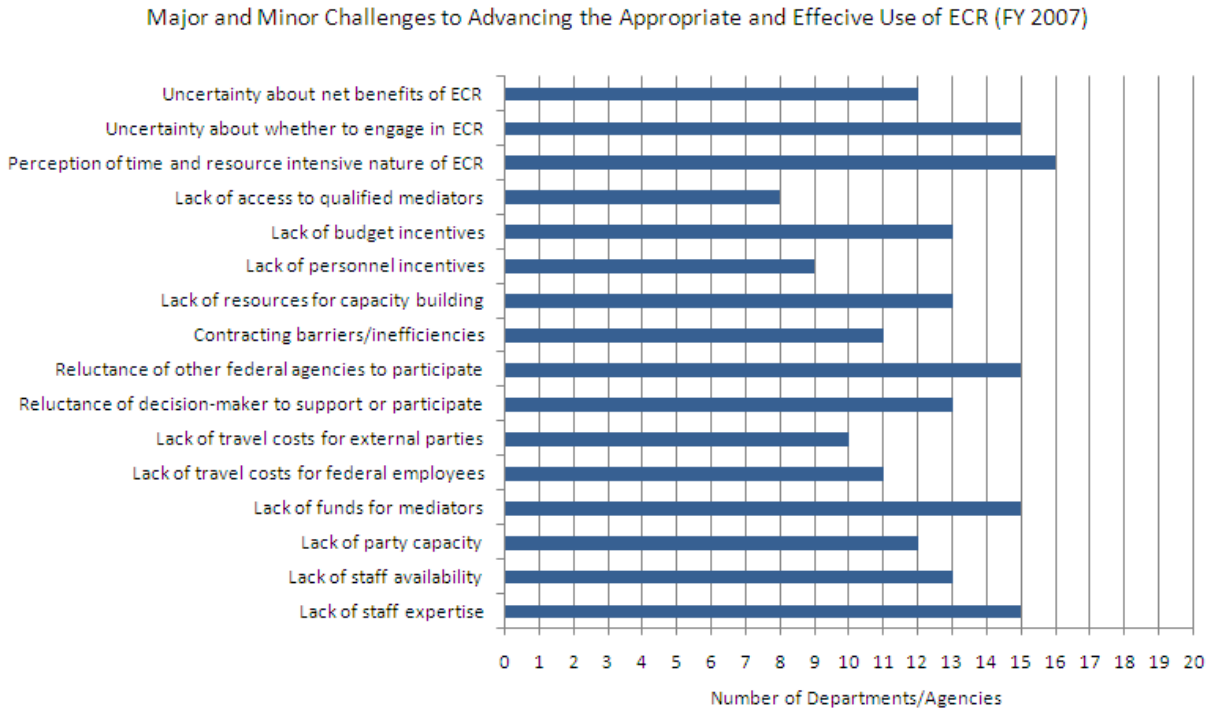


Figure 6. Major and minor challenges to the use of ECR as identified by agencies/departments.

The number of categories identified as "not applicable" reveal interesting patterns among agencies. First, only two potential challenges were selected by at least 50 percent of the agencies as being "not applicable." Eight of the 17 responding agencies considered "lack of personnel incentives" to be not applicable. Similarly, 8 of 16 responding agencies considered "access to qualified mediators" to be not applicable. These findings suggest that about half of the responding agencies believe that personnel incentives and access to qualified neutrals do not serve as impediments to undertaking ECR. Other potential challenges that were deemed as not applicable by a fair number of agencies include lack of "budget incentives"[29] (8 of 21) "travel costs for federal employees" (5 of 16), and travel costs for non-federal employees (6 of 16).

[29] On the other hand, 5 of 20 agencies deemed budget incentives to be a major challenge.

## VI. Efforts that do not fall within the definition of ECR

Question seven of the template asked agencies to describe other significant efforts "to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR." Most of the responses to this question focused on efforts to manage conflict that did not involve a neutral third party.

### Advisory Committees/Groups

Several agencies reported using advisory committees to aid them in working through conflict. DOE, for instance, reported making extensive use of site-specific advisory boards (subcommittees of Federal Advisory Committees) to elicit recommendations on key issues. The DOE report notes: "through public meetings, individual site boards give voice to a diversity of community views and provide a channel for two-way communication between DOE and the public on key site issues and upcoming decisions." NOAA reports using Sanctuary Advisory Councils (SACs) for a similar purpose, stating that their National Marine Sanctuary Program (NMSP) received input from SACs on 84 projects in FY 2007. DOI and USFS report using Resource Advisory Councils (chartered under the Federal Advisory Committee Act) for similar assistance on land management issues. DoD reported using Resource Advisory Boards for similar purposes.

### Collaborative Efforts

DOE and DoD reported working collaboratively with other agencies and external parties through Federal Facility Agreements. These agreements, entered into under CERCLA, contain a dispute resolution process which is designed to enable parties to reach agreement without having to resort to litigation. DOI noted in its report that the Minerals Management Service uses leases in its Alaska Region which call for a dispute resolution process in disputes under oil and gas leases in Alaska. Similarly, NOAA reports that the cooperative assessment agreements that it enters into pursuant to its Damage, Assessment, Remediation, and Restoration Program (DARRP) encompass many of the ECR *Basic Principles for Agency Engagement in ECR* as they specify decision-making authority, provide dispute resolution procedures, and list specific duties, objectives, and authorities for the purpose of managing conflict.

### Partnering Initiatives

Several agencies reported on partnering initiatives. USFS reported that its National Partnership Office was established in 2003 to facilitate the Forest Service's work with communities. Other agencies reporting that they worked closely with partners include EPA, DOI, and NOAA.

### Direct Negotiations

Almost all agencies reported that they regularly rely on direct negotiation to resolve environmental conflict. DOJ in particular noted that it negotiates agreements in well over 90% of many types of environmental and natural resource cases. EPA reports that its Region 10 Office offers pre-filing negotiations with parties in most administrative cases.

**Public Outreach**

Several agencies also reported on using public participation as a means for engaging diverse interests without the aid of a 3rd party. EPA noted that its Office of Pesticide Programs regularly engages affected stakeholders through public meetings. Other agencies (DOI, USFS) reported regular public involvement through NEPA and other environmental statutes.

## VII. How Agencies decide whether they should use ECR

Most agencies reported that the decision to participate in ECR was dependent on the facts of the particular case. Several agencies said they had policy or guidelines that set out criteria to aid decision makers in this decision. FERC, for example, has regulations that require complainants to consider ADR as a means for resolving their complaint.[30] DOI reports that the Minerals Management Service has included an ADR provision in its draft regulations that establishes ADR procedures for disputes relating to access to off shore pipelines.[31] EPA noted that the criteria listed in Section 572 of the Administrative Dispute Resolution Act were important in making the decision whether to engage in ECR.[32] VA also reported that it has revised its Directives on ADR to include reference to ECR.[33]

## VIII. Substantive Programs where ECR is Used

### Programmatic Areas that Can Benefit from ECR

Agencies were asked in Question Four of the template if they continued to use ECR in any of the priority areas that they identified in their FY 2006 ECR reports. They were also asked if usage had increased in these areas, and if they had identified new priority areas of use for FY 2007. In total, agencies identified over 80 priority areas for ECR use in their FY 2006 reports. Table 3 depicts priority areas that had been identified by more than one agency.

[30] http://www.ferc.gov/legal/maj-ord-reg.asp
[31] http://www.mms.gov/ooc/press/2008/press0618.htm
[32] http://www.usdoj.gov/adr/adr%20guide/adra1996.html
[33] http://www.opm.gov/er/adrguide_2002/section1-veterans.asp

Table 3. Programmatic areas that can benefit from ECR

| Priority Area | Agencies | Increased Use in FY 2007 |
|---|---|---|
| NEPA | EPA, DoD, USFS, DOI, USIECR | Yes |
| Environmental Cleanup/Restoration | EPA, NOAA, DOI, DoD | Yes |
| Natural Resource Conflict on Federal Land | USFS, DOI | Yes |
| Species/Habitat Conservation | DOI, NOAA | Yes |
| Hydropower and Natural Gas | DOI, FERC | Yes |
| Coastal Zone Management | NOAA, DoD | Yes |
| Historic Preservation | DOI, DoD, NOAA | Yes |
| Tribal Consultation | DoD, DOI | Yes |
| Property Rights | DoD, DOI | Yes |
| Clean Water Act | DoD, DOI | Yes |

In addition, agencies identified the following new priority areas for FY 2007:

* Off Shore Pipeline Access (DOI)
* Regulatory Development (EPA)
* Transportation (DOT)
* Superfund Program (EPA)
* Habitat Improvement (DOI)
* Grazing Disputes (DOI)
* Collaborative Policy Making in Science and Technical Areas (DOI)
* Regulations governing licensing for In Situ Leaching (ISL) Processing (NRC)
* Regulations regarding site cleanup (NRC).

## IX. Cases

Question Nine of the template asked agencies to describe a particular ECR case and how the *Basic Principles for Agency Engagement in ECR* related to the case. Agencies provided the following cases in response to this question:

### *A. EPA--Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act Programs.*

Under the Clean Water Act, EPA is responsible for approving analytical procedures for monitoring wastewater pollutants. Detection (determining a pollutant's presence) and quantitation (determining the quantity of the pollutant) are significant issues for regulators, the regulated community, environmental laboratories, agencies that must use EPA-approved analytical methods, and those who focus on human health and the environment.

In 2005 EPA chartered the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act Programs (Committee). The charge for the Committee was "to provide advice and recommendations on approaches for the development of detection and quantitation procedures and uses of these procedures in Clean Water Act programs." The Committee was facilitated by a team of neutrals and completed its recommendations in December, 2007.

The Committee's work was consistent with the following *Basic Principles for Agency Engagement in ECR:*

**Informed Commitment and Accountability:** EPA provided the Director of the Office of Water Engineering and Analysis Division to chair the Committee. In addition, the Deputy Assistant Director for the EPA Office of Water attended several meetings. The Office of Water was accountable to the Agency and to the Committee as it serviced the Committee. In addition, all members understood and accepted their roles as Committee members.

**Balanced and Voluntary Representation:** The 21 members of the Committee represented the significant interests bearing on the Committee's work. They came from the environmental community (4 seats), environmental laboratories (4 seats), industry (4 seats), public utilities (4 seats), states (4 seats), and one member from EPA.

**Group Autonomy**: The Committee developed its protocols, and its definition for consensus-based decisions. The Committee's final report represented the views of all Committee members. The Committee functioned autonomously from the EPA.

**Informed Process:** The Committee was thoughtful and deliberate in planning its work. To gain understanding of this highly technical subject matter, the Committee reached consensus on how to proceed. Among other things, the Committee agreed on the need for a pilot study to inform final decision-making, as well as reviewed in a transparent fashion the universe of detection and quantitation approaches.

**Openness:** All Committee participants and the public received agendas at least two weeks prior to each Committee meeting and meeting materials were posted to the Committee Website. The public was also able to participate in meetings by teleconference.

**Timeliness:** The Committee completed its work and a report with recommendations on time by December 31, 2007.

**Implementation:** By having an EPA representative on the Committee, EPA ensured that possible decisions could be implemented consistent with federal law and policy.

***B. DOI Bureau of Land Management, Prineville, Oregon:***

There has been an ongoing dispute over the past several years concerning the appropriate uses that should be allowed on a 2500 acre tract of BLM land in the Prineville, Oregon District. Some residents of the Prineville area have advocated increased off-road vehicle use for recreational purposes. Several nearby landowners have opposed this, contending that increased use would lead to increased trespass on their properties, as well as unacceptable increases in noise. The BLM hired a third party neutral in FY 2007 to hold initial discussions with the parties and then to facilitate a two-day conflict resolution session. Based on this session, a smaller self-directed core group was formed that met to develop a consensus recommendation on several issues. The BLM has been able to use the recommendations as alternatives in the Resource Management Plan that is being developed by the District Office.

This process allowed stakeholders to refocus their attention from conduct to issues and separate the person from the problem through the use of several of the *Basic Principles for Agency Engagement in ECR,* including:

- **Informed Commitment** (although the parties' positions were initially at odds they committed to going through the ECR process);
- **Balanced, Voluntary Representation** (the homeowners and the recreational use interests were both represented);
- **Openness** (the facilitator of the two day process kept all parties apprised of all developments);
- **Timeliness** (the parties were able to reach agreement shortly following the two day session); and
- **Implementation** (the group was able to present their desired future conditions in a format that the agency could use to make rational decisions for future management of public lands).

***C. DOJ: Water Rights Cases.*** DOJ's report described the mediation of two longstanding water rights cases. One involved groundwater rights in which mediators were able to reach an agreement after the parties had spent years in negotiation. In the other case USFS and the State of Montana reached agreement also after having been deadlocked in direct negotiation for a long period of time. The DOJ report notes that the mediators moved the discussions from positions to interests, "producing benefits not likely to have resulted from litigation."

***D. Department of the Army:*** **CERCLA case.** The Department of the Army report described a CERCLA case in which the Department of the Army was named a 3rd party defendant. This case is currently in its third mediation. The first mediation concluded in FY 2006 as the parties agreed to a process to develop the formula to allocate liability among hundreds of defendants. The second mediation dealt with the extent of financial liability and resulted in an agreement on the Army's share of liability. The third mediation is underway to resolve the remaining issues.

***E. VA: Environmental Compliance***. The Department of Veterans Affairs reported on the successful mediation of two EPA compliance actions. VA reports that through the mediation

process EPA agreed to a reduction in fines and VA agreed to implement a Supplemental Environmental Project.

***F. NOAA: Coastal Zone Management.*** **OCRM** -- ***Mediation between the Navy and California Coastal Commission***: In FY 2007, the assistance of the Office of Ocean and Coastal Resource Management was requested to mediate a dispute between the Department of the Navy and California Coastal Commission in regards to sonar exercises off of the California coast that were alleged to be harmful to marine mammals. OCRM assisted with developing the format for the mediation discussions and arranging for a mutually agreed upon expert to answer the questions of the parties in regards to sonar in the marine environment. Although the dispute between the Navy and Commission is still being resolved, mediation discussions resolved most of the issues on which the parties disagreed.

***G. DOI and USACE: Missouri River Recovery Implementation Committee (MRRIC).*** DOI and USACE reported on the use of a facilitator to resolve issues pertaining to the Missouri River Recovery Implementation Committee (MRRIC). This multi party group consisted of a variety of federal, state, local and Tribal agencies. The goal of the group was to develop a shared vision and comprehensive plan for the restoration of the Missouri River ecosystem. The facilitated process has produced a consensus charter for the group that will be presented to the group in the winter or early spring of 2008.

***H. FERC: Upper American River Project and Chili Bar Hydroelectric Project:*** FERC reported on a settlement reached in a relicensing proceeding of the Upper American River Project and the Chili Bar Hydroelectric Project. The settlement was mediated by FERC's Dispute Resolution Service and includes measures to support native fish, amphibian and reptile populations, water level elevations, protection of the viewshed, among others. FERC reports that six of the *Basic Principles for Agency Engagement in ECR* were followed in reaching the settlement, including informed commitment; balanced, voluntary representation, group autonomy, informed process; and openness.

***I. USIECR: Bridgeport Paiute Indian Colony:*** The USIECR reported on a case involving the DOI Bureau of Land Management, the Bridgeport Paiute Indian Colony, and the local community of Bridgeport, California. The case involved a transfer of land from the Bureau of Land Management to the Bridgeport Paiute Indian colony for which the Interior Board of Land Appeals had received multiple protests. The conflict was mediated over a 3-day period in February, 2007, which resulted in a settlement that according to one participant avoided a costly and divisive legal dispute.

***J. DOT: US 30 through Nebraska.*** US 30 is a major route through Nebraska. It provides the only direct connection between Columbus and Freemont, two large service and trade centers in the state. For a variety of reasons, US30 had to be relocated and improved. An Advisory Panel was formed consisting of DOT, the Nebraska Department of Roads (NDOR), and various stakeholder groups for the purpose of reaching agreement on the new location of US 30. With the help of a mediator, the panel reached agreement on the new location for new US 30.

## X. Potential Revisions for the FY 2008 Template

Based on learnings from the FY 2007 report template, the Senior Level Forum has revised the FY 2008 template to improve the quality of data collected, and to make it easier to analyze the progress agencies are making in meeting the goals of the Joint Memorandum.

To this end, the final question on the FY 2007 report template asked agencies to: (1) comment on any difficulties they had in collecting data; and (2) provide suggestions for improving the template in the future. The following summarize the comments received:

- The importance of keeping questions consistent over time. Several agencies stated this makes it easier to collect data, and to spot trends.
- Several agencies were complimentary of the format and suggested that it should not be tinkered with.
- Two agencies said the format was burdensome, requiring too much time to complete.
- Two agencies noted that some questions are not well suited for responses by field-level personnel.
- The addition of a question asking for information on unassisted collaborative problem solving activity was well received. It is clear several reporting agencies view unassisted collaborative problem-solving as integral to their missions.
- Some confusion over question two--"Challenges." Two agencies reported that it was unclear whether the "not applicable" choice meant "no challenge" or something else.
- Some confusion over the meaning of the term "initiated" in question three. Does it mean sponsoring the process, or the first party that asks for the process? EPA suggested changing "initiated" to "sponsoring", and defining it as the party that leads and provides the resources for the process.
- Concern regarding overlap between question one (building capacity) and question eight (notable achievements).

The above recommendations and feedback received at the July 9, 2008 ECR Quarterly Forum have been taken into consideration in refining the FY 2008 template. A copy of the FY 2008 report template can be found at: http://ecr.gov/Resources/FederalECRPolicy/AnnualECRReport.aspx.

## XI. Conclusion

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

- agencies reported 15 to 25 percent more instances of ECR in FY 2007 than they did in FY 2006. This could be a reflection of increased ECR, improved reporting, or of a more focused template.
- agencies have had much more success historically in tracking and recording data relating to downstream ECR, but upstream tracking capabilities are improving; and

- 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.

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.

The reports identified 14 of the 18 potential challenges listed in question two as major or minor challenges. 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. Agencies also submitted examples of cases in which they used third parties to resolve environmental conflict and further the goals of the Joint Memorandum.

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 second annual ECR Reports build on the information submitted in the FY 2006 ECR reports. They also reaffirm many of the conclusions and patterns identified in the *FY 2006 Analysis*. On the whole, they show that agencies are making significant progress in increasing the use of ECR in accordance with the Joint Memorandum.

## Appendix A. ECR Report Template

# Questions for 2007 ECR Policy Reports (Revised July 19, 2007)

On November 28, 2005, Joshua Bolten, then Director of the Office of Management and Budget (OMB), and James Connaughton, Chairman of the President's Council on Environmental Quality (CEQ) issued a policy memorandum on environmental conflict resolution (ECR). 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 memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year. The report format below is provided for the second year of reporting in accordance with this memo for activities in FY07.

The report deadline is January 15, 2008.

We understand that collecting this information may be challenging; few departments or agencies have collected this data in the past. We ask that you make a good faith effort to acquire the data to the best of your ability. The intention is to establish a useful baseline for your department or agency, while collecting 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 2007 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, a copy of the analysis of FY 2006 ECR reports is available at 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 2007, including progress made since 2006. 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 the items below present challenges or barriers that your department/agency has encountered in aVAncing the appropriate and effective use of ECR.

| | Extent of challenge/barrier | | |
|---|---|---|---|
| | Major | Minor | N/A |
| a) Staff expertise to participate in ECR | ☐ | ☐ | ☐ |
| b) Staff availability to engage in ECR | ☐ | ☐ | ☐ |
| c) Lack of party capacity to engage in ECR | ☐ | ☐ | ☐ |
| d) Limited or no funds for facilitators and mediators | ☐ | ☐ | ☐ |
| e) Travel costs for your own or other federal agency staff | ☐ | ☐ | ☐ |
| f) Travel costs for non-federal parties | ☐ | ☐ | ☐ |
| g) Reluctance of federal decision makers to support or participate | ☐ | ☐ | ☐ |
| h) Reluctance of other federal agencies to participate | ☐ | ☐ | ☐ |
| i) Reluctance of other non-federal parties to participate | ☐ | ☐ | ☐ |
| j) Contracting barriers/inefficiencies | ☐ | ☐ | ☐ |
| k) Lack of resources for staff capacity building | ☐ | ☐ | ☐ |
| l) Lack of personnel incentives | ☐ | ☐ | ☐ |
| m) Lack of budget incentives | ☐ | ☐ | ☐ |
| n) Access to qualified mediators and facilitators | ☐ | ☐ | ☐ |
| o) Perception of time and resource intensive nature of ECR | ☐ | ☐ | ☐ |
| p) Uncertainty about whether to engage in ECR | ☐ | ☐ | ☐ |
| q) Uncertainty about the net benefits of ECR | ☐ | ☐ | ☐ |
| r) Other(s) (please specify): _____ | ☐ | ☐ | ☐ |
| s) No barriers (please explain): _____ | ☐ | ☐ | ☐ |

## Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2007 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[34] | Completed Cases or projects [35] | **Total FY 2007 ECR Cases**[36] | **Decision making forum that was addressing the issues when ECR was initiated:** | | | | Of the **total FY 2007 ECR cases** indicate how many your agency/department | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | Federal agency decision | Administrative proceedings /appeals | Judicial proceedings | Other (specify) | initiated: | participated in but did not initiate: |
| *Context for ECR Applications:* | | | | | | | | | |
| Policy development | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| Planning | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| Siting and construction | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| Rulemaking | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| License and permit issuance | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| Compliance and enforcement action | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| Implementation/monitoring agreements | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| Other (specify): _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| **TOTAL** | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ | _____ |
| | (the sum should equal **Total FY 2007 ECR Cases**) | | | (the sum of the Decision Making Forums should equal **Total FY 2007 ECR Cases**) | | | | (the sum should equal **Total FY 2007 ECR Cases**) | |

[34] A "case in progress" is an ECR case in which neutral third party involvement began prior to or during FY 2007 and did not end during FY 2007.

[35] A "completed case" means that neutral third party involvement in a particular matter ended during FY 2007. 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.

[36] "Cases in progress" and "completed cases" add up to "Total FY2007 ECR Cases".

4. Is your department/agency using ECR in any of the priority areas you listed in your FY 2006 ECR Report (if submitted)? (Refer to your response to question 2 in your FY 2006 report.) Please also list any additional priority areas identified by your department/agency during FY 2007, and indicate if ECR is being used in any of these areas.

| List of priority areas identified in your department/agency FY06 ECR Report | Check if using ECR | Check if use has increased since FY 2006 |
|---|---|---|
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |
| _____ | ☐ | ☐ |

| List of additional priority areas identified by your department/agency in FY 2007 | Check if using ECR |
|---|---|
| _____ | ☐ |
| _____ | ☐ |
| _____ | ☐ |
| _____ | ☐ |

Please use an additional sheet if needed.

5. 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. Does your agency have a system for making the decision to initiate and/or participate in an ECR process? If so, please describe.

7. Describe other significant efforts your agency has taken 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.

## Section 4: Demonstration of ECR Use and Value

8. Briefly describe your departments'/agency's most notable achievements or aVAnces in using ECR in this past year.

9. ECR Case Example

Provide a description of an ECR case (preferably completed in FY 2007) summarizing the presenting problem or conflict, how it was addressed through the use of the principles for engagement in ECR (Appendix A of the Policy Memo, attached), and what outcome was achieved. Please include a discussion on the extent to which this was an effective use of ECR, including reference to the likely alternative decision making forum and how the outcomes differed, how resources were expended, and what comparative benefits or drawbacks occurred as a result of the ECR process.

10. 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, 2008.
Submit report electronically to: ECRReports@omb.eop.gov

## Appendix B. FY 2007 Agency ECR Case Examples

*Responses to Question 9 - Provide a description of an ECR case (preferably completed in FY 2007) summarizing the presenting problem or conflict, how it was addressed through the use of the principles for engagement in ECR (Appendix A of the Policy Memo, attached), and what outcome was achieved. Please include a discussion on the extent to which this was an effective use of ECR, including reference to the likely alternative decision making forum and how the outcomes differed, how resources were expended, and what comparative benefits or drawbacks occurred as a result of the ECR process.*

### Air Force (USAF)

At one of our Air Force bases, we were able to use an ECR process to find cleanup solutions and allow timely construction of remedies for contaminated sites.

Through tiered partnering team solutions the time for project implementation was greatly shortened. The project is ongoing, but in FY 07, use of the ECR process allowed three high risk sites to go forward by September of 2007, meeting USAF goals.

### Army Corp of Engineers (USACE)

a. From the USACE Great Lakes and Ohio River Division:

"The Great Lakes and Ohio River Division has an extremely controversial project at Wolf Creek Dam (Cumberland Lake). The dam impounding this lake has been identified to have safety issues. The lake is upstream of Nashville and many smaller municipalities. Prior to initiating work on the dam the Nashville District embarked on a very integrated program of public awareness. The approach towards educating the public and avoiding ECR involved public meetings, news releases, TV spots, radio announcements and just about every other form of media transmission of information. The District did and outstanding job of dealing with conflict resolution by demonstrating a high degree of sensitivity to the fear of the public and reaching out to them to educate in every manner conceivable."

b. From the USACE Northwest Division (NWD:

"Numerous milestones associated with the development of the Missouri River Recovery Implementation (MRRIC) were met in 2007 although establishment of the actual MRRIC will be completed in 2008. These milestones include:

> Effective direct facilitation of the Federal Working Group (FWG) throughout the MRRIC development process
>
> Development of a process for development of the MRRIC Charter with the full range of Basin Tribes and stakeholders
>
> Facilitation of development of the recommended charter for the MRRIC with range of Tribes and stakeholders over the past year. This included numerous meetings of the drafting and review teams across the Basin as well as public review process for the draft charter. A **consensus** recommended charter is anticipated to be provided by Basin Tribes and stakeholders to the ASA (CW) in January of 2008."

"……conflict resolution process for the Baker Dam relicensing effort by Puget Sound Energy (PSE). PSE agreed to a negotiated settlement of mitigation for their relicense. They engaged over 20 representatives of Federal, state, and local resource agencies, local governments, tribal nations, and NGOs over 5 years to develop a plan that was acceptable to all parties. PSE hired excellent facilitators (not PSE employees) who were able over time gain the trust and respect of participants. Without the facilitators, this process could never have been successful. The Negotiated plan was signed early in 2007. (The Corps did not have authority to sign).

"Using a negotiated settlement process required considerable time and support from PSE and participants. It was costly, exhausting, and resulted in a large mitigation plan. However, PSE was ultimately able to avoid going to court over the relicense effort, and has good relationships with basin stakeholders. Signers have agreed they will not pull out of the settlement agreement and sue PSE"

c. From the USACE South Atlantic Division (SAD):

"….. SAJ initiated an arrangement with the Florida Conflict Resolution Consortium (Dr. Tom Taylor) to facilitate resolution of environmental issues stemming from an ongoing feasibility study for navigation improvements at Port Everglades (Fort Lauderdale), Florida. Various navigation improvement scenarios could have significant impacts highly valued coral reef/hardbottom resources in the project area. There are significant differences between USACE and Federal and state resource agencies, as well as with scientists in the academic community, in regard to the quantification of impacts on these resources and potential measures to mitigate these impacts. The differences have been as fundamental as the appropriate methodologies for analyzing the impacts and mitigation options ranging to the basic assumptions (e.g., coral recovery rates) used in the methodology. The complex issues associated with this project were broken down into a set of manageable elements. A series of meetings, facilitated by Dr. Taylor, were set up to address each element, with each subsequent meeting building upon the progress and accomplishments from the previous meeting. The process is still underway as of early 2008, but it has already helped to significantly narrow the technical gaps and facilitated less hostile, more productive, interaction among the parties. [USACE Jacksonville District (SAJ]"

"….. the late stages of a feasibility-level study for channel improvements at Miami Harbor. At that time, SAJ successfully used the Florida Conflict Resolution Consortium to resolve differences relative to appropriate mitigation requirements for the project".

d. From the USACE South Pacific Division (SPD):

"… use of a third party mediator for the ESA Collaborative Program. Conservation Breeding Specialist Group facilitated a symposium on the Population Viability Assessment (PVA) and Population and Habitat Viability Assessment (PHVA) for the Rio Grande Silvery Minnow along the Rio Grande among Federal, state, local agencies, non-profit groups, local businesses and tribes. Information collected was unbiased and not based on agencies' agendas or missions. [USACE Albuquerque District (SPK)]"

"The Guadalupe River flood control project in Downtown San Jose, California has been the only notable example where ECR was used to resolve an environmental dispute to allow project construction to continue. An agreement was reached through an alternative dispute resolution process between 1997-1999. The agreement avoided litigation raised over concerns about the adequacy of the project mitigation plan, which has been raised in Notices of Intent to Sue under the Clean Water Act filed by private environmental interests.

## Army Legal Services Agency - Environmental Law Division (USALSA)

The Army was named a third-party defendant in a CERCLA case initiated by the Environmental Protection Agency (EPA) and the New Jersey Department of Environmental Protection (NJDEP), allegedly arranging for the disposal of waste at the Combe Fill South Superfund Site in New Jersey (the Site). United States v. American Thermoplastics, Inc. This case has been ongoing for over 10 years, and is currently in its third mediation. The first mediation ended in FY 2006 and was somewhat successful in allocating liability among hundreds of parties. A second mediation was initiated in FY 2006 to apply the allocation in a mutual settlement. It is this mediation that ultimately resulted in an agreement on Army's share of liability at the Site.

Although the United States participated in the second mediation, it was not a party to the first mediation because the US, as a unitary executive, could not agree to keep confidential information regarding other party's waste streams and disposals at other sites. The parties moved forward with limited discovery in the litigation track while mediation progressed.
The second mediation resulted in an agreement in principal between the Army and the private parties, EPA and NJDEP. Caucusing helped the parties to evaluate the offers and move toward an agreement. The government employed mediator recognized the importance of neutrality through these discussions, yet was able to transfer information among the different groups to move them toward settlement.

**Department of Health and Human Services (DHHS)**

Not Applicable

**Department of Homeland Security (DHS)**

Not Applicable

**Department of Energy (DOE)**

**National Energy Technology Laboratory**

The National Energy Technology Laboratory (NETL) is part of the national laboratory system which is owned and operated by DOE. NETL's mission is to enable domestic coal, natural gas and oil to economically power the Nation's homes, industries, businesses and transportation systems while protecting our environment. NETL's Albany site continues to collaborate with Oregon's Department of Environmental Quality (ODEQ) in its groundwater investigation. ODEQ provides advice and recommendations to NETL related to issues surrounding potential groundwater contamination. ODEQ is a state regulator with authority delegated from EPA. An issue for NETL is how best to address the issues associated with potential contamination, including investigating the nature and extent of the contamination while balancing the interest and duties of the ODEQ and those of the public.

Throughout its investigation, NETL shares data and various reports with ODEQ. In response, ODEQ provides advice and recommendations to NETL on issues surrounding the potential groundwater contamination. NETL voluntarily complies with ODEQ's recommendations. The exchange of information and guidance, allows for openness between the two agencies, a more informed process in terms of obtaining guidance or agreement on particular actions or suggested approaches and accountability by NETL to ODEQ. This cooperative approach has made for a more effective groundwater investigation than if NETL simply pursued its own investigation without any input from its regulator. ODEQ will ultimately be charged with determining NETL's compliance with groundwater related rules and regulations. Consequently, collaborating at this early stage, saves NETL resources in the form of personnel, time and money.

**Richland Operations Office and Office of River Protection**

As described in section II. A, DOE, EPA and the State of Washington Department of Ecology are engaged in high level negotiations focused primarily on milestones for the Hanford WTP and SST retrievals, and groundwater remediation.

The current negotiations described have not yet concluded, and it is important to note that a fundamental principle agreed to by all three parties is that, to the extent the parties have identified individual topics on which progress has been made, all parties have reserved the ability to review the entire package before committing to enter into an agreement. No such review has yet taken place and senior management of the three parties has made no final decisions concerning an agreement. However, all three parties recognize the benefits of reaching a collaborative solution.

**Paducah Gaseous Diffusion Plant**

The 1350-acre Paducah Gaseous Diffusion Plant (PGDP) is a uranium-enrichment facility owned by DOE. The PGDP started uranium-enrichment in 1952. Plant operations have generated hazardous, non-hazardous and radioactive wastes.

Collaborative processes were led by the Kentucky Research Consortium for Energy and Environment (KRCEE) with meetings facilitated by a subject matter expert from Argonne National Laboratory (ANL).

Projects led by KRCEE included studies of seismic conditions at the Paducah Gaseous Diffusion Plant (PGDP) (i.e., Seismic Study), methods to acquire property or interests in property to restrict access by the pubic to contaminated groundwater underlying private property (i.e., Land Study), and the rate at which trichloroethylene (TCE), a common contaminant in groundwater at the PGDP, degrades to nontoxic products (i.e., TCE Degradation Study). The Seismic Study was completed by researchers from the University of Kentucky (UK) following project scoping by a team that included representatives from the UK, the Kentucky Geological Survey, United States Geological Survey, Commonwealth of Kentucky Environment and Public Protection Cabinet Department of Environmental Protection (KDEP), Commonwealth of Kentucky Cabinet of Health and Family Services Radiation Health Branch (KYRHB), EPA, and DOE's Portsmouth/Paducah Project Office (PPPO). The results of the Seismic Study are being used to support decisions regarding the siting and evaluation of a potential on-site disposal facility that would accept wastes associated with the continuing cleanup and future demolition of the PGDP that would otherwise require offsite disposal, and the safety of a currently operating permitted Subtitle D landfill. Generally, the results indicate that there are no seismic conditions that would preclude the future construction of the on-site disposal facility or the continued operation of the Subtitle D landfill. The Land Study was completed by KRCEE with cooperation from faculty located at UK and provides information regarding property acquisition that will be used when making cleanup decisions for contaminated groundwater at the PGDP. During completion of the project KRCEE attended and presented at several meetings with the public, KDEP, KYRHB, EPA, and PPPO.

The TCE Degradation Study is an ongoing project led by KRCEE that includes a project team composed of representatives from UK, KDEP, KYRHB, EPA, PPPO, Savannah River National Laboratory, Idaho National Laboratory, and DOE Office of Groundwater and Soil Remediation. The results of the TCE Degradation Study will be used to evaluate the rate and sustainability of natural attenuation of TCE found in groundwater and soil at the PGDP. The findings of the evaluation will be incorporated into future multi-million dollar decisions regarding cleanup of the TCE contamination found in source areas at and in plumes originating from the PGDP.

The ongoing project being facilitated by ANL involves the evaluation and risk assessment of soil and rubble piles found outside the industrialized area of the PGDP at locations accessible to recreational users. Through facilitated meetings, PPPO was able to reach agreement to use innovative sampling methods, such as X-Ray Fluorescence (XRF) and immunoassay kits, to determine the nature and extent of contamination. Using these methods for the soil and rubble pile areas and for future projects, now that the methods have been successfully demonstrated, is expected to result in more complete characterization of areas potentially impacted by contamination from the PGDP at considerable cost and schedule savings.

**Department of Interior (DOI)**

There has been an ongoing dispute over the past several years concerning the appropriate uses that should be allowed on a 2500 acre tract of BLM land in the Prineville, Oregon District. Some residents of the area have advocated increased off-road vehicle use for recreational purposes. Nearby landowners have opposed this, contending that increased use would lead to increased trespass on their properties, as well as unacceptable increases in noise. The BLM hired a third party neutral to hold initial discussions with the parties and then to facilitate a two day conflict resolution session. Based on this session, a smaller self-directed core group was formed that met to develop a consensus recommendation on several issues. The BLM has been able to use the recommendations as alternatives in the Resource Management Plan that is being developed by the District Office.

This process allowed stakeholders to refocus their attention from conduct to issues and separate the person from the problem. Through the use of several of the Basic Principles for Agency Engagement, including Informed Commitment (although the parties positions were at odds they committed to going through the ECR process); Balanced, Voluntary Representation ( the homeowners and the recreational use interests were both represented); Openness (the facilitator of the two day process kept all parties apprised of all developments); Timeliness ( the parties were able to reach agreement shortly following the two day session); and Implementation (BLM has been able to incorporate the recommendations into its plan), the group was able to present their desired future conditions in a format that the agency could use to make rational decisions for future management of Public Lands. The alternative forum for this conflict would have been the judicial system, as parties have indicated that this would be their alternative if they were not involved in settling the issues.

**Department of Justice (DOJ)**

The Department mediated to a successful resolution two longstanding water rights cases. In the Lummi Indian groundwater rights case, the United States proposed mediation which successfully brought to a conclusion years of negotiations with the State of Washington over complex issues. In the U.S. Forest Service case, mediation successfully brought to a close two decades of on-and-off negotiations over water rights on Forest Service lands in Montana. The mediation was particularly effective in getting the parties focused on "interest based" discussions, and resulted in three proposed water rights compacts involving scores of streams. The mediation avoided several hundred thousand dollars in litigation costs, and produced benefits not likely to have resulted from litigation.

## Department of the Navy (DON)

1. Facilitated Partnering. Pages 48 and 49 of the attached article provides concise descriptions of two notable achievements in the area of installation restoration partnering, a facilitated ECR process.

2. CERCLA Recovery. The second attachment is a press release from the Department of Justice describing the results of a mediation in an affirmative CERCLA action initiated by the DON, through the Department of Justice,
against Hercules, Inc. The mediation, conducted prior to the filing the complaint in district court, provided a recovery of $12.95 million to pay for clean-up of a Government owned, contractor operated site in West Virginia. It is the first settlement in which the Justice Department has recovered environmental cleanup costs from a contractor on behalf of the Navy.

3. Noise Mediation. The DON also successfully used mediation to deal with flight noise issues. The parties in the Oceana inverse condemnation case (Testwuide, et al. v. United States and related cases), which is before the U.S. Court of Federal Claims, engaged in mediation in March 2007, with Judge Bruggink of the court as mediator. This case involves allegations that flights of F/A-18 C/D aircraft from Naval Air Station Oceana and Naval Auxiliary Landing Field, Fentress constituted a "taking" of the roughly 2,070 properties involved in the litigation. The mediation was successful, in that the parties were able to reach a settlement with Judge Bruggink's able assistance, and the settlement has been accepted by all but five of the property owners.

Camp Butler's EMS was developed in partnership with the U.S. Environmental Protection Agency (EPA) and was fully implemented by 31 December 2005 in accordance with E.O. 13148. This required a review of all base practices and environmental impacts associated with these practices. Through risk prioritization ranking, Objectives and Targets were established. Camp Butler's environmental staff then prepared Standard Operating Procedures in order to minimize impact to the environment.

These efforts are reinforced by a robust EMS training plan, which includes awareness training at all levels. EMS training has been added to the Camp Butler Welcome Aboard Briefs and English and Japanese Environmental Compliance Courses.

### USNS JOHN ERICSSON

*Environmental Quality—Small Ship*

From Fiscal Year 2004 to 2006, the USNS JOHN ERICSSON successfully loaded 57,606,360 gallons of fuel for the ships of the fleet and 24,036,768 gallons of jet fuel with no major spills or issues. During the same time period, the ERICSSON completed over 350 separate Fueling at Sea operations in the 5th Fleet, 7th Fleet and 3rd Fleet AOR.

The ERICSSON operates in compliance with OPNAVINST 5090.1 and voluntarily complies with U.S. Coast Guard regulations, and Annex I of the International Maritime Organization's (IMO) "International Convention for the Prevention of Pollution from Ships, and the Protocol of 1978" (MARPOL 73/78). This Annex contains regulations for the prevention of oil pollution. Additionally, the ERICSSON voluntarily complies with the IMO's International Safety Management Code.

The ERICSSON strives daily to be a good steward of the environment by adhering to Navy and international environmental protection requirements. By following these regulations and guidance, the ERICSSON is able to minimize the chance of any impact to the environment, thereby enhancing the Navy's operational capabilities. All ERICSSON crewmembers are personally committed to the Military Sealift Command's approach of going beyond compliance to become true stewards of the ocean environment by operating an environmentally sound ship.

Fred Woody, manager of the T-AO class of ships, and Capt. John Pope, master of the USNS JOHN ERICSSON accept the SECNAV Environmental Award in the Environmental Quality—Small Ship category.

### Naval Weapons Industrial Reserve Plant McGregor

*Environmental Restoration—Installation*

Industrial activities at Naval Weapons Industrial Reserve Plant (NWIRP) McGregor, a former 9,700-acre government-owned, contractor-operated facility about 20 miles southwest of Waco, TX included weapons and solid-fuel rocket propulsion systems manufacturing from 1942 until its closure in 1995. In order to prepare the site for other uses, the Navy implemented an aggressive multi-phased Resource Conservation and Recovery Act (RCRA) Facility Investigation to ultimately achieve an EPA "Ready for Reuse" determination in 2006. The project hinged on the exceptional cooperation among EPA, the Texas Commission on Environmental Quality, the Navy and its contractors, and the public. It was this cooperation that facilitated a progressive regulatory strategy that replaced a redevelopment-hindering facility-wide RCRA permit with a redevelopment-friendly Post Closure Order. This investigation, remediation, and management strategy resulted in several key achievements:

- Noteworthy "Firsts": First Navy non-Base Realignment and Closure Operating Properly and Successfully (OPS) determination. First Navy facility to receive an EPA "Ready for Reuse" determination.
- Accelerated remediation timeframes: Expected reduction of clean-up times by 10 years or more using highly innovative remediation technologies that are readily transferable to other DoD sites.



- Cost savings: $20 million in construction costs and more than $1 million annually.
- Economic redevelopment: 1,000 new jobs for the city of nearly 6,000 residents have been generated.
- Spotless health and safety and environmental record: More than 1,000,000 construction man-hours with no reportable health and safety incidents.

Members of the NWIRP McGregor team accept the SECNAV Environmental Award in the Environmental Restoration—Installation category.

### Marine Corps Base Camp Lejeune

*Environmental Restoration—Installation*

The MCB Camp Lejeune Partnering Team is made up of the Base, Naval Facilities Engineering Command, EPA, the North Carolina Department of Environment and Natural Resources, and support contractors. Working together, and with a commitment to continuous improvement, the Team cleans up hazardous waste sites with the application of innovative, quality, and cost effective technologies to protect human health and the environment.

The Partnering Team has a formal process for ensuring that environmental programs are conducted in full compliance with Federal and State requirements. The Team works closely to resolve complex issues that may impede the progress of the Installation Restoration (IR) Program, and has been successful in reducing process time from 65 to 39 months.

The Team has lowered remediation costs by using the Pilot Expedited Environmental Cleanup Program, which allows the evaluation of innovative remedial technologies to identify the most cost-effective options.

MCB Camp Lejeune has developed and maintained three remediation programs, ensuring the effective and timely cleanup of varying types of contamination on Base. During the past year, the IR program has achieved No Further Action (NFA) or Records of Decision (ROD), which reduced the IR Program from 19 to 15 sites. Confirmatory sampling performed in 2006 under the Solid Waste Management Unit (SWMU) Program has also reduced the total number of SWMU sites from 59 to 23 sites. Finally, the Underground Storage Tank (UST) Program continues to achieve closure on several petroleum sites. During 2006, 10 UST sites achieved NFA, further reducing the total number of active sites on base to 48.

Representatives from MCB Camp Lejeune accept the SECNAV Environmental Award in the Environmental Restoration—Installation category.

Department of Justice

DEPARTMENT OF THE NAVY
ENVIRONMENTAL PROTECTION AGENCY

| | |
|---|---|
| FOR IMMEDIATE RELEASE | ENRD (202) 514-2007 |
| WEDNESDAY, OCTOBER 31, 2007 | EPA (202) 564-4355 |
| WWW.USDOJ.GOV | TDD (202) 514-1888 |

**HERCULES, INC. PAYS $12.95 MILLION FOR ENVIRONMENTAL CLEANUP COSTS AT NAVY-OWNED, CONTRACTOR-OPERATED SITE**

WASHINGTON—Hercules, Inc., a former defense contractor, has agreed to pay the United States nearly $13 million toward the cleanup of the Allegany Ballistics Laboratory (ABL) site in Rocket Center, West Virginia, according to a settlement reached today with the Department of Justice, the Department of the Navy, and the U.S. Environmental Protection Agency (EPA).

This is the first settlement in which the Justice Department has recovered environmental cleanup costs from a contractor on behalf of the Navy. The consent decree was lodged today in the U.S. District Court for the Northern District of West Virginia.

The agreement provides that Hercules, which operated the Navy-owned ABL site from 1945 to 1995, will pay a substantial portion of the costs needed to clean up the site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Some of the money recovered by the Navy from Hercules may go toward further environmental cleanups on Navy-owned land.

The Navy is performing the ongoing cleanup at ABL in consultation with EPA and the state of West Virginia. ABL was placed on EPA's National Priorities List (NPL) in May 1994. Under the agreement, EPA will recover a portion of the $12.95 million, which will go towards its expenditure in overseeing the cleanup of this NPL-listed facility.

In a complaint filed simultaneously with the consent decree, the United States charged that Hercules' activities at ABL, including the manufacture of rocket motors and fuel, led to environmental releases of hazardous substances including organic solvents, explosives, propellants, and metals.

"This settlement reflects our commitment to ensure that defense contractors pay their appropriate share of costs arising from environmental cleanups at military facilities," said Ronald J. Tenpas, Acting Assistant Attorney General for the Environment and Natural Resources Division. "This settlement is part of an expanding enforcement partnership between the Department of Justice and the Department of Defense the goal of which is to secure an appropriate contribution to overall cleanup costs from the contractors who operated these facilities."

"The Navy and Hercules had a longstanding relationship in the effort to develop and produce weapons systems to defend and protect our military and our nation," said Don Schregardus, Deputy Assistant Secretary of the Navy for Environment. "This agreement memorializes our shared commitment to further protect our nation by responsibly cleaning up our environment. The Navy appreciates Hercules' support in these efforts."

"Just like any other company, a government contractor that creates a contaminated site must take responsibility for cleaning up the site," said Donald S. Welsh, administrator for EPA's mid-Atlantic region. "EPA is pleased that today's settlement recovers taxpayer money that EPA has spent on this cleanup."

Today's agreement is subject to a 30-day public comment period and final court approval. A copy of the consent decree is available on the Department of Justice Web site at http://www.usdoj.gov/enrd/Consent_Decrees.html.

Additional information about the ABL cleanup program is available at the Navy's Web site, http://public.lantops-ir.org/sites/public/ABL/Site%20Files/IRhistory.aspx, and at EPA's Web site, http://www.epa.gov/reg3hwmd/super/sites/WV0170023691/.

###

## Department of Transportation (DOT)

1. US 30 is a major east-west route through Nebraska. It provides the only direct connection between Columbus and Fremont, two of the larger service and trade centers in this area of the state. The Nebraska Department of Roads (NDOR) sought conflict resolution assistance from the U.S. Institute for Environmental Conflict Resolution (USIECR). The USIECR worked with NDOR and the various stakeholder groups within this roadway segment to select a third party from its National Roster of Environmental Dispute Resolution and Consensus Building Professionals to conduct an independent conflict assessment and provide mediation services.

The mediators recommended forming a US 30 Advisory Panel to represent and share information with affected and interested segments of the population and to help them reach an agreement on a location for the new, improved US 30. The Panel generated a report with findings and recommendations in December 2006. Since that time the project has not moved forward due to NDOR's funding and schedule concerns.

2. With the assistance of the USIECR, the FAA continues to work to resolve disputes with the National Park Service and other stakeholders concerning substantial restoration of natural quiet to Grand Canyon National Park under the National Park Overflights Act (Pub. L. 100-91). ECR has helped the parties to better understand each other's positions and interests, to work together to find acceptable solutions, and to minimize litigation.

## Department of Veterans Affairs (VA)

In FY 2007, VA settled two compliance actions with EPA through the EPA's Office of Administrative Law Judges mediation program. These are the only actions completed in FY 2007 that presented an opportunity to utilize any form of ECR. Both actions involved violations of the Resource Conservation and Recovery Act (RCRA). Through the mediation process, EPA agreed to a reduction in fines and VA agreed to implement a Supplemental Environmental Project.

As discussed above, VA settled two EPA compliance actions through mediation with an EPA Administrative Judge. VA has a history of successfully settling enforcement actions through an informal process; however, in these cases, EPA chose to file an administrative compliance action. Once a compliance action is filed, the litigation process proceeds according to deadlines imposed by regulations and by the tribunal. By placing the cases on the mediation docket, the parties were afforded the opportunity to meet and complete a settlement. Although VA believes these matters would have settled eventually, participating in the mediation offered by the EPA saved both parties time and money by avoiding discovery and a trial.

**Environmental Protection Agency (EPA)**

*Use of the Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving by US Environmental Protection Agency in the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act Programs*

Under the Clean Water Act, the US Environmental Protection Agency (EPA) is responsible for approving analytical procedures for monitoring wastewater pollutants. Detection (determining a pollutant's presence) and quantitation (determining the quantity 20 of the pollutant) are significant issues for regulators, the regulated community, environmental laboratories that analyze wastewater for monitoring and compliance purposes, other agencies that must use EPA-approved analytical methods, and those who focus on human health and the environment.

By 2005, when EPA chartered the Federal Advisory Committee on Detection and Quantitation Approaches and Uses in Clean Water Act Programs (Committee), concerns with the Method Detection Limit (MDL) procedure as published in 40 CFR Part 136, Appendix B were well characterized. The charge to the Committee was "to provide advice and recommendations on approaches for the development of detection and quantitation procedures and uses of these procedures in Clean Water Act programs." The Committee made recommendations and completed its work in December 2007.

Informed Commitment and Accountability—The USEPA Office of Water made available to the Committee the Engineering and Analysis Division Director to Chair the Committee, participate fully on behalf of the Office of Water and represent the views of the Office of Water. The Deputy Assistant Administrator for the Office of Water appeared at several meetings to listen to the findings and engage with the Committee members. Technical assistance was provided via agency participation in technical work group meetings as well as agency funding of a pilot study of a new procedure. The US EPA Office of Water was accountable by participating in the process at every Committee meeting, bringing Agency views to the table, and organizing cross-Agency groups between sessions to communicate Committee deliberations and prepare for Agency representation. The process was transparent and accountable to the public through Federal Register notices, posting of Committee agendas and materials to a website, provision of teleconference lines for public participation, and public comment opportunities at each Committee meeting.

Balanced, Voluntary Representation—The Committee included 21 members balanced with the affected interests of the environmental community (4 seats), environmental laboratories (4 seats), industry (4 seats), public utilities (4 seats), states (4 seats) and one member from EPA. All parties were interviewed as part of a situation assessment and potential participants identified who would be willing to voluntarily serve on the federal committee, if appointed, under provisions of the Federal Advisory Committee Act. Some of the interested organizations had participated in litigation and public hearings around the issue of developing a new method for detection and quantitation at 40 CFR Part 136 Appendix B. All parties continued to participate in Committee meetings and EPA provided travel and per diem support to those who needed financial assistance in order to attend.

Committee rules were structured so that no consensus decisions could occur without participation of at least one member of each caucus (the term used to identify each interest grouping).

Group Autonomy—As a member of the Committee, EPA engaged with all participants in developing the protocols and the definition for consensus-based decisions, and used the assistance of a neutral facilitation team. The Committee made recommendations and prepared a report representing the views of all Committee members. The neutral 21 facilitation team served the whole Committee.

Informed Process—The Committee had a scope of reviewing detection and quantitation approaches and uses in Clean Water Act programs. The debate about changing the detection and quantitation approaches was quite technical. Early on, the Committee reviewed the universe of detection and quantitation approaches, prepared a short list of approaches for pilot testing, and agreed by consensus to characteristics of what Committee members needed a procedure to do. A scope of work for a pilot study was developed by a sub group (balanced with representatives from all caucuses) and brought to the full Committee for approval. Because the Committee members wanted to have pilot study results (a six month period) to inform final decision-making, the Committee formally requested a time extension from EPA. The time extension was granted and the Committee was re-chartered through December 31, 2007. Pilot study results were reviewed and Committee members weighed the results in decision-making around a recommended detection and quantitation approach.

Openness—All Committee participants and the public received agendas at least two weeks prior to each Committee meeting and meeting materials were posted to the public website. Teleconference lines were open for public participation at all Committee meetings.

Timeliness—The Committee completed its work and a report with recommendations on time by December 31, 2007. EPA provided views of the Office of Water throughout the process and at its conclusion, EPA representatives committed to taking through rulemaking a new approach to detection and quantitation.

Implementation—By having an EPA representative on the Committee, EPA ensured that possible decisions could be implemented consistent with federal law and policy. At several points, EPA experts briefed Committee members on legal and policy issues. Prior to final Committee recommendations, EPA representatives tested possibilities for both implementation and committed resources to implementation.

**Federal Energy Regulatory Commission (FERC)**

In FY07, the Sacramento Municipal Utility District, Pacific Gas & Electric Co., several federal and state resource agencies, several environmental interest groups, and other stakeholders reached a settlement in the relicensing proceeding of the Upper American River Project and the Chili Bar Hydroelectric Project. These projects are located on the American River, or its tributaries, in California, and comprise eight hydroelectric developments. Examples of issues that were resolved by the settlement include: measures affecting the ecology, health and suitability of reaches downstream of the project dams in order to support native fish,

amphibian, and reptile populations; water level elevations for the protection of fish; the availability of boat launches; the visual experience at the project reservoirs; measures that provide for the protection of wildlife and plants; vegetation and invasive weed management; measures to upgrade and expand recreational facilities and operations; a management plan to protect cultural resources; and project operations for hydroelectric generation.

The settlement was mediated by the Commission's Dispute Resolution Service. The DRS used five of the eight ECR principles for agency engagement: informed commitment; balanced, voluntary representation; group autonomy; informed process; and openness. A Draft Environmental Impact Statement was issued for the project in September 2007. Commission staff addressed a sixth ECR principle for agency engagement or implementation and modified some of the applicant-proposed project-related environmental measures to, among other things, require the filing of annual reports, expand the scope of some management plans, and provide an annual employee environmental awareness program. The settlement agreement is available on the Commission's website from the eLibrary feature at http://www.ferc.gov/docs-filing/elibrary.asp. Accession number 20070208-4003

## General Services Administration (GSA)

No cases in 2007.

## National Aeronautics and Space Administration (NASA)

Not Applicable

## National Capital Planning Commission (NCPC)

Not Applicable

## National Indian Gaming Commission (NIGC)

The NIGC's only case mentioned during 2006 that continued into 2007, was terminated as a result of the federal action being withdrawn.

## National Oceanic and Atmospheric Administration (NOAA)

*DARRP - Alcoa (Point Comfort) NPL Site Cooperative Assessment, Integrated Remediation and Restoration (CAIRR) Project*

The National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, along with other Federal agencies, faces the challenge of balancing competing interests in order to carry out its congressional mandate to protect and restore the public's trust resources in the oceans and on the coasts of the United States. NOAA regularly undertakes Cooperative Conservation by following principles for engaging in collaborative problem solving and Environmental Conflict Resolution (ECR) in its interactions with stakeholders. NOAA uses these principles in order to avoid litigation, achieve quality and timely outcomes, reduce transaction costs, and engender trust among stakeholders when controversies arise.

With NOAA leading the way, our collaborative partnership with EPA, federal and state co-trustees, industry, and local communities successfully integrated Remedial Investigation and Risk Assessment (RI/RA), natural resource restoration planning and project construction into a seamless solution to restore the Lavaca Bay estuary.

Partners:

Texas Commission on Environmental Quality, Texas Parks and Wildlife Department, Texas General Land Office National Oceanic and Atmospheric Administration

The U.S. Fish and Wildlife Service, USEPA, Cities of Port Lavaca and Point Comfort, Calhoun County & Calhoun Co. Navigation District, Alcoa

Alcoa Point Comfort Operations (PCO) began integrated production of aluminum and other products in the 1940's. Aluminum smelting operations ceased in the 1980s, but bauxite refining continues. In the late 1960's, PCO added a mercury cell chlor-alkali plant to produce caustic soda (and chlorine gas) for bauxite processing. Operation of that plant, through 1977, released mercury (Hg) and Hg laden wastewater to Lavaca Bay and to underlying aquifers. In April 1988, the Texas Department of Health issued a "closure order" prohibiting the taking of finfish and crabs for consumption from areas near the facility due to health risks posed elevated mercury concentrations. This action indicated that a CERCLA response might prove necessary and the site was proposed for the National Priorities List (NPL). The Point Comfort/Lavaca Bay Superfund Site (the Site) was placed on the NPL in 1994. The Site's Record of Decision for sources control and clean-up to reduce risk posed by elevated levels of mercury and hydrocarbons in sediment was issued jointly by the State of Texas and EPA on December 20, 2001.

NOAA's vision of a collaborative process catalyzed the team's adoption of the integrated paradigm (CAIRR). The partners' cooperation lead to the rapid completion of remedial actions and restoration construction at the Site. Empowered by the shared fundamental goal "betterment of the environment and natural resources", the team of diverse partners overcame all challenges presented and delivered results to the Public. This is an exemplar of the CAIRR partnership approach.

The Trustees and Alcoa recognized that it would be possible to use the information gathered in the RI/FS & Risk Assessments to assess natural resource damages due to the similarity of the data requirements. In 1997 a Memorandum of Agreement between Alcoa and the Trustees enabled funding and enhanced formal cooperation. Simultaneous investigations of risk and injury were conducted, effectively combining remediation with restoration planning. The entire team, working collegially, drew from the "communicative planning" approach to complete the RI/FS, Risk Assessments and NRDA. Applying the idea that with the "wicked problems" (i.e., in planning theory -complex contaminant and sociopolitical problems) such as this, there are no correct or incorrect answers - only better and worse ones, decisions were made that allowed the partnership to succeed. The remedial and restoration actions, i.e. appropriate compensation for all resource losses attributable to Site releases (including due to all remedial actions), were set forth in the universal settlement.

The CAIRR paradigm permitted comprehensive coverage of all CERCLA issues associated with the Site, fostered good working relationships among the trustees, Alcoa, and the local community, and resulted in nearly universal support for these restoration actions within the local community.

In January 2005, the final response and restoration legal agreements (consent decrees) were 'simultaneously' entered by U. S. District Court for the Southern District of Texas. Construction was rapidly initiated on all restoration projects and completed by August 2006.

Alcoa created 70 acres of intertidal salt marsh on Aransas National Wildlife Refuge and create 15 acres of new oyster reef in Lavaca Bay. Additionally, Alcoa built new fishing piers at Six Mile Park, Point Comfort Park, and at the Bayfront Peninsula in Point Comfort; replaced an existing auxiliary boat ramp and constructed a new timber dock at Six Mile Park; made improvements at Magnolia Beach; and constructed new timber docks at Six Mile Park and at Lighthouse Beach. All projects were completed during the timeframe.

One the wetland project is certified as successful, ALCOA will cause the transfer 729 acres of land to be preserved by the U.S. Fish and Wildlife Service as part of the Aransas National Wildlife Refuge adding to Whooping Crane Habitat under protection and management.

OCRM -- *Mediation between the Navy and California Coastal Commission*: In 2007, the assistance of the Office of Ocean and Coastal Resource Management was requested to mediate a dispute between the Department of the Navy and California Coastal Commission in regards to sonar exercises off of the California coast that were alleged to be harmful to marine mammals. OCRM assisted with developing the format for the mediation discussions and arranging for a mutually agreed upon expert to answer the questions of the parties in regards to sonar in the marine environment. Although the dispute between the Navy and Commission is still being resolved, mediation discussions resolved most of the issues that the parties were in disagreement on.

NMFS -- In 2007, the Pelagic Longline TRT was charged with reducing serious injury and mortality (bycatch) of long-finned pilot whales, short-finned pilot whales, and Risso's dolphins to levels approaching a zero bycatch rate in the Atlantic pelagic longline fishery. The team is composed of a diverse group of stakeholders, including commercial fishermen, environmental conservationists, academics, and federal and state representatives, each with their own views on reducing bycatch. The facilitators worked with each team individually to determine their position relative to the issue and how they might be willing to compromise to achieve the goal. The facilitators used this information throughout TRT meetings to shape the deliberations in such a way that all team members were comfortable with the resulting recommendations. Having facilitators manage the process was especially useful because NMFS could participate without seeming to "drive" the process or the outcome, which may have hindered deliberations or limited participation from team members. Facilitation was also key in keeping the team on track in terms of managing limited meeting time and organizing information in an easy to follow format that expedited the process.

**Nuclear Regulatory Commission (NRC)**

The NRC has traditionally used the convening and facilitation of collaborative processes in the development of rulemaking and policy that affect safety or environmental concerns. One example from CY2007 is the convening of a collaborative workshop on the environmental review aspects of new reactor licensing. This roundtable format involved participants of all major stakeholders, including representatives of the Council on Environmental Quality. The process resulted in the identification of major issues of concern – some of which the agency was not aware of, or at least not aware of the importance of the issues to particular stakeholders. The process also resulted in the clarification of the extent of agreement or disagreement on the key issues.

A second example is the collaborative work done with the EPA and the uranium mining industry on the establishment of new NRC regulations on the licensing of ISL uranium processing facilities. This process is currently evolving and the full development is anticipated to occur in CY2008. The process began with extensive dialogue between the staff of the Office of General Counsel at the two agencies to establish the framework for proceeding with an NRC rulemaking that would significantly involve the EPA from the beginning in the development of the NRC proposed rule. Separate meetings were held between the NRC and the National Mining Association (NMA), as well as meetings between the EPA and NMC, to ensure the correct identification of the issues and interests of concern to the mining industry. The NRC then established a collaborative Working Group composed of representatives of the EPA, the NRC, and affected State governments, to develop a draft proposed rule for discussion with a broader group of stakeholders, including advocacy groups, and Native American Tribal

interests, concerned about the affects of uranium processing. The Working Group is also developing the process that would most effectively involve this stakeholder community.

**Tennessee Valley Administration (TVA)**

No ECR cases to date

**U.S.D.A. Forest Service (USFS)**

The Lolo National Forest worked with a very diverse group of stakeholders in the development of 13 Restoration Principles for the National Forests of Montana. The 13 principles were developed and agreed to by a group of people with varied interests. Over a period of less than 1 year full consensus was reached. The group included people who have litigated many projects on the Forest and in the Region. Differences of opinion about national forest stewardship, and the "winner take all" structures, have led to decades of polarization among our citizenry and near paralysis on the ground. Over time, responsible people on many sides of forest issues concluded the present system was failing – failing our timber workers and timber-dependent communities, failing the ecological health of our forests, failing our responsibility to future generations. That left a question: Despite our differences, could key parties come to the table to see if there was a "zone of agreement" we share, a common ground set of ideas we could and build on to generate positive work on the ground?

In August, 2006, Artemis Common Ground invited nine people from industry, the conservation community, US Forest Service, state of Montana, and the non-profit sector to explore that question. After an all day meeting, everyone concluded that common ground might be created around the idea of on- the- ground restoration: work to restore the health of our national forests. The group formed a Steering Committee whose mission was to engage more community interests in an effort to develop Restoration Principles and an action plan to have those implemented on the ground.

In January, 2007, thirty-four representatives of conservationists, motorized users, outfitters, loggers, mill operators, state government and the Forest Service held its first meeting at Lubrecht Experimental Forest, facilitated by the National Forest Foundation. All present agreed the restoration goal was worth pursuing; they agreed to work by consensus—meaning that everyone had to agree before a proposal was accepted; they set August 1 as the deadline to finish their work; and they all personally committed to help get the job done.

The group contained long-time adversaries, and the effort was not easy. Success depended on honesty, ability to listen, to disagree respectfully, and most centrally, on learning how to focus on building the "zone of agreement". In such a process, 1/9/2008 version 2 13 loggers do not become environmental activists and conservationists do not change into timber mill managers. People retain their different perspectives—but they develop the ability to be able to say, "We disagree on these issues over there. But we can agree on this specific point. Let's start with that, and see if we can broaden areas of agreement, and if successful, figure out a better way to make good things happen on the ground".

That is what the Montana Forest Restoration Working Group did. At their last meeting, August 1, 2007, all recommendations were given final, unanimous approval. Next, the group agreed to change its name to the Montana Forest Restoration Committee (MFRC)—reflecting its new mission to see that the approved Restoration Principles and Implementation Plan are put into practice.

Finally, members of the group were asked if they wanted to continue to be involved in the effort by serving on the new MFRC. Every person in the room raised their hand.

## U.S. Institute for Environmental Conflict Resolution (UIECR)

# BLM Bridgeport Land Sale Mediation

**Location**: California

**ECR Application**: BLM Land Sale

**Conflict Setting:** Administrative Appeals

### Executive Summary

The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) in partnership with the U.S. Department of Interior's Board of Land Appeals (IBLA) designed and executed a mediation process to resolve a protracted and controversial land sale involving the Bureau of Land Management (BLM), the Bridgeport Paiute Indian Colony, and the local community of Bridgeport, California. A rapid assessment was used to determine if a negotiated resolution was feasible. In the resulting cost-effective mediation, the parties were able to negotiate an innovative agreement to resolve the conflict.

### Background

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|---|---|
| Mid 1990's | The Bridgeport Indian Colony proposed the purchase of the 40-acre parcel of BLM land immediately adjacent to the reservation. |
| Late 1990's | The proposed Bridgeport purchase was integrated into land transfer legislation developed by various California tribes.<br><br>When concerns about Indian gaming issues related to the 40-acre Bridgeport parcel threatened passage of the entire bill, the Tribe pulled the Bridgeport transfer request.<br><br>At the same time, the Tribe received a commitment from BLM to find another way to transfer the land. |
| 2000 to 2004 | The BLM subsequently considered several transfer options including a:<br>1) Land exchange,<br>2) Recreation & Public Purpose Act sale,<br>3) Congressional legislation, and a<br>4) Direct sale under the Federal Land Policy and Management Act (FLPMA).<br><br>The first three options were unsuccessful and BLM proceeded with the FLPMA option which required: (1) amending the existing Resource Management Plan (for which one protest was received and dismissed), and (2) initiating a direct sale process (for which one protest was received and addressed). |
| 2005 | The final Environmental Assessment and Decision Record was approved in June 2005. Sixteen protests were subsequently received and dismissed by the State BLM Director. However, of the 16 protests, three appeals were filed with IBLA. |
| 2006 | BLM with the support of the other parties explored the option of mediation to resolve the IBLA appeals. |

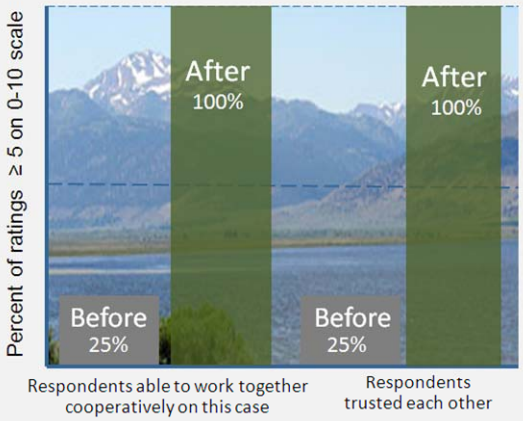
## ECR Timeline

| | |
|---|---|
| July 2006 | Assessment Conducted |
| Feb 2007 | 3-Day Mediation |
| April 2007 | Settlement agreement approved by Tribal elders |

## Results and Accomplishments

The following are the key outcomes and comparative benefits of the mediation:

- In the words of one participant, the mediation helped the parties negotiate **"a binding, legally enforceable agreement."**
- In addition to resolving the land sale conflict, the participants anticipate an **"improvement in community relationships with BLM."**
- Participants highly valued the skills and practices of the mediator, and in the words of one participant attributed their success to the mediator's ability to get them to **"think outside the box, which resulted in an innovative solution to the conflict."**
- In the absence of the mediation, the participants reported this conflict would likely have resulted in a **costly and divisive legal dispute**. In contrast, the assessment and 3-day mediation cost $19,000.
- Not only did the mediation result in a cost effective outcome, but the participants reported that the mediation allowed them to **more effectively address the conflict**.
- As a result of this experience with ECR, the participants reported **mediation would be their tool of choice** if faced with a similar type of conflict in the future.




## Institutionalizing ECR

The U.S. Department of Interior's Collaborative Action and Dispute Resolution Office (CADR) enlisted the help of the U.S. Institute to build capacity for, and use of, environmental mediation within the Interior Board of Land Appeals (IBLA). This task involved establishing a Pilot Mediation Referral Program within the IBLA. The program is now being used to screen and mediate cases such as the Bridgeport dispute.

## Credits

### Partners

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