

FY 2010 ECR Policy Report to OMB-CEQ

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

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

ECR is defined in Section 2 of the memorandum as:

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

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

The report format below is provided for the fifth year of reporting in accordance with this memo for activities in FY 2010.

The report deadline is February 15, 2011.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies are requested to collect this data to the best of their abilities. The 2010 report, along with previous reports, will establish a useful baseline for your department or agency, and collect some information that can be aggregated across agencies. Departments should submit a single report that includes ECR information from the agencies and other entities within the department. The information in your report will become part of an analysis of all FY 2010 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of prior year synthesis reports are available at www.ecr.gov.

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Date this report is being submitted:	January 13, 2011

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2010, including progress made since 2009. If no steps were taken, please indicate why not.

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

ECR is encompassed within the overall Air Force ADR Program that was established through AF Policy Directives. AF Policy Directive 51-12 specifically references the use of ADR in environmental disputes, in addition to disputes in other subject matter areas. The resources of the Air Force ADR program are, and have been, available to support the use of ECR and to train Air Force personnel in negotiation and communication skills within the context of ECR.

The Air Force continues to expand education and training in interest based conflict resolution skills through, inter alia, the following initiatives:

- The Air Force Negotiation Center of Excellence, based at Air University in Montgomery Alabama, has successfully imbedded negotiation and conflict management skills into every level of commissioned officer and non-commissioned officer Profession Military Education (PME). Additionally research projects and ongoing electives continually refresh the training with scenario-based learning to realistically reflect circumstances under which Air Force personnel will be faced in their duties.
- Training in ECR has been institutionalized as a module at the yearly Negotiation and Dispute Resolution course given every year at the AF JAG School.
- The Dispute Resolution Division of the General Counsel's Office is continually improving and expanding training in basic negotiation, communication, and ADR skills, and supporting delivery to an ever-widening audience within the Air Force.
- Following on last year's report, during 2010, the Dispute Resolution Division (GCD), in collaboration with the Environment and Installations Division (GCN), provided three (3) two day training courses on negotiation skills to engineers, program managers, and lawyers from the Air Force Real Property Agency (AFRPA). In addition to providing basic interest

based negotiation training, a multi-party two-stage negotiation scenario based upon a negotiation involving an enhanced use lease was employed as a teaching tool. Over 60 people attended this training.

- In 2011, further initiatives are planned involving, inter alia, (1) presentations to attorneys and AFRPA personnel provided by GCD attorneys on the Contract Disputes Act and how that Act impacts the drafting of appropriate ADR clauses and how these clauses apply to disputes in housing privatization contracts and enhanced use leases, (2) a three day environmental negotiations workshop put on by the Navy Civil Engineer Corps Officer's School (CECOS) directed to both Air Force civil engineers, program managers and environmental and installations attorneys, and (3) a collaborative presentation on negotiations by GCN and GCD attorneys to the annual Air Force Center for Engineering and the Environment (AFCEE) conference.

Section 2: Challenges

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

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

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2010 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR “case or project” is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2010 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2010 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored ⁴	Participated in but did not sponsor ⁵
<i>Context for ECR Applications:</i>									
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	11	2	13	13	_____	_____	_____	5	8
Siting and construction	15	_____	15	_____	4	11	_____	_____	15
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	2	2	_____	2	_____	_____	_____	2
Implementation/monitoring agreements	_____	_____	_____	_____	_____	_____	_____	_____	_____
Other (specify): water rights	1	_____	1	_____	_____	1	_____	_____	1
TOTAL	27	4	31	13	6	12	_____	5	26
	(the sum should equal Total FY 2010 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2010 ECR Cases)				(the sum should equal Total FY 2010 ECR Cases)	

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

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

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

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

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

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2010, and indicate if ECR is being used in any of these areas. Note: An overview of substantive program areas identified by departments/agencies in FY 2009 can be found in the FY 2009 synthesis report.

List of priority areas identified in your department/agency prior year ECR Reports	Check if using ECR	Check if use has increased in these areas
CERCLA	X	<input type="checkbox"/>
NEPA	X	<input type="checkbox"/>
LAND USE / ENCROACHMENT	X	X
WATER RIGHTS	X	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2010	Check if using ECR	
_____	<input type="checkbox"/>	

Please use an additional sheet if needed.

5. It is important to develop ways to demonstrate that ECR is effective and in order for ECR to propagate through the government, we need to be able to point to concrete benefits; consequently, we ask what other methods and measures are you developing in your department/agency to track the use and outcomes (performance and cost savings) of ECR as directed in Section 4 (b) of the ECR memo, which states: *Given possible savings in improved outcomes and reduced costs of administrative appeals and litigation, agency leadership should recognize and support needed upfront investments in collaborative processes and conflict resolution and demonstrate those savings and in performance and accountability measures to maintain a budget neutral environment* and Section 4 (g) which states: *Federal agencies should report at least every year to the Director of OMB and the Chairman of CEQ on their progress in the use of ECR and other collaborative problem solving approaches and on their progress in tracking cost savings and performance outcomes. Agencies are encouraged to work toward systematic collection of relevant information that can be useful in on-going information exchange across departments?* [You are encouraged to attach examples or additional data]

Air Force environmental conflicts and disputes tend to be wide-ranging and the volume is not as high as agencies, for example, with licensing and enforcement as their primary mission. Senior leadership has long recognized the value of ADR and its contribution to mission accomplishment through its creative problem-solving attributes as well as savings in cost and time. ADR is treated by the Air Force as “budget neutral” with a positive impact on mission accomplishment. Air Force leadership fully supports the need for up front investments for training in collaborative processes and conflict resolution.

6. Describe other significant efforts your agency has taken in FY 2010 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR as presented on the first page of this template.

The Air Force continues the education, training, and outreach efforts described more fully in response to Section 1 above.

In addition, and throughout FY '10, the Air Force participated in 83 Restoration Advisory Boards (RABs), the great majority of which do not conform to the Policy Memo's definition of ECR, because they do not utilize third party neutrals. These advisory boards include community and regulator representatives and employ collaborative decision making processes for many clean-up issues.

Section 4: Demonstration of ECR Use and Value

- 7 Briefly describe *your departments'/agency's most notable achievements* or advances in using ECR in this past year.

Increased outreach, education, and training. Creation and implementation of a new targeted training course.

8. ECR Case Example

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

Name/Identification of Problem/Conflict
<p>Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance, and how the ECR effort was funded</p> <p>A public utility proposed a transmission line in a location near the end of a runway at Sheppard Air Force Base (AFB), Texas. The transmission line would have interfered with the glide path of student pilots landing aircraft at the training base. The State Office of Administrative Hearings provided an Administrative Law Judge (ALJ) as a mediator. This matter was resolved in less than six months.</p>
<p>Summary of how the problem or conflict was addressed using ECR, including details of any innovative approaches to ECR, and how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)</p> <p>The ALJ conducted meetings with the utility company and the Air Force and the Air Force was able to explain the safety problems with the proposed location as well as with an existing power line that was currently interfering with landings. The ALJ encouraged the parties to enter into a settlement agreement.</p>
<p>Identify the key beneficial outcomes of this case, including references to likely alternative decision making forums and how the outcomes differed as a result of ECR</p> <p>The public utility agreed to not site the new line in a location that caused runway or glide-path interference and also agreed to move the existing power line that was interfering with landings to a location five miles away where it would have minimal, if any, impact on the flying mission. The utility also agreed to lower the height of the poles in order to further reduce safety concerns. This agreement avoided protracted administrative hearings and adversarial proceedings on the siting decision and eliminated the negative impacts to the flying mission at this busy training base.</p>
<p>Reflections on the lessons learned from the use of ECR</p> <p>The process was helpful in identifying the issues and concerns of both parties so that a safe solution could be achieved without prolonged administrative hearings.</p>

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

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

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

Previous years comments remain applicable. We strongly urge that next year there be a simplified report format for agencies whose mission focus is not licensing, permitting, or environmental enforcement.

Please attach any additional information as warranted.

Report due February 15, 2011.

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

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

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

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