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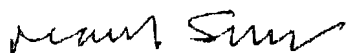
SUBJECT: ENVIRONMENTAL CONFLICT RESOLUTION FY 2008 SUMMARY REPORT

The joint OMB and CEQ memorandum issued on November 28, 2005 directs federal departments and agencies to report annually on their progress increasing the use of environmental conflict resolution (ECR) and collaborative problem solving techniques and practices across the federal government.

For FY 2008, sixteen federal departments and agencies submitted annual ECR reports. The reporting departments and agencies also worked collaboratively to draft the attached overview of the ECR work undertaken across the federal government during FY 2008. The overview is a synthesis of ECR accomplishments as reported by individual departments and agencies for FY 2008. For reference purposes, the sixteen reporting agencies have made their individual reports available online at: <http://www.ecr.gov/Resources/FederalECRPolicy/AnnualECRReport.aspx>.

The U.S. Institute for Environmental Conflict Resolution (the U.S. Institute) was tasked by OMB and CEQ with assisting federal departments and agencies with the implementation of the memorandum. On behalf of the participating federal departments and agencies, the U.S. Institute is pleased to disseminate the attached summary report on ECR, which is consistent with the open, collaborative, and participatory agenda of the Administration. If you have any questions about the policy memorandum or the attached report, please do not hesitate to contact me or Patricia Orr at (520) 901-8501 or by emailing schaefer@ecr.gov or orr@ecr.gov.

Sincerely,



Mark Schaefer
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FY08 ECR Policy Annual Report Distribution

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Environmental Conflict Resolution in the Federal Government

Analysis of FY 2008 ECR Reports
Submitted by Federal Departments and Agencies
Pursuant to the OMB/CEQ ECR Memorandum of
November 28, 2005

October 15, 2009

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Analysis of FY 2008 ECR Reports

Executive Summary

On November 28, 2005, the Office of Management and Budget (OMB) and the President's Council on Environmental Quality (CEQ) issued a joint policy memorandum on environmental conflict resolution (ECR Memorandum). The Memorandum directs federal agencies to increase the effective use of ECR and their institutional capacity for collaborative problem solving. This report synthesizes the 2008 federal agency annual reports submitted to OMB and CEQ in response to the policy memorandum.

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

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

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

The ECR Memorandum defines ECR as third-party assisted conflict resolution in the context of environmental, public lands, or natural resources issues. The Memorandum acknowledges, however, that there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that federal agencies enter into with non-federal entities to manage and implement agency programs and activities.

The Memorandum requires periodic leadership meetings, quarterly interdepartmental senior staff meetings, and annual reporting by departments and agencies to OMB and CEQ on progress made each year. The meeting and reporting requirements are designed to provide advice and guidance, and to facilitate on-going information exchange on ECR. Many agencies including the most frequent users of ECR have reported that the forums and reporting requirements have proven beneficial to advancing the goals set out in the policy memorandum.

The following departments and agencies submitted FY 2008 ECR reports:

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

Agency reports highlight the progress being made in meeting the goals of the ECR Memorandum. The following is a summary of progress as reported by federal departments and agencies for FY2008.

- ECR use in the federal government increased from 320 reported cases in FY2007 to 419 in FY2008, a 31% increase. The two reasons suggested by the reports are that agencies are improving in their ability to track and record ECR activity, and that agencies are engaging in an increasing number of ECR cases from year to year.
- ECR is being used to reduce environmental conflicts and improve environmental decisions in mission critical areas that include among other things, National Environmental Policy Act (NEPA) issues; environmental cleanup and restoration; natural resource management on federal land; species and habitat conservation; coastal zone management; historic preservation; tribal consultation; energy infrastructure development and management.
- Government-wide, ECR use is greatest in the areas of compliance and enforcement, planning, and monitoring and implementing of agreements. ECR is also used in the contexts of policy development, permitting, rulemaking, siting and construction.
- A critical component of this effort is documenting ECR's role in minimizing the costs of conflict and maximizing the benefits of collaboration. Agencies reported a wide spectrum of benefits from the use of ECR, including litigation costs avoided, expedited work on projects, innovative solutions, cost-effective solutions, and improved working relationships among stakeholders that help solve issues now and help manage issues in

the future. Even when agreements are not reached the benefits of ECR are being highlighted, including narrowing the issues that may end up in litigation.

- Agencies report that greater use could be made of ECR to more effectively address current environmental governance challenges in their program areas. Most agencies regularly using ECR have invested in training to build competencies in conflict resolution and collaborative-problem solving. Training is seen as a key to increasing the effective use of ECR. Trainings have focused on federal agency staff, but broader audiences of affected stakeholders have been reached including state and local governments, tribal nations, NGOs, environmental advocates, community-based groups, and environmental and natural resource attorneys.

I. Introduction

The FY 2008 ECR Reports are the third annual reports submitted by agencies in response to the November 28, 2005 Memorandum on Environmental Conflict Resolution (ECR Memorandum) issued by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ). Among other things, the ECR Memorandum directs federal agencies to 1) increase the effective use of ECR, 2) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; 3) assure that agency infrastructure supported ECR; 5) invest in support of ECR programs; and 6) focus on accountable performance and ECR achievement.

This Analysis synthesizes and offers a government-wide perspective on the experiences reported by agencies in their FY 2008 ECR reports. It covers the following:

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

This Analysis also provides context for the FY 2008 findings by referencing key elements of previous annual reports. For example, among other things, the *FY 2007 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 reporting agencies were taking some measures to implement the ECR Memorandum.
- Agencies use ECR in a variety of contexts to further their respective missions.
- Agencies are reporting greater use and acceptance of ECR.

A. Development of the Template for the FY 2008 Report

As was the case with the FY 2006 and FY 2007 reports, the FY 2008 reports were prepared in response to a template of questions developed by the ECR Senior Level Forum (Forum).¹ In response to suggestions made in the FY 2007 agency reports, the Forum decided to make a few

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

minor changes to the FY 2008 template. These include adding a column to the “Challenges” question of the Template (Question 2) enabling agencies to identify a potential challenge as not being a challenge or barrier; eliminating the question from the FY 2007 template asking agencies to describe the process they use to decide whether they will undertake ECR; and providing a format through which agencies can describe particular ECR cases (question 8). The remainder of the template remains untouched, as the Forum determined that the remaining questions were yielding useful data. In addition, several members of the Forum had commented on the importance of consistency in the data collected through the template. One way of ensuring consistency, these members suggested, would be to ask similar questions from year to year.

B. FY 2008 ECR Reports

From January through May 2009, the following 16 agencies submitted FY 2008 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of Homeland Security (DHS)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Transportation (DOT)
- Department of Veterans Affairs (VA)
- 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 Indian Gaming Commission (NIGC)
- Nuclear Regulatory Commission (NRC)
- The U.S. Institute for Environmental Conflict Resolution (USIECR)

Two of these agencies have a number of “sub-agencies” that make the 16 total somewhat misleading. The ECR activity of DOI’s nine bureaus and services is reflected in its report. These bureaus, the Bureau of Land Management (BLM), the Fish and Wildlife Service (FWS), the Bureau of Indian Affairs (BIA), the Bureau of Indian Education (BIE); the National Park Service (NPS); the Minerals and Management Service (MMS); the Office of Surface Mining (OSM); the United States Geological Survey (USGS); and the Bureau of Reclamation (BOR), submitted their own reports to the DOI Office of Collaborative Action and Dispute Resolution (CADR). CADR then collated this information and submitted a single DOI ECR report to OMB and CEQ. DoD’s report contains collated data from the DoD agencies. DoD also attached separate reports from the Departments of Navy (DON), Army (DA), Air Force (USAF), and the Army Corps of Engineers (USACE).

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

II. Use of ECR

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

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

The total number of reported individual cases is 419.³ This figure should be viewed as an approximation. It is clear from the reports that some cases have been reported more than once.⁴ It is also clear that not all ECR cases were noted in response to Question 3 of the Template.⁵ Moreover, agency representatives acknowledge that it is likely that the tracking systems in place do not record all ECR activity that is taking place throughout the federal government.⁶ The figure of 419 cases therefore serves more as a general frame of reference than a precise indicator of ECR cases that took place in FY 2008.

The 419 cases are spread throughout eight agencies, with EPA being the agency most frequently involved in ECR (142 cases).⁷ DoD (82 cases), USFS (92 cases), DOI (81 cases), FERC (16 cases), DOT (3 cases), NOAA (2 cases), and NRC (1 case) also engaged in ECR in FY 2008 (Table 1). Six agencies reported that they did not engage in any ECR cases in FY 2008.⁸ It is apparent from their reports that some of these agencies are infrequently faced with environmental conflict. For example, VA reports “historically, there have not been a significant number of VA projects in which [ECR] would be appropriate.” DHS reports “[d]uring 2008, DHS did not take steps to build a programmatic/institutional capacity for ECR. DHS is not opposed to the use of ECR; however it presently perceives few situations where ECR could be helpful in resolving issues with the effects of homeland security activities on communities, public health, and the natural environment.” GSA reported that it did not engage in ECR in FY 2008, but also noted the importance of ECR in its report, stating “A long-standing concern has been the ad-hoc nature of public notification and meeting facilitation practices across the agency. Currently differences can be found region by region and often project by project. Success with ECR and NEPA requires improved awareness on the part of our project managers and greater engagement on the part of our NEPA managers.”

³ This figure does not include the 43 cases in which DOJ reported using a paid neutral, or the 30 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.

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

⁵ DOE, for instance, did not record any cases involving the use of a third-party neutral in response to question 3 of the template.

⁶ See Discussion on Tracking of ECR, Section IV, *Infra*.

⁷ EPA was also involved in 64 additional cases that used a third party but were not agreement-seeking.

⁸ These agencies were: HHS, DHS, GSA, NASA, NIGC, and TVA.

Table 1. Distribution of ECR cases in the federal government for FY 2008

	Number and Percent of FY 2008 ECR Cases
DoD	82 (20%)
DOI	81 (19%)
DOT	3 (1%)
EPA	142 (34%)
FERC	16 (4%) ⁹
NOAA	2 (0%)
NRC	1 (0%)
USFS	92 (22%)
Total	419 (100%)

Government-wide, 32 % of ECR took place in compliance and enforcement. This is primarily because EPA had the largest number of ECR cases (142) and most of these fell into this category. The Planning category constituted 23% (98 cases) of all federal ECR activity. These cases come primarily from the two agencies with significant land management responsibilities, DOI and USFS, which were involved in a combined total of 84 planning cases. The Implementation and Monitoring Agreements Category made up 18 % of the total number of cases. This portion comes primarily from the 45 partnering teams¹⁰ established by the Department of the Navy to implement the terms of agreements to cleanup Superfund sites. Policy development (Policy) accounted for 5 % of all ECR in FY 2007, with licenses and permits (Permits) (8%), rulemaking (Rules) (3%), siting and construction (2%) (Siting) and “other” (10%) accounting for the remainder of cases.

As was noted in the *FY 2006 and FY 2007 Analyses*, the categories of ECR activity within a particular agency tend to be heavily dependent on the agency’s mission. For example, DOI agencies manage well over 1,000 field units. Planning is critical to the success of these units. This explains why planning and permitting make up almost 60% of DOI’s ECR activity, as shown by the DOI ECR context profile.

⁹ The ECR case numbers for FERC are based on a 04/02/09 email and a subsequent conversation with Jacqueline Holmes of FERC.

¹⁰ These partnering teams are organized in a three tier structure and chartered to address installation restoration issues. Collectively, the teams worked on 1,384 sites.

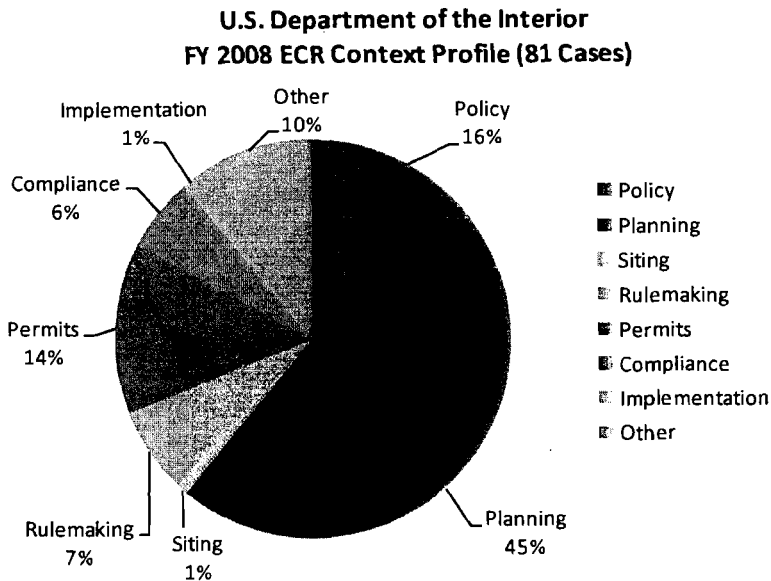


Figure 1. DOI ECR context profile for FY 2009 (81 cases)

ECR Context profiles for other agencies reveal similar links between ECR activity and mission focus. As an independent agency that protects public health and the environment, one of EPA's primary functions is the enforcement of its rules. This is evident from the EPA ECR Context Profile, which shows that the overwhelming majority (84%) of its ECR activity is dedicated to enforcement and compliance. In contrast to DOI, only 1% of EPA's ECR cases were in the planning context. ECR Context Profiles from other agencies show similar links between ECR activity and mission (See Appendix B).

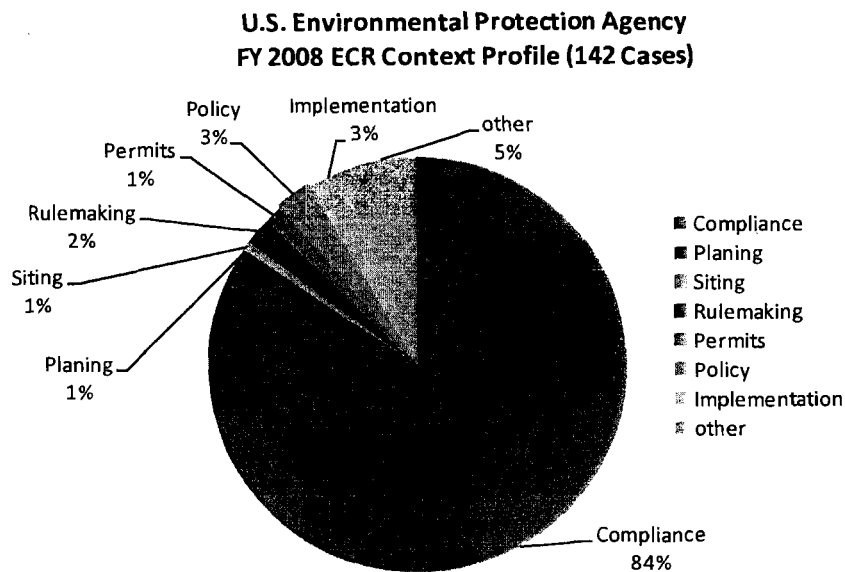


Figure 2. EPA ECR context profile for FY 2008 (142 cases)

Agencies were also asked to identify whether their cases were in progress or completed. Of the 419 cases, 237 (57%) were identified as in progress, and 182 (43%) were identified as completed.

C. Participant or Sponsor?

Question three also asked agencies to identify whether they were sponsors or non-sponsor participants of particular ECR cases (Table 2). While all agencies were more likely to be sponsors than participants, the degree to which they sponsored processes appears to be dependant on their missions. Agencies with substantial enforcement and compliance missions such as FERC and EPA reported that they engaged in ECR as sponsors in 87 to 100 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 relatively higher percentage of being involved in ECR as non-sponsor participants. USFS, for example, reported that it is involved primarily as a non-sponsor participant in 25% of its ECR cases. DOI, several of whose agencies have land management missions that are similar to USFS, reported being involved as non-sponsor participants in 35% of its ECR cases. According to USFS staff,¹¹ USFS's relatively high percentage of involvement as a non-sponsor participant relates directly to its status as a land manager. In that role USFS is often invited to participate in processes that are initiated or sponsored by neighboring federal, state, local, and Tribal agencies.

Table 2. Agency participation in or sponsoring of ECR cases

	Number and Percent of Cases		Total Number
	Initiated	Sponsored	Of Cases
DoD	15 (42%)	21 (58%)	36 [†]
DOI	53 (65%)	28 (35%)	81
DOT	2 (67%)	1 (33%)	3
EPA	124 (87%)	18 (13%)	142
FERC	16 (100%)	0 (0%)	16
NOAA	2 (100%)	0 (0%)	2
NRC	1 (100%)	0 (0%)	1
USFS	69 (75%)	23 (25%)	92

[†] The DoD figures included 45 DON facilitated partnering teams, organized in a three tier structure, which address installation restoration issues. Collectively, the teams work with 1,570 active and inactive sites. DoD reports that the concept of initiation is not appropriate for these matters given the long standing existence of the teams.

¹¹ Based on a conversation with Martha Twarkins, USFS, 3/14/2008

D. Decision Making Forum

Agencies were also asked to identify the decision making forum where issues were being addressed when ECR was initiated. The choices in this part of question three were intended to generally approximate the continuum of conflict as expressed in the *FY 2006 Analysis*.¹²

“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.

**FY 2008 ECR Decision-Making Forum
(419 Cases)**

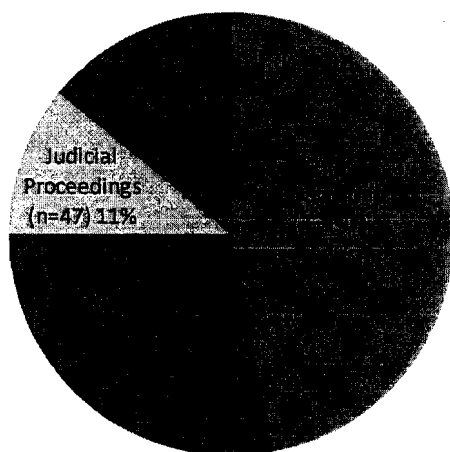


Figure 3. Agency decision making forums where FY 2008 cases were initiated

Figure 3 shows that almost 47 percent (197 of 419) of cases fall into the upstream “Agency Decision” category. Agencies categorized 116 cases as Administrative Proceedings and Appeals, with 96 of these coming from EPA, which is consistent with its compliance and enforcement focus. Agencies categorized 47 of their cases as “Judicial Proceedings”, and 59 cases as “Other.”

E. How does Reported Usage for FY 2008 compare to FY 2007?

Agencies reported engaging in approximately 100 more cases in 2008 than in 2007, an approximate 30 percent increase. EPA reported 57 % more cases in FY 2008. DOI and USFS reported 76% and 46 % increases in cases, respectively. There are at least two possible explanations for these increases: 1) there was more ECR activity in 2008, and 2) that agencies are doing a better job of recording and tracking ECR activity. Table 2 details the distribution of ECR cases throughout the federal government for FY 2007 and FY 2008.

¹² See 2006 Analysis, pp 12-13.

Table 3. Distribution of ECR cases for FY 2007 and FY 2008

	Number and Percent of FY 2007 ECR Cases	Number and Percent of FY 2008 ECR Cases
DoD	74 (23%)	82 (20%)
DOI	46 (14%)	81 (19%)
DOT	12 (4%)	3 (1%)
EPA	90 (28%)	142 (34%)
FERC	21 (7%)	16 (4%)
NOAA	8 (2%)	2 (0%)
NRC	3 (1%)	1 (0%)
USFS	63 (20%)	92 (22%)
VA	3 (1%)	0 (0%)
Total	320 (100%)	419 (100%)

III. Building Capacity

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

Programmatic Capacity: Infrastructure, Personnel and Operations

Almost all of the agencies that engage in ECR reported on the importance of building infrastructure and dedicating staff to increase the appropriate and effective use of ECR. Among other actions, agencies took the following measures during FY 2008:

- Supporting a newly established Conflict-Resolution & Public Participation Center in carrying out its mandate to anticipate, prevent, and manage water conflicts (USACE);
- Creating a Senior Executive Service position to deal with ECR issues (DOT);
- Requiring ECR-related elements in management performance plans (DOT, DOI);
- Continuing to fund and support offices that are dedicated full time to ECR (EPA, FERC, DOI, USACE);
- Refining external and internal webpages on use of mediation and other forms of environmental conflict resolution in order to facilitate and promote use of ECR (DOJ);
- Sustaining an integrated conflict management program allows for linkage between ECR and work place conflict management (DOI); and
- Setting up monthly conference calls to discuss ECR issues (DOE).

Overall, the reports showed that agencies that engage in ECR invest in its infrastructure. The investments range from the funding of FTEs and training, to individual ECR processes. EPA, for example, reports that “ [it has] made considerable investments to support its ECR program, a

trend which continued in FY 2008. In FY 2008, the Agency had eight FTEs in the CPRC and two and a half FTEs total in the New England, Denver, and San Francisco regional offices devoted to ECR. In addition, more than 20 other individuals support the ECR program as part of their job responsibilities or on a collateral duty basis.” DOI, DoD, FERC, and DOJ reported that they also continue to fund full or part time ECR positions as well as invest in training and other ECR services.

Leveraging Resources: Interagency Agreements and Partnering

Several agencies reported on efforts to partner with other agencies to leverage resources dedicated to ECR. EPA and USIECR continued work under their interagency agreement on a range of projects, including the Coeur d’Alene Lake Management Plan case and a series of “collaboration workshops” for EPA and other federal agency staff involved in the National Environmental Policy Act review program. Similarly, other agencies such as DOI and USFS reported on their partnering activities with USIECR to promote ECR in their respective agencies.

The Department of the Navy reported that it participates in 45 facilitated partnering teams that oversee the restoration efforts at 1,570 active and inactive sites. Within these teams representatives from the DON, EPA, state governments, local officials, and sometimes various other groups, use collaborative methods to craft creative and cost-effective restoration processes designed to address as many interests as possible. DoD reported that the protection of natural resources and wildlife at Fort Knox in Kentucky was dependant on an installation natural resources management plan agreement involving the Army, the Kentucky Department of Fish & Wildlife Resources and the US Fish & Wildlife Service. The plan describes the responsibilities of all parties as well the requirement to conduct annual meetings and workshops to note accomplishments or address and resolve concerns.

Several agencies, including DOE and DoD, rely on the dispute resolution language in Federal Facility Agreements to help them resolve disagreements with other federal agencies. USACE and DOI agencies reported that they often rely on Memorandums of Understanding (MOU), and Memorandums of Agreement (MOA) with local, regional and national stakeholder groups to detail the processes that they will use to collaborate with one another. FERC reported that it has been able to collaborate with the states of Oregon and Washington through MOUs with respect to the licensing of hydrokinetic projects.

Strategic Planning

Several agencies reported on the importance of strategic planning in carrying out their ECR objectives, in accordance with Section 5 of the ECR Memorandum. EPA reported that its ECR program “furthers all five goals in EPA’s Strategic Plan: 1) clean air and climate change; 2) clean and safe water; 3) land preservation and restoration; 4) healthy communities and ecosystems; and 5) compliance and environmental stewardship.” Other examples of strategic planning related to ECR include an environmental stewardship strategic goal that references the ECR Policy Memorandum (DOT); a strategic plan that includes a core goal of collaboration and recognizes the need to partner with other federal agencies, tribes, stakeholders, and the public to achieve its goals. (Federal Highway Administration); GPRA goals that include ECR and ADR objectives (FERC, USFS); and being “guided by a shared mission and a 5 year strategic plan to

grow the Department's ECR capacity and utilization while transforming the Department into a more collaboration driven culture." (DOI).

Policy/Guidance/Procedures

Several agencies reported on developing policies, guidance, or procedures to further the goals of the ECR Memorandum. DoD reported that its agencies "have ADR policy statements that encompass ECR and a strategic focus on the use of conflict resolution and collaborative techniques...for instance, Air Force Policy Directive 51-12 specifically mentions the use of ADR in environmental disputes as well as in other kinds of disputes."

EPA reported that its ADR policy has a great degree of commonality with the themes in the ECR Memorandum as it articulates the following expected benefits from ADR/ECR:

- Faster resolution of issues;
- More creative, satisfying and enduring solutions;
- Reduced transaction costs;
- Fostering a culture of respect and trust among EPA, its stakeholders, and its employees;
- Improved working relationships;
- Increased likelihood of compliance with environmental laws and regulation;
- Broader stakeholder support for agency programs; and
- Better environmental outcomes.

DOI's Minerals Management Service (MMS) reported that it has established procedures to resolve shipper disputes concerning open access and nondiscriminatory transportation services on pipelines operating on the Outer Continental Shelf. The final rule gives MMS the responsibility to administer a complaint and dispute resolution procedure that may involve third party neutrals in selective cases where oil and gas shippers claim discrimination by private entities operating pipelines on the Outer Continental Shelf. The ADR process may commence when a party calls MMS staff on a toll-free number and discusses a concern involving a qualified pipeline and one of its shippers.

Integrating Science and Research into ECR

Several agencies reported on initiatives promoting collaboration in science and research as a strategy to increase the effective use of ECR. DOI reported that USGS sponsored the 2008 "Great Valley Water Resources Science Forum" on October 27, 2008 and the Shenandoah Valley Water Symposium, "Linking Local Public Policy with Science to Take Care of the Water" on October 28, 2008. The conference enabled scientists engaged in the development and applications of ground-water flow models; drought prediction, monitoring, and impacts; and water quality issues to interact collaboratively. USGS also hosted a conference on ecosystems services "Using Science for Decision Making in Dynamic Systems," in December 2008. The conference provided a forum to discuss the latest and most innovative methods, tools, and processes for assessing ecosystem services, and promoting collaboration amongst scientists.

The Bureau of Reclamation and the United States Geological Survey reported they are working together to study methods of managing conflict where scientific views differ over how much

water can be made available for various uses. The Bureau of Reclamation (BOR) also developed, in conjunction with Oregon State University, a professional skill building workshop, with a workbook entitled “Sharing Water, Building Relations: Managing and Transforming Water Conflict in the US West.” In 2008, this workshop was presented in Phoenix, AZ, Salt Lake City, UT, and Bismarck, ND to BOR water managers and project operational staff. In addition, BOR partnered with Oregon State University to analyze the incidence of water related conflicts in the Upper Colorado River basin.

Education/Awareness/Training

All of the agencies that engage in ECR reported education, awareness and training activities. Most agencies are utilizing training to further the goals of the ECR Policy Memorandum. The FY 2008 reports showed:

- More than 100 environmental collaboration and conflict resolution training sessions were sponsored during FY 2008 by federal departments/agencies.
- Sponsors included BIA, BIE, BLM, BOR, CADR, CPRC, DOE, DON, EPA, FAA, FERC, FWS, MMS, NPS, OGC, OSM, SOL, TSA, USACE, USALSA, USAF, USFS, USGS, and USIECR. The trainings ranged from introductory informational sessions delivered within a working day, to more in-depth trainings spanning several days to a week.
- The training content ranged from basic to advanced; of-the-shelf to customized; and was delivered in traditional training room settings and online.
- Primary audiences were federal agency staff, but also included non-federal participants in some offerings.

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

Leadership Commitment and Cultural Change

One of the underlying themes of the ECR Memorandum is the need for a cultural change in federal agencies to “face the challenge of balancing competing public interests and federal agency responsibilities and federal agency responsibilities when striving to accomplish national environmental protection and management goals.” Several agencies reported on activities that were designed to promote a pro-ECR culture in their agencies. For instance, USIECR, in conjunction with a number of other agencies, including EPA, DoD, DOI, FERC, DOT, and others, hosted the Fifth National ECR Conference in Tucson, Arizona in May 2008. About 300 participants met for the three-day conference, which featured training workshops, panel sessions, interactive roundtable discussions and federal agency meetings. Discussions were held on topics and issues ranging from new tools and technology used in ECR processes, to global warming and climate change.

DOI’s CADR Office reported on the linkage of its Integrated Work Place Conflict Management System, “CORE PLUS”, with ECR capacity. The DOI Report notes “ [t]he Department believes

managers and employees strengthen the capacity of the organization to effectively manage conflict situations with external parties and stakeholders when they are comfortable using the same tools to effectively manage conflicts and disputes that arise within the organization as well.”

The Federal Aviation Administration (FAA) reported that its Associate Chief Counsel for ADR emphasized the need for ECR at the Airports and Environmental Law Conference in 2008.

In November 2007 the USACE Director of Civil Works, Major General Don Riley, issued a memorandum to all commanders in Corps regional offices that promoted the use of Shared Vision Planning and other collaborative processes and tools. This high-level endorsement of collaborative processes and tools complements Goal 2b of the USACE Campaign Plan, which directs the agency to “Implement collaborative approaches to effectively solve water resource problems.” High level support for the USACE programs was also supplied in 2008, by Assistant Secretary of the Army for Civil Works J.P. Woodley who stressed that: “[USACE] *will broaden [its] collaboration with others to enhance the chances of balancing water uses and making wise investments and trade-offs decisions*”.

In addition, the EPA CPRC sponsored the first-ever EPA Conflict Resolution Week in October 2007. This week of workshops and presentations coincided with International Conflict Resolution Day. Activities during the week included expert speakers on situation assessments and the attorney’s role as problem-solver and an ECR exhibit staffed by EPA ECR experts.

IV. Collaboration without a Third Party

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

Advisory Committees

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

DoD agencies reported that they regularly use Resource Advisory Boards (RABs) to provide DoD agencies with input. Air Force reported that it relied on the expertise of 83 RABS on a variety of environmental issues in FY 2008.

EPA reported that its Office of Enforcement and Compliance Assurance (OECA) utilizes the National Environmental Justice Advisory Council to coordinate discussions about air quality in communities, and the development of nationally consistent screening approaches for identifying environmental justice populations. EPA also reported making extensive use of the Federal

Insecticide, Fungicide and Rodenticide Act Scientific Advisory Panel to obtain independent peer review and advice on novel or controversial scientific issues and the Pesticide Program Dialogue Committee to explore a wide range of pesticide policies—both substantive and procedural—with a diverse group of stakeholders.

NOAA reported that it relies upon the 30-member Marine Protected Areas Federal Advisory Committee, made up of diverse stakeholder representatives, to raise issues, develop recommendations and resolve conflicts related to planning and implementation of the national system of Marine Protected Areas (MPAs). NOAA also reported that it began in 2008 a coordinated effort to engage advisory councils and communities in an initiative titled “Blue Seas, Green Communities.” The initiative, among other things, helps sanctuaries to engage their advisory councils for the purpose of identifying and implementing projects that will contribute to the greening of sanctuary communities.

USACE reported that it is able to work collaboratively with stakeholders through a variety of committees and groups, including the Southeast Natural Resource Leaders Group (SENRLG); Lower Columbia River Solutions; the Lower Columbia River Estuary Program; the Coastal America Partnership; the Navigation and Environmental Sustainability Program of the USACE on the upper Mississippi River; and the Midwest Natural Resource Group.

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

Public Participation/Community Outreach

Several agencies reported on their use of collaborative problem-solving in the context of community outreach and public participation. EPA continued to operate a community outreach office for the Hudson River Polychlorinated Biphenyl (PCB) site. This office, located in Fort Edward, New York was created because EPA recognized a local need for easy access to information about Hudson River Superfund Site activities and the desire for meaningful interaction with EPA staff and management.

EPA also engaged in international outreach, presenting a workshop on the use of ADR in Beijing for Chinese government officials and scholars, and a module on the value and methods of public participation to officials from various Middle Eastern governments. EPA also hosted a delegation of South Korean journalists who were on a weeklong study tour to gather information about the use of collaborative processes.

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

research community, government, and the public. In FY2008, the NOAA Aquaculture Program collaborated with USDA to convene a stakeholder panel to discuss issues associated with feeds used in aquaculture production; co-hosted with the NOAA Habitat Program a National Symposium on Shellfish and the Environment; provided grant funding for a workshop on Offshore Aquaculture in the Pacific Northwest; and co-hosted the first annual public stakeholders meeting of the Interagency Joint Subcommittee on Aquaculture. Each of these forums provided participants with opportunities to question experts and engage in unfiltered discussions to help resolve controversial issues.

Agencies also reported using the principles of collaborative problem-solving in the context of public participation. VA reported that public outreach is a component of its compliance with NEPA for construction and other projects that have an impact on the environment. Similarly, NRC reported that its staff continues to use an expanded public outreach program in the areas of new reactor licensing and the renewal of existing reactor licenses, to accomplish many of the objectives of ECR. The NRC reports that disputes over the licensing of energy facilities, such as commercial nuclear reactors, emerge because of the lack of clear information on the NRC licensing process, distrust of agency motivation, and the belief that the public is being excluded from the licensing process, among other things. The NRC's expanded public outreach program attempts to deal with these issues through early and continuing interaction with interested stakeholders. Several other agencies, including EPA, DOI, FERC, USFS, and others also reported using collaborative problem-solving in the context of public engagement.

NEPA/Environmental Compliance

Many agencies reported on engaging in collaboration with agencies and stakeholders in processes under NEPA and other environmental statutes. DOE reported that prior to beginning an EIS for the Energy Technology Engineering Center (ETEC), its Oakland Project Office contracted with a public participation expert to interview and ascertain the perspectives of approximately 80 stakeholders. This outreach helped start a dialogue with the ETEC stakeholders.

EPA's Region 3 reported that the development of the Chesapeake Bay Oysters Environmental Impact Statement has provided an opportunity for it to work with a multitude of interested parties with differing agendas and without the assistance of a neutral third party. By developing a process which was inclusive of industry, state, NGOs and federal agencies, EPA was able to include a number of alternatives in the EIS without selecting a preferred one. This allowed for a review and ranking of a number of options proposed by USACE and industry.

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

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

Unassisted Negotiation/ Assisted Non-Agreement Seeking Processes

Unassisted Negotiation

Almost all agencies reported the use of unassisted negotiation to resolve environmental conflict. VA reported that it “has a history of successfully settling enforcement actions through an informal process and without the assistance of a third party.” DOE reported that it successfully negotiated modifications to the Waste Isolation Pilot Project (WIPP) permit. Prior to preparing DOE’s final permit modifications, DOE sought and evaluated stakeholder comments and incorporated those comments into the final permit modification application. According to DOE “[t]he key beneficial outcome of these negotiations was the elimination of obstacles and issues that otherwise may have been contentious with the regulator and stakeholders, if not afforded an opportunity to discuss the proposed changes before submittal of the permit modification request.”

EPA reported that its Region 7 has adopted the practice of using pre-filing negotiations in all administrative enforcement actions seeking a monetary penalty. Out of 149 administrative penalty actions the Region initiated in FY 2008, all but one case was settled by the parties in the pre-filing stage. DOJ reported that it negotiates resolutions to well over 90% of environmental and natural resource cases. For example, DOJ attorneys negotiate resolutions to most civil environmental enforcement cases prior to filing. The result is that the court case begins with the filing of a complaint and lodging of a proposed consent decree that undergoes public review and comment.

DHS reported that the FEMA Environmental Management Program of the Occupational Safety, Health and Environment Office (OSHE) often negotiates with Federal, State and local regulatory agencies concerning agency environmental compliance, environmental plans, development and implementation of interagency agreements. FEMA also negotiates with property owners where FEMA may be operating as a tenant or lessee.

Assisted Non-Agreement Seeking Processes

EPA reported using third parties to facilitate non agreement-seeking processes. EPA tracked these cases, and reported that in engaged in 64 such cases in FY 2008.

IV. Tracking and Evaluating ECR

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

Tracking ECR Cases

As was the case with the 2006 and 2007 reports, the 2008 reports show that agencies are most successful at tracking ECR that occurs in formal administrative or judicial proceedings. Formal proceedings are tracked regardless of whether ECR is taking place, through agency or judicial docketing systems. These systems make it easier to track ECR when the parties to a case choose alternative dispute resolution to resolve their differences. The Interior Board of Land Appeals, for instance, uses its docketing system to track ECR in implementing its ADR pilot program. FERC reports that since 2000 its Dispute Resolution Service (DRS) has tracked its ADR activities and workload, inclusive of ECR activities, in a database and has developed a case evaluation survey to measure participant feedback. Also, the DoD Army Environmental Law Division maintains a database that captures a description of the type of ECR and the ultimate outcome. Similarly, DOJ reports tracking ECR through the procurement process it uses to hire external mediators.

Additionally, agencies such as DOI and USFS reported that the act of completing their respective Annual ECR Reports has enhanced their capability of tracking ECR activity. The USFS report states” [f]or the last 3 years...[t]he Agency has contacted each national forest unit individually to query their use of ECR and collaboration. This continues to remind USFS Forest Managers of the value of ECR as well as inform the national office of ways to better provide information and tools to utilize ECR.”

Despite the success of the Report Template in engaging field offices, the tracking of ECR in the more upstream settings¹³ remains in the developmental phase in most agencies. In these settings, which would encompass planning, policy development, siting and construction, rulemaking, and the implementation of upstream agreements, there do not appear to be any agencies that require centralized reporting of ECR other than that which is required for annual ECR Report.

EPA reported that it has three methods for gathering data about the use of ECR throughout the Agency. The first method is its Conflict Prevention and Resolution Services contract, which allows EPA to quickly and regularly identify current ECR cases where external service providers are serving as neutral third parties, and the nature of the cases. EPA’s interagency agreement with USIECR serves a similar purpose. The second method for measuring ECR use at EPA is through a network of headquarters office and regional staff members who are designated to assist with the ECR annual reporting process, some of whom also provide additional ECR program services as needed by their respective organizational units. These individuals are able to confirm preliminary ECR case lists generated by EPA’s Conflict Prevention and Resolution Center (CPRC) and supplement such lists with additional ECR cases.

The third source of information about ECR use at EPA is the CPRC’s request and services tracking system, in which CPRC staff log requests received for ADR/ECR services and record the services that are provided in response

Evaluation

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

- The USIECR reported on the opportunity to evaluate the workings and outcomes of a large number of ECR processes that arose from a partnership of federal and state public

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

policy dispute resolution programs. The coordinated effort to collect data through shared procedures and evaluation survey instruments resulted in the assembly of 52 ECR cases concluded between 2005 and 2007 involving multiple public agencies and stakeholders concerning a broad array of environmental issues around the country. This evaluation effort has become known as the Multi-Agency ECR Evaluation Study (MAES). The MAES evaluation framework was itself a product of collaboration among program managers interested in evaluating how their programmatic efforts were contributing to the effective use of ECR. 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. Details on this evaluation effort were reported in an article in *Conflict Resolution Quarterly* in early 2008, and a second article is forthcoming in late 2009. Highlights were presented at the U.S. Institute's National ECR2008 Conference.

- The USACE Institute for Water Resources is currently developing a survey instrument based on the MAES instruments. The survey is being designed to evaluate the use of collaborative modeling for planning and conflict resolution which may include the use of a third party neutral. The survey will document the process characteristics, output, and outcomes of collaborative processes, including shared learning, trust and relationship building, acceptability of the decision, and the ease of implementation (lack of resistance/objection).
- FERC entered into an agreement with the Harvard Negotiation & Mediation Clinical Program (HNMCP) to study alternative dispute resolution (ADR) in the energy industry, inclusive of ECR, in three regulated energy sectors: electricity, hydropower and natural gas. The study will help FERC better understand how energy companies view ECR as a tool for energy conflict prevention and resolution and what measures can be taken to improve the capacity and entry points for ADR/ECR in energy and environmental-related decision-making and problem-solving processes.
- EPA and DOI also reported on their jointly sponsored Systematic Evaluation of Environmental and Economic Results (SEEER). SEEER involves the study of particular ECR cases to evaluate the economic and environmental effects of ECR. According to the EPA report "SEEER'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.
- DOJ notes the difficulty in tracking and quantifying the full range of its mediation activities. DOJ notes some challenges in tracking and quantifying the full range of its mediation activities since court officials routinely serve as informal mediators. DOJ indicates that it negotiates resolution to well over 90% of environmental and natural resource cases. DOJ also reported that it increased its use of paid mediators in environmental and natural resource cases, with more mediation funding in environmental and natural resource cases than all other kinds of cases combined. Compared to 2007, DOJ increased its ECR funding from \$429,900 to over \$612,800.

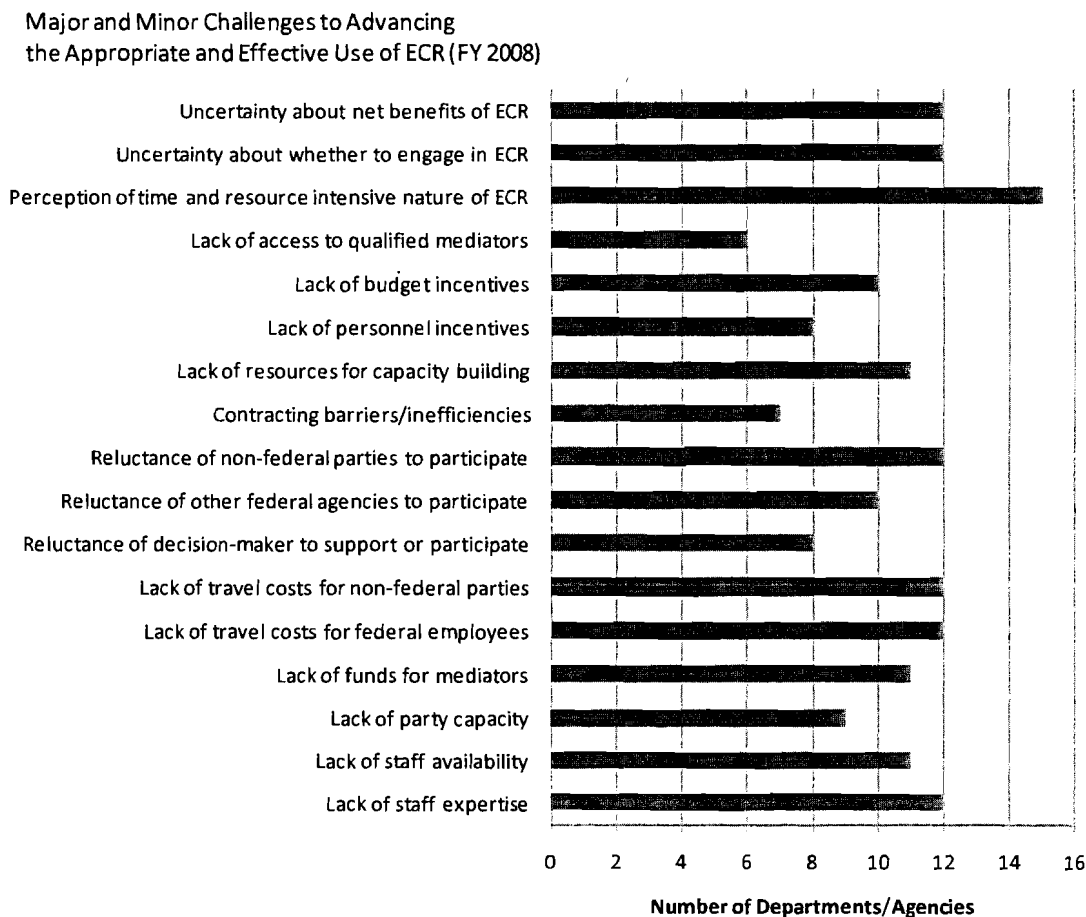
V. Challenges to Engaging in ECR

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

The lack of resources and the perception of the resource intensive nature of ECR were among the most frequently cited challenges in the reports. Fourteen agencies considered the “perception of the time and resource-intensive nature of ECR” as a challenge. Twelve agencies deemed uncertainty about the net benefits of ECR; “uncertainty about whether to engage in ECR”, “reluctance of non-federal parties to participate; lack of travel costs; and lack of staff expertise as challenges. Ten agencies deemed as challenges “reluctance of other federal agencies to participate”, and lack of budget incentives.” (Figure 4).

Each potential challenge received 6 or more agency responses. In some cases, 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.

Figure 4. Major and minor challenges to ECR in FY 2008.



VIII. Substantive Programs where ECR is Used

Programmatic Areas that Can Benefit from ECR

Agencies were asked in Question 4 if they continue to use ECR in any of the priority areas that they identified in their FY 2007 ECR reports. They were also asked if usage had increased in these areas, and if they had identified new priority areas during FY 2008.

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

	Priority areas where ECR was applied during FY 2008	Increase use in at least one priority area
DoD	<p><i>Priority areas where ECR was applied during FY 2008:</i> Superfund litigation, sonar conflict, navigation, flood risk management, hydropower, water supply, recreation, ecosystem restoration, regulatory, addressing coastal zone management issues, CERCLA, EAJA, NEPA, consultations with U.S. Fish and Wildlife, and intra-Navy and intra-DOD conflicts that arise from different interpretations and applications of laws, regulations, and policies.</p> <p><i>New priority areas identified during FY 2008:</i> NEPA BRAC construction, land use encroachment by private land developers, contamination of drinking water, and water wells issues due to natural gas drilling by private enterprises.</p>	✓
DOE	<p><i>Priority areas where ECR was applied during FY 2008:</i> Conflicts in environmental cleanup decisions, relationships with regulators, multi-issue and multi-party environmental disputes, hazardous waste facility permit modifications, NEPA, and public engagement issues.</p>	
DOI	<p><i>Priority areas where ECR was applied during FY 2008:</i> Natural resource and environmental litigation, project and resource planning, investments when decisions are appealed, stakeholder and community involvement in plans and decisions, land use, off-road vehicle use, wild and scenic river studies, grazing permits, habitat conservation, administrative appeals, natural resource damage assessment, species recovery, land conveyances, timber sales, wildland fire management, endangered species act issues, NEPA, adaptive management, water rights adjudication, hydropower licensing, lands unsuitable for mining petitions, MMS administrative appeals of orders to pay, and MMS multi-party revenue appeals.</p> <p><i>New priority areas identified during FY 2008:</i> National petroleum reserve Alaska lease sale, fee to trust land status, false claims act litigation, MOAs for marine mammals program.</p>	✓

DOJ	<p><i>Priority areas where ECR was applied during FY 2008 and where new priority areas were identified:</i> Civil environmental and natural resource cases including environmental enforcement and defensive cases.</p>	✓
DOT	<p><i>Priority areas where ECR was applied during FY 2008:</i> Dealing with complex and controversial transportation projects, assisting in the timely delivery of transportation projects, and dealing with differing opinions on one or more major environmental issues.</p>	
DHS	<p><i>New priority areas identified during FY 2008:</i> National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, and environmental management.</p>	
EPA	<p><i>Priority areas where ECR was applied during FY 2008:</i> National Environmental Policy Act, Superfund program, regulation development. <i>New priority areas identified during FY 2008:</i> Wetlands program.</p>	✓
FERC	<p><i>Priority areas where ECR was applied during FY 2008:</i> Hydro licensing and relicensing applications, natural gas facility certificate applications, liquefied natural gas facility authorization applications, electric transmission siting authorization application.</p>	
GSA	<p><i>Priority areas where ECR was applied during FY 2008:</i> Potential international issues related to our Border Stations, resolution of notices of violations issued by Federal, State or local regulators for violations by GSA for any of the major environmental laws regulating GSA conduct, resolution of critical comments made by cooperating agencies and general public regarding a GSA proposed action and implementation of a NEPA compliance strategy. <i>New priority areas identified during FY 2008:</i> Site selection controversies on major construction projects, health/safety disputes during major renovations.</p>	
NIGC	<p><i>Priority areas where ECR was applied during FY 2008:</i> Traffic impacts/mitigation, and historic impacts/mitigation <i>New priority areas identified during FY 2008:</i> Overall NEPA process.</p>	
NOAA	<p><i>Priority areas where ECR was applied during FY 2008:</i> ECR used along with NEPA processes.</p>	✓
NRC	<p><i>Priority areas where ECR was applied during FY 2008:</i> Development of NRC proposed regulations for ISL</p>	
USFS	<p><i>Priority areas where ECR was applied during FY 2008:</i> Protracted and costly environmental litigation, project delays, delays implementing needed environmental protection measures, administrative appeals, low quality outcomes when environmental plans and decisions are not informed by all available information and perspectives, lost opportunities when environmental plans and decisions are not informed</p>	✓

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

IX. Cases

The cases that agencies supplied in response to question 8 of the 2008 Template have several common themes. They tend to show that ECR helps minimize the costs of conflict and maximize the benefits of collaboration. Agencies reported that in these cases projects moved quicker, solutions were cost-effective, litigation costs were avoided, and working relationships were improved. Even when agreements were not reached the benefits of ECR helped to narrow issues that might possibly end up in litigation.

Agencies made the following comments about the value of ECR as it pertained to specific cases:

Kept things moving, quicker clean-up and resulted in significant savings in litigation costs (~1M) (Air Force – Jet Fuel Leakage Case)

Avoided construction delays, produced a cost effective solution (saving ~6M), and more informed mitigation (NOAA – Facility Siting Case)

Provided a forum for the public to help steer the project to a decision, fewer appeals, and non from groups who regularly appeal decisions. (USFS– Cibola NF Travel Management Rule)

Substantive cost savings and improved programmatic efficiencies, established credibility and facilitated better working relationships. (DOE – NPDES Permit Appeal)

Some of the projects greatest opponents are now its greatest supporters. Established process to ensure stakeholder involvement in future decisions. (FHWA – I-70 Mountain Corridor Project)

Found clean up solutions, facilitated timely construction of remedies for contaminated sites, project implementation was greatly shortened. (Air Force – Base Clean-up Case)

Brought to a close two decades of on-and-off negotiations, avoided several hundred thousand dollars in litigation costs, and produced benefits not likely to have resulted from litigation. (Department of Justice – Water Rights Case in Montana)

Using a negotiated settlement process, litigation was avoided and stakeholder working relationships improved. (Army Corp of Engineers – Puget Sound Energy Relicensing)

Participating in mediation offered by the EPA saved both parties time and money by avoiding discovery and trial. (Department of Veterans Affairs – EPA Compliance Action Cases)

In the words of one participant their success was attributed the mediator's ability to get them to "think about side the box, which resulted in an innovative solution to the conflict." (U.S. Institute for Environmental Conflict Resolution – DOI/IBLA Bridgeport Land Sale Mediation)

Federal and state co-trustees, industry, and local communities collaboratively developed a seamless solution to restore the Lavaca Bay estuary. (National Oceanic and Atmospheric Administration – Lavaca Bay Case)

In commenting upon the resolution of the National Bison Range Management Case (USIECR Report), Secretary of the Interior Dirk Kempthorne stated " [f]orging this agreement was no simple task...[with] this agreement the Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes are entering into a new era of partnership and cooperation that will enhance the National Bison Range and its fish and wildlife resources for all Americans."

Long-time adversaries learned how to focus on building the "zone of agreement" unanimous agreement was reached and every participant wanted to be part of future restoration efforts." (USDA Forest Service – Lola National Forest Restoration Case)

Detailed case write-ups provided by agencies in their FY 2008 reports are provided in Appendix D.

XI. Conclusion

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

- agencies reported about 35 percent more instances of ECR in FY 2008 than they did in FY 2007. This could be a reflection of increased ECR, improved reporting, or both.
- agencies have had much more success historically in tracking and recording data relating to downstream ECR, but upstream tracking capabilities are improving;
- the context of ECR use is clearly related to agency mission. Regulatory agencies use ECR more in enforcement cases, land and natural resource management agencies use ECR more frequently in upstream contexts such as planning and policy development. Agencies whose missions focus primarily on areas other than natural resources and the environment tend to make more limited use of ECR.
- Even where ECR does not prevent litigation agencies still perceive it as an important tool in resolving conflict. As the Department of the Army reported " [e]ven if the ECR does not result in a settlement of the matter, it might result in narrowing the issues, or getting a better more accurate assessment of the litigation risk."
- The beneficial effects of resolving an ECR case can be profound. As noted above, in commenting upon the resolution of the National Bison Range Management Case (USIECR Report), Secretary of the Interior Dirk Kempthorne stated " [f]orging this agreement was no simple task...[with] this agreement the Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes are entering into a new era of partnership and cooperation that will enhance the National Bison Range and its fish and wildlife resources for all Americans."

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

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

Similar to the 2007 reports, agencies identified resource-related challenges as the biggest and most frequent impediments to undertaking ECR. Resource-related challenges such as lack of sufficient funding and time, and the resource-intensive nature of ECR, were the most frequently cited major challenges. None of the agencies that engage in ECR found access to qualified mediators was a major challenge.

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

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

In sum, the third annual ECR Reports build on the information submitted in the FY 2007 ECR reports. They also reaffirm many of the conclusions and patterns identified in the *FY 2007 Analysis*. On the whole, they show that agencies are making significant progress in increasing the use of ECR in accordance with the ECR Memorandum.

Appendix A. ECR Report Template for FY 2008

FY 2008 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 third year of reporting in accordance with this memo for activities in FY 2008.

The report deadline is January 15, 2009.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies can collect this data to the best of their abilities. The 2008 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 2008 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of the analysis of FY 2006 and FY 2007 ECR reports will be 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 2008, including progress made since 2007. If no steps were taken, please indicate why not.

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

Section 2: Challenges

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

	Major	Minor	Not a challenge/ barrier	N/A
	<i>Check <u>only one</u></i>			
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
k) Lack of resources for staff capacity building	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m) Lack of budget incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r) Other(s) (please specify): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s) No barriers (please explain): _____	<input type="checkbox"/>	<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 2008 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 ¹⁴	Completed Cases or projects ¹⁵	Total FY 2008 ECR Cases ¹⁶	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2008 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored ¹⁷	Participated in but did not sponsor ¹⁸
<i>Context for ECR Applications:</i>									
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____	_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	_____	_____	_____	_____	_____	_____	_____	_____	_____
Other (specify): _____	_____	_____	_____	_____	_____	_____	_____	_____	_____
TOTAL	_____	_____	_____	_____	_____	_____	_____	_____	_____
	(the sum should equal Total FY 2008 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2008 ECR Cases)				(the sum should equal Total FY 2008 ECR Cases)	

¹⁴ A "case in progress" is an ECR case in which neutral third party involvement began prior to or during FY 2008 and did not end during FY 2008.

¹⁵ A "completed case" means that neutral third party involvement in a particular matter ended during FY 2008. 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.

¹⁶ "Cases in progress" and "completed cases" add up to "Total FY2008 ECR Cases".

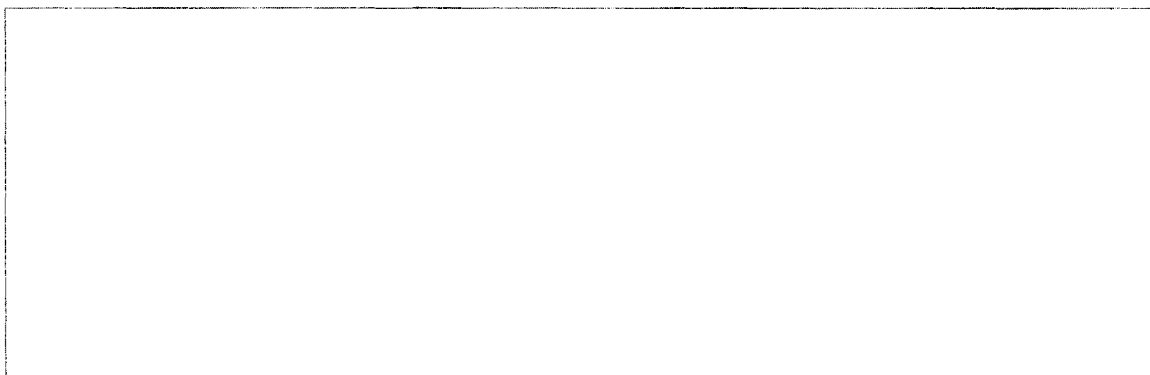
¹⁷ Sponsored - to be a sponsor of an ECR case means that an agency is contributing financial or in-kind resources (e.g., a staff mediator's time) to provide the neutral third party's services for that case. More than one sponsor is possible for a given ECR case.

¹⁸ 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).


- | List of priority areas identified in your department/agency FY 2007 ECR Report | Check if using ECR | Check if use has increased since FY 2007 |
|--|-------------------------------|--|
| _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| _____ | <input type="checkbox"/> | <input type="checkbox"/> |
| _____ | <input type="checkbox"/> | <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 2008 | Check if
using ECR | |
| _____ | <input type="checkbox"/> | |
| _____ | <input type="checkbox"/> | |
| _____ | <input type="checkbox"/> | |
| _____ | <input type="checkbox"/> | |

35

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



6. Describe other significant efforts your agency has taken in FY 2008 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

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

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2008). Please limit the length to no more than 2 pages.

Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance

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

Identify the key beneficial outcomes of this case, including references to likely alternative decision making forums and how the outcomes differed as a result of ECR

Reflections on the lessons learned from the use of ECR

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

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

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

Please attach any additional information as warranted.

Report due January 15, 2009.

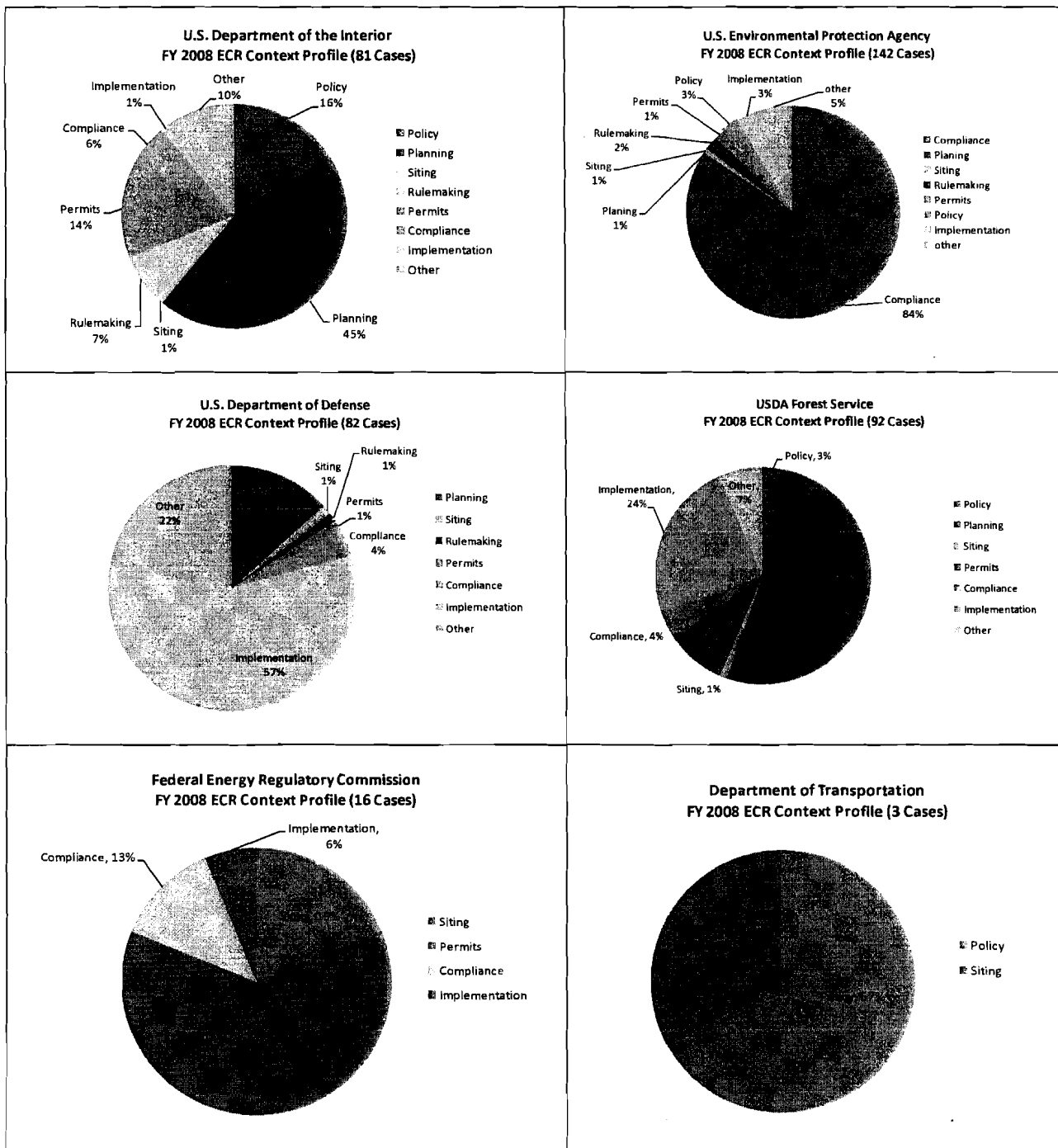
Submit report electronically to: ECRReports@omb.eop.gov

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

Appendix B. Context Profile of Cases for All Reporting Agencies



Note: NOAA was engaged in two ECR cases in FY 2008. Both cases occurred within the siting and construction context. NRC was engaged in one case, and this case occurred within the rulemaking context.

Appendix C. Agency Decision Making Forum for FY 2007 and FY 2008

FY 2007	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%

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

FY 2007 and FY 2008	Federal Agency Decision	Administrative Proceedings/ Appeals	Judicial Proceedings	Other
	Number and Percent (%)			
FY2007	186 (58%)	43 (14%)	30 (9%)	61 (19%)
FY2008	197 (47%)	116 (28%)	47 (11%)	59 (14%)

Appendix D. Agency ECR Case Examples

Environmental Protection Agency

The Total Coliform Rule (TCR) is the principal regulatory tool under the Safe Drinking Water Act (SDWA) that protects the quality of potable water from bacterial contamination in the distribution system. The rule affects approximately 155,000 public water systems in the United States. The TCR was last revised in 1989. Numerous changes have occurred since that time, both in the number of new regulations under the SDWA and in scientific knowledge. EPA published its decision to revise the TCR as part of its National Primary Drinking Water Regulation (NPDWR) Review in July 2003. In response to recommendations from the Stage 2 Microbial Disinfection Byproducts (M/DBP) Federal Advisory Committee the Agency also decided to consider as part of the TCR revision whether it would be appropriate to add new requirements to address risks associated with distribution systems.

The TCR sets both health goals (maximum contaminant level goals or MCLGs) and legal limits (maximum contaminant levels or MCLs) for the presence of total coliform bacteria in drinking water and requires all public water systems (PWSs) to monitor for the presence of total coliform in the distribution system. Total coliforms are a group of closely related bacteria that are abundant in the feces of warm-blooded animals and are common inhabitants of ambient water. Although they are (with few exceptions) not harmful to humans, their presence can indicate other types of bacterial contamination. Total coliform is therefore a convenient indicator of treatment efficacy and distribution system integrity because water treatment that would control coliform would also minimize the likelihood of pathogen occurrence.

EPA drew on third party assistance in late 2006 to consult stakeholders about forming a Federal Advisory Committee to provide advice to the Agency on these issues and to facilitate a technical workshop in early 2007. As a result of this convening process, EPA formed the Total Coliform Rule/Distribution System Advisory Committee (TCRDSAC) to develop an agreement in principle regarding recommendations to EPA on 1) revisions to the TCR; and 2) what information about distribution systems is needed to better understand and address possible public health impacts from potential degradation of drinking water quality in distribution systems.

The TCRDSAC met a total of 13 times during the period of July 2007 through September 2008 and reached consensus on an Agreement in Principle with recommendations for revisions to the TCR that take a proactive approach to protect public health. It recommends maintaining an MCL for *E. coli* and replacing the MCL for total coliform with a treatment technique approach that relies on *E. coli* and total coliform monitoring to establish a framework for public water systems to assess the potential for sanitary defects and to correct them as appropriate. The Committee also recommended forming a Research and Information Collection Partnership to develop recommendations for research and information collection efforts.

EPA's Office of Ground Water and Drinking Water (OGWDW) has made a long-term investment in collaborative relationships with its stakeholders, which provided a strong foundation for the TCRDSAC's success. This commitment to collaboration is reflected in: the

value placed by EPA and its stakeholders on shared learning before taking positions on issues, the establishment of explicit criteria for a sound agreement and analysis of proposed options against those criteria, the active and informed participation by members through work groups and task groups, and the participants' willingness to bring up difficult issues or differences in a timely manner and at the same time listen with respect to one another. In addition, inclusive and balanced participation, stakeholder involvement in the convening process; clear protocols that covered such ECR principles as accountability, group autonomy, openness and implementation, extensive and collaborative technical analysis; and EPA's investment of staff and resources all contributed to the success of this process. The process was transparent and accountable to the public through *Federal Register* notices, posting of Committee agendas and materials to a website, and public comment opportunities at each Committee meeting.

Informed Commitment and Accountability—The Director of EPA's OGWDW served as Chair of the Committee, demonstrating EPA's clear commitment to the process. Further, EPA agreed that, after consultation with both the Assistant Administrators of the Office of Water and the Office of Research and Development (ORD), the Chair's signature on any agreement would be on behalf of the Agency as a whole. Staff from OGWDW, ORD and EPA regional offices participated actively at every Committee meeting and on the Technical Work Group (TWG), bringing Agency views to the table. They also organized cross-Agency groups between sessions to communicate Committee deliberations and prepare for Agency representation. The Assistant Administrator for the Office of Water participated in the signing ceremony.

Balanced, Voluntary Representation—The TCRDSAC was comprised of 15 member organizations, each of which was consulted as part of the situation assessment and received letters about their possible interest in participating. Stakeholder representation was well managed by working through existing national associations and groups representing state and federal regulators, the regulated community, local government, public health experts, public interest organizations, and state consumer advocates. The category of non-community water systems was the most difficult to represent, in part because of the enormous variety among them. To address this situation, at least five members of the committee were selected in part because of their extensive experience with these kinds of small systems. In addition, EPA organized and scheduled the Small Business Regulatory Enforcement Fairness Act (SBREFA) compliance process to take place early enough in the TCRDSAC process so that Committee members could consider the SBREFA results in their deliberations. Members of the Committee generally had an excellent attendance record, due largely to their commitment to the process but also to the fact that the meetings for the full year were scheduled early in the process.

Group Autonomy—The agreed upon protocols for participation established a clear collaborative process, decision making was consensus-based, and the written Agreement in Principle was signed by all members. A neutral facilitation team served the whole Committee, and neutral technical experts provided leadership for the TWG and reported its findings to the Committee.

Informed Process—In advance of the process, EPA, working with distribution system experts, compiled existing information regarding potential health risks that may be associated with distribution systems in nine white papers. In addition, EPA developed a series of ten TCR issue papers. These distribution system white papers and TCR issue papers were used to

inform EPA and stakeholders about areas of potential TCR revisions and distribution system requirements. EPA held a technical workshop in early 2007 to review these papers. In June 2007, prior to the first meeting of the TCRDSAC, a group of approximately 60 technical experts met to discuss what data and analyses existed or could be assembled to support the work of the Committee. At its first meeting in July 2007, the TCRDSAC officially formed the TWG to support its deliberations. The TWG had an open membership that continued to evolve throughout the process based on TCRDSAC needs. The TWG held a total of 13 one-day meetings to prepare presentations that provided information to the Committee to help identify issues, analyze options under consideration and address other topics at the Committee's request. Over the course of the Advisory Committee process, the TWG set up 13 task groups to focus on specific aspects of its work. These task groups met mostly through conference calls and occasional half-day meetings. Neutral third parties provided facilitation support for all the TWG meetings, sixteen task group conference calls, and two of the task group half-day meetings.

Openness—The facilitation team, in consultation with Committee members, drafted agendas that were circulated in advance to all Committee members with request for comment. Committee meetings were announced in the Federal Register and were open to the public. Opportunities for public comment were provided. Meeting agendas, summaries and materials were posted to the public website.

Timeliness—The Committee completed its work and a report with recommendations by early fall 2008.

Implementation—At several points, EPA briefed Committee members on legal and policy issues and vetted recommendations for consistency. By having an EPA representative on the Committee, EPA could ensure that recommendations were consistent with federal law and policy. EPA will use the recommendations in the Agreement in Principle as the basis of a Notice of Proposed Rulemaking to the maximum extent possible consistent with the Agency's legal obligations. The Agreement in Principle was signed formally, with signatories committing both themselves and the organizations they represented to support those components of EPA's proposed rule that reflect the consensus of the Committee. At the last meeting of the Committee, members also reported outreach plans already underway to communicate the recommendations to others around the country. In the agreement, EPA committed to specific, future consultations with stakeholders on issues related to the TCR revisions. Planning for those consultations as well as for establishing the recommended Research and Information Collection Partnership has already begun.

The TCRDSAC members paid explicit attention to the quality of the outcome throughout their deliberations, seeking not only to address specific concerns and goals for improvement but also to consider the interests of the public in as objective a manner as possible. Early in its deliberations, the TCRDSAC developed ten criteria for evaluating a revised TCR and concluded in its Agreement in Principle that its recommendations, taken as a whole, adequately address these criteria. Overall, the new revised TCR paradigm is designed to trigger systems with positive total coliform/*E. coli* monitoring results to do an assessment, to identify whether a sanitary defect(s) is (are) present, and to correct such defects accordingly. The Committee stated that this "...is an improvement over the current TCR framework in that it takes a more proactive approach to identifying and fixing problems that affect or may affect public health."

The collaborative approach taken also resulted in a much more active level of engagement in supporting and implementing the recommended revisions by stakeholders than would have been achieved through a traditional notice and comment rulemaking alone.

The success of the TCRDSAC process demonstrates the value both of the ECR principles and of long-term sustained investment in a collaborative relationship with stakeholders.

Differences in perspectives are to be expected given the diverse interests affected by public decisions. It follows that the commitment and capacity to learn from those differences is an important ingredient in making decisions that improve public health, are seen as legitimate and are implemented effectively.

Other specific lessons learned from this process include the value of:

- A clear process map for long and complex processes, so that participants maintain a clear view of where they are in the process and what is needed to accomplish their charge in the time available;
- Organization-based membership for effective outreach to constituencies and long-term implementation of agreements reached;
- Written protocols approved by the members that specify the group's charge, what will happen if agreement is reached and if it is not, and other ground rules to ensure the transparency and legitimacy of the process;
- Shared learning strategies, including defining decision-relevant information, joint exploration of information and analysis by stakeholders' technical staff, and neutral technical experts working for the Committee as a whole along with the facilitation team to provide leadership to the TWG and serve as respected spokespersons presenting the jointly produced findings to the Committee;
- Shared criteria for what constitutes a sound agreement; and
- Facilitators who think strategically and collaboratively with EPA and its stakeholders in developing agendas, suggesting process options, facilitating meetings, working through issues individually as needed, and managing the logistics, including meeting summaries, so that the participants can focus on the issues.

Air Force (USAF)

Transco v. United States.

A federal magistrate judge assisted the parties in reaching a settlement of this case, filed in federal district court for the Eastern District of Pennsylvania in 2005. The plaintiff alleged that the petroleum, oil and lubricant (POL) storage area at Willow Grove Air Reserve Station had leaked jet fuel into the property under which the plaintiff had three natural gas pipelines, damaging the protective coating and necessitating repair/replacement of the pipeline. Plaintiff sought over \$2.5 million in damages. Magistrate judge involvement began in August of 2006.

There was disagreement over what tests should be conducted, how much the AF should assist in pipeline excavation, and the relative degree of control the parties should have over the site and the timing of events. The magistrate judge helped the parties to resolve points of disagreement and keep moving forward. Timelines imposed by the magistrate were very helpful.

Ultimately, the parties agreed that if the plaintiff could show that the soil was contaminated by jet fuel, the Air Force would pay for excavation and backfill, and the plaintiff was able to oversee access to the pipeline right of way that it wanted.

The settlement allowed clean-up to progress more quickly and saved the Air Force what could have been over a million dollars in litigation costs.

U.S. Army Corps of Engineers (USACE)

Atlantic Intracoastal Waterway - Charleston County, SC

Charleston District, Regulatory Office – Dock owners on the Atlantic Intracoastal Waterway in Charleston County, SC reported that a neighboring dock owner and tugboat contractor were illegally agitating and dredging to remove sediments. The activity also resulted in re-deposition of sediments beneath adjacent docks, raising bottom elevations and making the adjacent docks unusable during low tides.

An overview of the timeline is below:

- Violation reported in October 2006
- Cease and Desist letters issued October 26, 2006
- Requested survey received January 4, 2007
- Case referred to DOJ in January 2007
- Several months of case preparation
- ECR mediation June 21, 2007
- Consent Decree ordered December 19, 2007
- \$15,000 paid in early 2008
- Restoration Plan completed November 2008 and the minor required restoration is expected to be completed by February 2009

Charleston District regulatory and legal staff were initially unable to resolve the violation and the case was referred to the DOJ for prosecution. Based on informed commitment at DOJ and the Corps, all parties agreed to a mediation process using ECR in order to reduce the possibility of lengthy and costly litigation.

The violation was resolved quickly using ECR-mediated negotiation and resulted in the defendants paying a \$15,000 fine and restoration of the neighbors affected dock areas to restore proper elevations. Without the use of ECR mediation, this case would surely have gone into a lengthy and costly litigation proceeding. The dock owner and tug contractor each retained separate legal counsel and each would have involved time-consuming as well as expensive discovery processes prior to any courtroom testimony taking place. The Corps considers the outcome particularly beneficial to the affected dock owners because their dock areas were able to be restored much more quickly than might have been the case with a courtroom trial scenario.

Charleston District is very much in favor of ECR techniques that can help us to resolve violation cases quickly, and in particular those cases which bring about relief to affected parties faster than traditional legal processes.

Army Legal Services Agency (ALSA)

CERCLA litigation is very complex and time consuming for most judges, so early on in the litigation the judge agreed to send the case to mediation. The parties negotiated a mediation agreement and set up an agenda and protocol for the mediation. The mediation process involved a document exchange, submitting of mediation papers and then a mediation session. The process was not rigidly tied to time limitations, and progressed as necessary to ensure all parties' concerns were raised and parties had time to caucus and work toward resolution.

In this particular case, the parties worked through the issues with informed commitments, accountability and openness. Each party was allowed to voice the issues/points to be resolved. Position papers were comprised of positions that agency/party leaders and clients supported. During ECR, confidentiality agreements were supported during oral presentations and through caucusing, the parties worked toward a resolution.

ECR can avoid formal discovery, hearings and judge imposed deadlines. Parties can systematically move through ECR in a less formal atmosphere, providing the parties more time to gather the information and to prepare for the ECR sessions. It eliminates many of the formalities of preparing for and conducting a trial on the merits, saving man hours in preparing briefs, and the expenses in traveling to the court house and court costs.

The process works only if the parties are willing to work toward a resolution. This often involves compromising from an earlier position, which some parties are not willing to do if they perceive their position as one that will win in court. In assessing whether to enter into ECR, it is important to keep in mind that ECR might change that client's perception. ECR can inform the client on the facts, thereby altering the client's perception on whether his position will actually win in court. The result is a willingness to move closer toward a resolution of the issue. Even if the ECR does not result in a settlement of the matter, it might result in narrowing the issues, or getting a better more accurate assessment of the litigation risk.

Department of Energy (DOE)

Paducah Gaseous Diffusion Plant (Kentucky)

A third-party neutral was used to assist in the settlement of a Paducah site National Pollutant Discharge Elimination System (NPDES) permit appeal. The ECR process lasted almost a year with several periodic meetings. The parties articulated their respective interests and then worked on alternatives that would address those interests. As a result of the timing of the commencement of the Paducah ECR case, DOE (and the other parties to the administrative case) avoided significant expenditures for discovery and the costs of preparing for, and participating in, a hearing on the merits. The resolution of disputed effluent limits and monitoring requirements resulted in substantive costs savings to DOE and improved programmatic efficiencies. Additionally, the ECR process resulted in the Department's establishing credibility with both the Commonwealth of Kentucky and the environmental

group involved in the case and facilitating better working relationships with them. Further, ECR allowed the parties to resolve their environmental issues without the uncertainty associated with litigating those issues.

West Valley Demonstration Project (New York)

In December 2006, the Department was sued by the State of New York over the West Valley Development Project. In mid2007, the Department retained the services of a professional mediator to assist the parties in resolving legal disputes of two decades' duration.

Department of the Interior (DOI)

Decades of water conflicts in the Klamath Basin between conservationists, tribes, farmers, fishermen and state and federal agencies have recently devolved into a "rotating crisis" for Klamath Basin communities. In 2001, water deliveries to irrigators were terminated. In 2002, returning adult salmon suffered a major die-off. And in 2006 the commercial fishing season was closed along 700 miles of the West Coast to protect weak Klamath River stocks. Yet despite this serious state of affairs, the Klamath Basin presents a unique potential for robust ecosystem restoration and community development.

In January 2008, a diverse group of 28 parties led by Tribes and irrigators completed two years of precedent-setting negotiations, and made Draft 11 of the 257-page Klamath Basin Restoration Agreement (KBRA) available for public review. The proposed agreement includes a water balance for the irrigation project, refuges, lake, and river; community sustainability measures, including ESA assurances, power cost security, and economic development; and habitat restoration and fish reintroduction programs focused on long-term fish recovery.

Over the years there had been numerous facilitated efforts, all of which likely contributed to the successful outcome. The process that led to the production of the KBRA began in 2005 in a forum in which the main points of contention regarding water were not even in play. For differing reasons, all of the key water parties were also interested in PacifiCorp's licenses on four hydropower dams on the mainstream of the Klamath River that block access to 300 miles of salmon habitat. These licenses were up for renewal before the Federal Energy Regulatory Commission (FERC). With the assistance of DOI CADR, PacifiCorp and stakeholders hired two facilitators and adopted settlement protocols, and a confidentiality agreement. For a variety of reasons, that process did not produce progress between PacifiCorp and the stakeholders.

In February 2006, the stakeholders ended their association with the facilitators, and went into an "extended caucus" without PacifiCorp and without outside facilitation. The group was loosely facilitated by the FWS Regional Director, and FWS staff provided administrative support for the talks (agendas, booking rooms, meetings minutes, etc). The group came to be known as the Klamath Settlement Group (KSG). Throughout 2006 the parties worked directly on the water issues even as they continued both formal FERC proceedings (conditions, trial type hearing, etc) and direct discussions with PacifiCorp on the dams. In the absence of that FERC record, parties would have been less willing to move forward on water issues separate from progress with PacifiCorp on dams. In January 2007, the KSG produced a 23 page settlement framework that included the quantitative water balance.

In April 2007, the Klamath Water Users Association, Yurok Tribe, and Karuk Tribe, issued an invitation to those parties who had expressed support for the Settlement Framework to begin a new phase of the negotiations, engage PacifiCorp, and commit to move forward in an intense program to build upon progress to date and reach a final settlement.

To support this process, FWS (after consulting with DOI CADR) hired a third party facilitator. The facilitator approached the task as a “project manager.” The facilitator helped the group develop a work plan to translate the framework into a final agreement by November 2007. The group was split into workgroups, and, thanks to the durability of the central water balance, moved steadily through many difficult and detailed issues to produce a proposed final settlement agreement three months behind schedule in January 2008.

In parallel, throughout 2008, Federal agencies and the States of California and Oregon negotiated an agreement-in-principle with PacifiCorp, the private utility that owns four hydropower dams on the main-stem of the Klamath River. These talks, which did not involve third party, resulted in an agreement in principle in November 2008.

Parties now intend to complete both agreements by June 30, 2009.

There were at least three distinct phases in the process. The first phase was focused on PacifiCorp’s hydropower dams, and was led by two facilitators. The second phase was loosely led by FWS staff in a more informal manner and resulted in the framework. The third phase was led by a facilitator and resulted in the KBRA.

In retrospect it is possible to see that the principles of engagement were not fully present in the first phase, although that was not apparent at the time. Nevertheless, participation in the formal process of the first phase was important in creating habits of working collaboratively together. Patterns were established on representation, autonomy, and openness in the first phase that carried forward.

In the second phase, the critical element was informed process. The group developed a cadre of technical professionals who were viewed as “honest brokers.” They ran model after model, and created a sound basis for the water allocation.

In the third phase, with the allocation agreed to, but many details remaining, the group became more work product focused, with small working groups generating material, and then coming back to the larger group. This arrangement could only work with the trust established in the earlier phases (accountability, openness, etc).

This settlement is not yet completed, and even once the documents are completed, there will be many steps and many years for authorization and implementation. The benefits of the work completed to date are that they have created a central forum and a central set of priorities in a basin that had been fractured by multiple jurisdictions, authorities, and priorities.

The KSG process will evolve over time, perhaps in ways not currently apparent. But the end product of that collaborative effort will be more coherent for the basin as a whole than the patchwork alternative to a negotiated outcome.

If there had not been an ECR process, (the KBRA and the hydropower agreement), different processes would have continued on a piecemeal basis:

FERC relicensing

Oregon's water rights adjudication

ESA consultation (Reclamation/FWS/NMFS)

TMDL process in OR and CA

And several more...

Some of these processes would not be resolved for decades, with litigation likely. It is difficult to see how these processes would have resulted in a coordinated set of solutions for the basin as a whole.

"Interest-based negotiation can lead to win-win situations. When parties work together, things that once seemed impossible start to seem possible.

So how and why does it happen in some places and not others? What can government agencies do to foster ECR success? I really don't know, it almost seems like lightning in a bottle. Even during the process, I was never sure if the process was "working." It is hard to know how long to expect it will take – FWS has had to revise the contract with the facilitators several times with add-ons."

- David Diamond, FWS

Department of Justice (DOJ)

In 2007, after unsuccessful negotiations, DOJ filed a complaint to enforce the Clean Air Act at one of the largest cement facilities in the country. The facility was the largest source of nitrogen oxide – a smog-producing chemical - in California. The case proceeded into intensive litigation including discovery of fact and expert witnesses and motion practice. In the second half of 2008, the case also proceeded on a parallel track of mediation in accordance with standard court procedures. Trial was scheduled for January 2009.

The mediation proceeded with a private neutral chosen by the parties. The mediator convened the parties on a regular basis and provided a process to focus on settlement prospects notwithstanding the press of litigation demands. The discussions were informed by ongoing disclosures during the discovery process.

The settlement was the largest yet in a cement kiln enforcement initiative. The consent decree included stringent new limits for nitrogen oxide that will reduce emissions by 1,890 tons per year, a nearly 40% reduction. The facility must pay a \$2 million civil penalty. The environmental work is scheduled to start sooner than what otherwise would have been anticipated in the court case.

The case was an example of a mediator providing a calm, ongoing process to facilitate settlement discussions amidst an otherwise adversarial context.

Department of Transportation (DOT)

I-70 Mountain Corridor Project in Colorado – FHWA

In May 2007, the project team engaged the USIECR to help select a third party facilitator to help the group move forward from the DEIS to select a preferred alternative. This allowed the group to reach a point where they could accept the facilitator and apply all the basic

principles for the engagement of ECR, especially informed commitment, group autonomy, and informed process.

In the Spring of 2008, the Collaborative Effort Team completed its work.

The Collaborative Effort Team is a 27 member group that includes representatives of different interests in the 144 mile corridor, including local governments, highway users, transit, environmental, business and recreation, as well as state and federal agencies. Working with independent facilitators, the team met regularly at various locations in the corridor; the meetings were open to the public for observation with brief opportunities for public comment.

During its work the team focused on: agreeing on which key questions remain and identifying areas that need more information and analysis; building agreement around an alternative that identifies modes of travel and transportation improvement strategies; and establishing processes to ensure stakeholder involvement in future decisions.

There is a great value in involving stakeholders in the decision making process of a project. Some of the project's greatest opponents are now its greatest supporters. They remain involved in the process and help to explain, and to defend, the project's decisions. This also demonstrates to other projects in the state the usefulness of these principles.

National Oceanic and Atmospheric Administration (NOAA)

National Weather Service Barrow WSO/UAIS & Housing

Analyses indicated that building the WSO/UAIS & housing on a new site was more cost efficient and beneficial to the government and NWS than redeveloping the existing site. The NEPA audit identified the presence of two endangered (threatened) duck species. The U.S. Bureau of Land Management preferred that the NWS relocate to a new site, while the U.S. Fish and Wildlife Service preferred that the NWS redevelop the existing site.

The ECR process was implemented shortly after the NEPA Draft Environmental Assessment report was issued in November 2007. Comments were accepted on the Draft until December 2007. The NWS began negotiations with the U.S. Fish and Wildlife Service in mid-December, with other federal and state agencies, and private businesses, entering the negotiations in early 2008. Stakeholders involved included NOAA/NWS, U.S. Fish and Wildlife Service, Bureau of Land Management, U.S. Army Corps of Engineers (USACE), City of Barrow, Alaska Department of Transportation and Public Facilities, and the Ukpeagvik Inupiat Corporation (UIC).

The NWS was responsible for the planned renovation and construction activities. The results of the NEPA environmental audit were shared with the interested stakeholders, including perceived environmental impacts. The NWS and other interested parties entered into the negotiations, due to the presence of wetlands in and near the proposed project area. The above agencies voluntarily entered into negotiations and the interests of all stakeholders represented a balanced approach to resolving interagency differences.

The entire process was open and additional stakeholders (City of Barrow, Alaska Department of Transportation and Public Facilities, and the Ukpeagvik Inupiat Corporation (UIC)) joined the negotiations. As a result of stakeholder input, NWS moved forward with construction activities in FY 2008. Certain mitigation measures were implemented to reduce potential

impacts on the endangered eider duck population and habitat. Examples of measures implemented included construction during non-migratory and non-nesting seasons (1 October to 31 May), preventing predator bird species (e.g., ravens) from nesting on radar towers, and the installation of bird flight diverters on tower guy wires.

The construction site will be accessible to various stakeholder representatives during the construction phase and once completed, the operational phase of the WFO/UAIS, to verify compliance with mitigation measures and permit conditions.

Funds were allocated for FY 2008 to begin construction (\$3.6 M). As a result of the negotiations, the conflicts were resolved and construction is scheduled to begin in Spring 2009. If construction had been delayed, the funding would have been impacted. Any delays into the next fiscal year would have increased construction costs.

Additionally, there was an estimated \$6M cost avoidance by building the new housing on Federal property versus building on leased privately owned property. There is another estimated \$200,000 to \$800,000 cost avoidance on rental and lease payments for housing, should the employee's and their families needed to be relocated during redevelopment of the existing site.

A key beneficial outcome of the case was habitat protection for the endangered duck species. The NOAA/NWS worked with the USFWS to identify mitigation measures and recommendations to be implemented during construction and operation of the WSO/UAIS at the new site location. These measures will reduce potential negative impacts to populations of the endangered speckled and Steller's eiders.

Without all parties participating in and following the principles of the ECR process, it is probable that construction would have been delayed, resulting in increased construction and rental costs, and delays in operational improvements to the WSO/UAIS and housing. Also, mitigation measures to protect the eider duck habitat may not have been as thoroughly evaluated without the expertise and input from the various agencies.

The ECR process worked well in the above example. Through open negotiations with the USFWS and other interested stakeholders, the NWS was granted permission to construct a new WFO/UAIS and employee housing on the new sites versus the existing site.

The mitigation measures NWS implemented were reasonable and should provide no undue burden. The negotiations resulted in an estimated cost avoidance of approximately \$1.4 M to \$6 M to the NWS and government.

All parties communicated and interacted in good faith resulting in a positive outcome for the City of Barrow and residents of the North Slope, the NWS, and the endangered eider duck population.

DARRP - Chevron (Port Arthur) Site Cooperative Assessment, Integrated Remediation and Restoration (CAIRR) Project

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 a portion of the Neches River basin.

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 Arthur and Bridge City, Orange Co. Drainage District, and Chevron USA.

The Old Gulf Refinery site has been an active refinery since the discovery of oil at 'Spindletop' in 1902. NOAA and the Texas Trustees worked to achieve remedial goals at the site to address releases of hazardous substances including aromatic hydrocarbons and metals. Work was initiated in 1993 to control potential sources of contamination and ensure that human and environmental health would be protected from further risk. Simultaneously, the Trustees worked with Chevron to negotiate a cooperative Natural Resource Damage Assessment (NRDA) claim related to the site. NOAA and the Texas Natural Resource Trustees (Texas Commission on Environmental Quality, Texas Parks & Wildlife, Texas General Land Office and US Fish & Wildlife Service) finalized the Restoration Plan/Environmental Assessment (RP/EA) for the Old Gulf Refinery Site, Port Arthur, Texas in 2004.

NOAA's vision of a collaborative process catalyzed the team's adoption of the integrated paradigm (CAIRR). The partners' cooperation led 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 Chevron recognized that it would be possible to use the information gathered in the Remedial Investigation/Feasibility Study (RI/FS) and Risk Assessments to assess natural resource damages due to the similarity of the data requirements. 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. The benefits of this approach were numerous, and included: development of a Conceptual Site Model (CSM) that reflects a common understanding of the site, application of a logical framework for Ecological Risk Assessment (ERA) to NRDA, ensuring that assessment endpoints address trust resources, development of measurement endpoints that support or complement NRDA needs, gathering data cost effectively during the Remedial Investigation, strengthen ERA through input from Trustees and Resource Managers, application of consistent approaches and tools in both processes, determining NRD liability associated with various remedial options (for Chevron as the Potentially Responsible Party), reduction of the overall costs

associated with ERA and NRDA, global settlement of liability for hazardous substance release and damages, expedient protection and restoration of public natural resources.

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 to resolve both cleanup and NRD liabilities under CERCLA.

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

On March 30, 2005, the final response and restoration legal agreements (consent decrees) were 'simultaneously' entered by U. S. District Court for the Eastern District of Texas. Chevron voluntarily began to implement source control, in-situ stabilization and capping of identified wastes, excavation, etc., to address potential site-related human health and ecological risks prior to execution of an Agreed Order with the state of Texas. The final remedy also included waste consolidation; grading and capping within the Site's waste areas; installation of controls to manage and treat storm water run-off from inactive and completed areas; and adjustments to dike elevations and slopes necessary to construct caps, monitor to prevent areas of excessive settlement and protect against future erosion. All on-site corrective action (remedial) construction activities were completed in 2005. Restoration implementation was delayed by complications arising from Hurricane Rita in fall 2005. Construction was initiated on restoration projects in fall of 2006 and completed by 2008.

Chevron constructed and planted at least 85 acres of estuarine marsh and approximately 30 acres of wet prairie and constructed water control structures to enhance nearly 1600 acres of coastal wet prairie near Port Arthur, Texas.

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

The Cibola NF started the planning process to implement the Travel Management Rule (TMR) on the Sandia Ranger District in early 2007. The TMR directs each national forest to identify a system of motorized roads and trails for use. After appropriate public involvement and environmental analysis this system is then displayed on a Motorized Vehicle Use Map (MVUM). All areas on the forest/district not identified on the MVUM are then closed to motorized travel. The identification of motorized roads and trails to place on the MVUM has proven to be extremely controversial on many national forests.

The Cibola NF acquired the services of the US Institute for Environmental Conflict Resolution (USIECR) to act as a neutral third party. USIECR facilitated meetings and workshops designed to bring the public up to speed on the TMR, the planning process used by the Forest Service, and to help guide the development of alternatives to be analyzed in the NEPA process.

Implementation of the TMR requires changes to the ways the public use the Sandia Ranger District for motorized recreation that is generally more restrictive than historical use. Because of the potential for controversy, the forest leadership committed to early public involvement. With the help of the USIECR, the forest convened working groups with a balanced representation of environmental interests, local landowners, and other interested individuals

and organizations to identify concerns and develop options to implement the TMR. The forest held several informational meetings and workshops to keep the process open, inform the participants of progress, and keep the proposal moving toward a decision.

ECR provided a forum for affected segments of the public to get involved early, have their interests addressed in project development, and help steer the project to a decision. The alternatives developed using ECR were likely somewhat different than would have been developed using standard processes. An alternative to the proposed action was selected in the decision and was itself modified based on information received during the ECR process. Finally, although the decision was appealed, the Agency received fewer appeals than expected, and none from the groups that regularly appeal Forest Service decisions.

Reflections on the lessons learned from the use of ECR:

Once committed to using ECR you need to continue on that path to maintain credibility.

To be most effective the Agency must give up some "control" of the process, particularly in developing alternatives to address in NEPA

Federal Energy Regulatory Commission (FERC)

In FY 08 the Commission's DRS played a significant role in mediating complex business and transactional energy disputes that could lead to more energy infrastructure development and capacity for large ECR cases in the near future. The ECR cases reported for FY 08 in responses no. 1 and 3 in which the parties agreed to an ECR process were primarily smaller, two-party disputes that typically involved an energy company and either a landowner or a community. DRS staff functioned in a third-party neutral role and solved these cases effectively and efficiently, often not needing to travel to the location of the dispute.

U.S. Institute for Environmental Conflict Resolution (USIECR)

National Bison Range Management (MT)

1908 - The National Bison Range Complex in Montana, administered by U.S. Fish and Wildlife Service (FWS), was established in 1908 to conserve the American bison. Approximately 65 percent of the Refuge lies within the borders of the Confederated Salish and Kootenai Tribes (CSKT) reservation lands.

1973 - Title 1 of the Indian Self Determination and Education Assistance Act of 1975 (P.L.93-638) established procedures by which tribes could negotiate contracts with the Bureau of Indian Affairs to administer their own education and social service programs. It also provided direct grants to help tribes develop plans to assume responsibility for federal programs.

1996 - In mid 90's the Indian Self Governance Act was amended to provide opportunities for tribes to assume management responsibilities of other programs and functions administered by the Secretary of the Interior if the programs or functions are of special geographic, historical, or cultural significance to the participating Indian tribe. After the amendment, the CKST approached the FWS to explore a management role at the National Bison Range.

2004 - In 2004, FWS and CKST began implementing the first role sharing management plan for the range.

2006 - Implementation of the role-sharing plan produced tensions between FWS and CKST, with both sides accusing the other of undermining the co-management plan. In late 2006, the Department of the Interior canceled the co-management plan, only to reverse that decision two weeks later, saying it would re-establish the relationship in 2007.

2007 - In early summer of 2007, the Interior Department's Office of Collaborative Action and Dispute Resolution (CADR) contracted the U.S. Institute for Environmental Conflict Resolution (U.S. Institute) to hire impartial facilitators to assess the feasibility of using assisted negotiation to resolve the issue. The impartial facilitators, Jon Townsend and Suzanne Ghais, conducted the assessment and determined that a negotiated solution was feasible. At the same time, Lyle Laverty, the Interior Department's assistant secretary, directed FWS to find agreement.

2008 - As pressure to resolve the conflict mounted, FWS and CKST leadership agreed to work toward resolving the conflict through assisted negotiation. On June 19, 2008, after six months of negotiations, the CKST and FWS signed a three-year agreement representing a government-to-government partnership to share management responsibilities for the National Bison Range.

The assessment set the stage for informed commitment and group autonomy in line with the Basic Principles for Agency Engagement.¹⁹ The negotiation process included balanced voluntary representation of the parties, FWS and CSKT, and both parties were accountable to their leadership. The agreement was available to the public via a 60-day public comment period in the Federal Register (Volume 73, Number 133, July 10, 2008).

The two-part ECR process was conducted intensively over a nine month period (a three month assessment and a six month negotiation) during which time a concerted effort was made to bring all relevant information to the table. This process ensured informed deliberations and ultimately a robust agreement. Follow-through provisions include opportunities to reengage the facilitation team if things don't go as planned.

According to Interior Secretary Dirk Kempthorne,

"Forging this agreement was no simple task...[with] this agreement the Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes are entering into a new era of partnership and cooperation that will enhance the National Bison Range and its fish and wildlife resources for all Americans"

In the words of CSKT Chairman James Steele, the signed agreement is a *"historic opportunity,"* and he added that *"it is a day of great pride for many people because we will now be able to demonstrate that we can be innovative partners."*

In a post process evaluation the parties indicated that lobbying, litigation, and unassisted negotiations were the likely alternative forums for addressing this conflict in the absence of ECR.

¹⁹ As outlined in the 2005 Joint Memorandum on Environmental Conflict Resolution issued by the Office of Management and Budget and the Council on Environmental Quality.

From the participants' perspectives the ECR process better served their interests; more effectively addressed the issues; and trust was built and working relationships significantly improved.

ECR is both a proactive and reactive conflict management tool. In situations where there is known or anticipated conflict, engaging parties early can help minimize the negative ramifications of conflict (e.g., project delays, hostility), and maximize the positive benefits of collaboration (e.g., building productive working relationships).

It should be noted that while the parties at the negotiating table reached agreement to resolve this issue, the Public Employees for Environmental Responsibility subsequently filed a law suit challenging the agreement. This law suit is currently pending.

Acknowledgements:

This report was compiled by David Emmerson, Senior Conflict Management Specialist, Office of Collaborative Action and Dispute Resolution (CADR), U.S. Department of the Interior. David Emmerson worked on behalf of OMB, CEQ, and in conjunction with Agency ECR Points of Contact to create this government-wide perspective on the experiences reported by agencies in their annual ECR reports. Sincere thanks are due to David Emmerson and CADR for supporting this effort.