



DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
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MEMORANDUM FOR DEPARTMENT OF DEFENSE ADR LIAISON

SUBJECT: Request for Environmental Conflict Resolution (ECR) Data for Fiscal Year 2011

The Department of the Navy's ECR Annual Survey for Fiscal Year 2011 is provided as enclosure (1). If you have any questions regarding the survey report, please feel free to contact me at matilda.brodnax@navy.mil or (202) 685-6990.

A handwritten signature in black ink that reads "Matilda A. Brodnax".

Matilda A. Brodnax

Attachment:
As stated

FY 2011 ECR Policy Report to OMB-CEQ

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

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

ECR is defined in Section 2 of the memorandum as:

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

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

The report format below is provided for the sixth year of reporting in accordance with this memo for activities in FY 2011.

The report deadline is February 15, 2012.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies are requested to collect this data to the best of their abilities. The 2011 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 2011 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of prior year synthesis reports are available at www.ecr.gov.

Name of Department/Agency responding:	Department of the Navy
Name and Title/Position of person responding:	Matilda Brodnax, Assistant General Counsel (ADR)
Division/Office of person responding:	Office of the General Counsel / ADR Program Office
Contact information (phone/email):	(202) 685-6990; <u>matilda.brodnax@navy.mil</u>
Date this report is being submitted:	1 February 2012

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2011, including progress made since 2010. If no steps were taken, please indicate why not.

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

The Department of the Navy (DON) has had a strong Alternative Dispute Resolution (ADR) Program Office for several years. Staffed with three attorneys, it handles a wide variety of ADR issues facing the DON, including environmental matters. The DON ADR Program Office works with appropriate DON commands responsible for environmental issues. During 2011, the U.S. Institute for Environmental Conflict Resolution (USIECR) provided NEPA collaboration training to DON NEPA specialists at the Washington Navy Yard and via VTC to participants across the country. Later in the year, USIECR provided a comprehensive ECR presentation at the DON Litigation Roundtable. Training materials and external links to ECR courses have also been published on the web at <http://www.adr.navy.mil/content/sect106consult.aspx> and <http://ecr.gov/Training/Training.aspx>.

The DON has demonstrated a long standing capacity for ECR in the area of installation restoration. The DON currently participates in 51 facilitated partnering teams that oversee the restoration efforts at 1,295 active environmental restoration sites. Within these teams, representatives from the DON, EPA, state governments, local officials, and sometimes various other groups use collaborative methods to craft creative and cost effective restoration processes designed to address as many interests as possible.

Section 2: Challenges

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

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

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2011 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR "case or project" is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

Context for ECR Applications:	Cases or projects in progress	Completed Cases or projects	Total FY 2011 ECR Cases	Decision making forum that was addressing the issues when ECR was initiated: ¹				Of the total FY 2011 ECR cases indicate how many your agency/department Sponsored Participated in but did not sponsor	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored	Participated in but did not sponsor
Policy development	___	___	___	___	___	___	___	___	___
Planning	___	___	___	___	___	___	___	___	___
Siting and construction	___	___	___	___	___	___	___	___	___
Rulemaking	___	___	___	___	___	___	___	___	___
License and permit issuance	___	___	___	___	___	___	___	___	___
Compliance and enforcement action	___	___	___	___	___	___	___	___	___
Implementation/monitoring agreements	51	___	51	___	___	___	51 ²	___	___
Other (specify): _____	___	___	___	___	___	___	___	___	___
TOTAL	51 (the sum should equal Total FY 2011 ECR Cases)	___	51	___	___ (the sum of the Decision Making Forums should equal Total FY 2011 ECR Cases)	___	51	___ (the sum should equal Total FY 2011 ECR Cases)	___

¹ The DON has 51 facilitated partnering teams, organized in a three tier structure, which address installation restoration issues. Collectively, the teams work with 1,295 active environmental restoration sites. The concept of initiation is not appropriate for these matters given the long standing existence of the teams.

² These 51 facilitated partnering teams collaborate to implement environmental restoration regulations.

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2011, and indicate if ECR is being used in any of these areas. Note: An overview of substantive program areas identified by departments/agencies in FY 2010 can be found in the FY 2010 synthesis report.

List of priority areas identified in your department/agency prior year ECR Reports	Check if using ECR	Check if use has increased in these areas
Addressing Intra-Navy and Intra-DOD conflicts that arise from different interpretations and applications of laws, regulations, and policies	<input type="checkbox"/>	<input type="checkbox"/>
Using formal dispute resolution between lead and cooperating agencies throughout the NEPA process, but particularly prior to the publication of the DEIS and FEIS	<input type="checkbox"/>	<input type="checkbox"/>
Resolving storm water toxicity standards in NPDES permits	<input type="checkbox"/>	<input type="checkbox"/>
Expediting the NEPA and permitting process for the proposed move of Marine Corps / CVN to Guam	<input type="checkbox"/>	<input type="checkbox"/>
Avoiding contentious, unproductive consultations under Section 106 of the National Historic Preservation Act	<input type="checkbox"/>	<input type="checkbox"/>
Addressing Coastal Zone Management Act issues, particularly problems with NOAA regulations implementing the Act	X	<input type="checkbox"/>
Resolving takings claims generated by AICUZ noise issues	<input type="checkbox"/>	<input type="checkbox"/>
Environmental Restoration Program	X	X
List of additional priority areas identified by your department/agency in FY 2011	Check if using ECR	

Negotiating allocations in affirmative cost recovery actions under CERCLA and state law	X
Negotiating allocations in defensive CERCLA actions	X

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

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

6. Describe other significant efforts your agency has taken in FY 2011 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.

An overseas installation at one DON command was interested in updating the instruction on fishing along the harbor's shores. Rather than rewriting the instruction in a vacuum, the installation briefed the subject during a quarterly

Federal/State regulatory meeting and solicited input from all in attendance, including State and Federal natural resource subject matter experts (SMEs). The meeting attendees reached the general consensus to maintain the status quo, allowing very limited shoreline fishing and only catch and release in most spots.

Another example of proactive collaboration from the same installation: some individuals on the installation's staff wanted to revive a public pig-hunting program. Installation staff reached out and met in person with the local SMEs. These experts provided candid advice to the Installation staff, advice that the staff would probably not have gotten simply by exchanging written materials with the experts.

The same overseas DON command described a successful collaborative venture with a federal regulatory agency, taking a proactive, innovative approach to a potential Endangered Species Act (ESA) violation. Rather than waiting to be the subject of an enforcement action under the ESA for failing to modify shore installation management operations, the command Installation staff acted proactively to reduce the fallout of flying seabirds confused by night lighting. The Installation staff, including the Commanding Officer, the Public Works Officer, and the security patrols, worked collaboratively with the natural resource SMEs, considering different ways of directing lights downward, shielding lights, modifying light bulbs, and minimizing lighting to meet force protection standards and security night-lighting requirements. Their goal was to focus on actual lighting needs rather than "lighting up the place like a Christmas tree." Installation staff kept the U.S. Fish and Wildlife Service (USFS) advised of their progress and invited them to visit the base at night to help DON staff identify offending lights and discuss Installation needs. The USFWS was impressed with DON's efforts and suggested creating a marketing presentation package about the Installation staff's actions and using it as a positive collaborative case study.

A final thought from this DON installation: "We try to live by the notion of "cooperative conservation" and "collaboration;" as we know with dwindling budgets, we can't do it alone. We attend many inter-agency meetings, establish rapport and hopefully, trust, and speak candidly about our mission priorities (national defense) and fiscal law limitations. Although emotionally we would like to do much more, sometimes we are just not authorized to do so. We don't fear the public; we are not good neighbors any longer; we are active members of the community which is an incremental difference, but a difference. Living on islands we can't drive away mad -- as we have no choice but to circle back and there's the person once again -- so it has to be worked, resolved, thought through again and again until you reach something you can both tolerate with an understanding that both parties tried really hard."

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.

Fiscal Year 2010 Chief of Naval Operations Environmental Awards

This annual DON award recognizes people, ships, and installations for their exceptional environmental stewardship.

Installations

"Naval Station Norfolk (NSN) is the world's largest Naval installation, and is one of 66 DoD installations located within the Chesapeake Bay watershed, the nation's largest estuary. The Naval Support Activity Norfolk (NSAN) Headquarters Complex is located adjacent to NSN to the south. Due to the size of NSAN and its close proximity to NSN, all installation restoration (IR) sites located at the installation are managed as part of the NSN restoration program. NSN and NSAN achieved an unparalleled partnership among the Navy, EPA, and Virginia Department of Environmental Quality. Throughout the partnering process, site-specific project status updates led to expedited document reviews and approvals, and achievement of major milestones in both Navy Remedy in Place and EPA Installation Construction Completion. This facilitated long term site management strategies that also provided for the beneficial reuse of multiple IR sites at NSN, including over 22 acres of re-usable outdoor recreation space, 1,400 parking spaces on 14 acres, and approximately a quarter of an acre of reusable warehouse space."¹

¹ Currents Magazine, summer 2011, pp. 16 - 29 at 27, http://greenfleet.dodlive.mil/files/2011/08/Sum11_CNO_Environmental_Awards.pdf, (last accessed 12/9/11).

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2011). Please limit the length to no more than 2 pages.

Name/Identification of Problem/Conflict

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

This complicated case, with a history spanning over 50 years, centered around the contamination of a formerly DON-owned site by a series of government-owned, contractor-operated (GOCO) facility operators who manufactured propellants, rocket motors, and missile components. DON sought reimbursement for a portion of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup costs, including future costs for ongoing cleanup. The facility itself has been transferred to the local city, but CERCLA cleanup continues.

A meeting attended by DON, DOJ, and counsel representing successors of two of the former operating contractors was held in October 2010. At this meeting the parties agreed to mediate several complex issues, some with scant legal precedent. Using a number of resources, including USIECR's Roster of Neutrals, The parties jointly selected a private mediator, and the two-day mediation took place in March 2011. DOJ was responsible for administrating and funding the mediation.

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

The parties recognized that fifty years of documents and complex issues created the potential for costly discovery and high-risk litigation, so they had tried repeatedly to settle this case, but were still very far apart. As a result their expectations going into the mediation were fairly modest; they hoped the mediator could get them within shouting distance on some of the most problematic issues.

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

Through the expert assistance of the mediator the parties were able to settle the case, avoiding years of costly discovery and an uncertain outcome.

Reflections on the lessons learned from the use of ECR

In the right circumstances and with a skilled mediator parties can arrive at a mutually advantageous outcome, even if going into the mediation it seems that they are too far apart to reach resolution.

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

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

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

The DON ADR Program Office incorporated the 2011 survey questions into an online database, and worked with the Assistant General Counsel (Energy, Installations and Environment) to solicit world-wide responses from throughout the DON.

Please attach any additional information as warranted.

Report due February 15, 2012.

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