Department of Energy
Washington, DC 20585

January 15, 2010

Horst Greczmiel
Associate Director
For NEPA Oversight
Council on Environmental Quality
722 Jackson Place, N.W.
Washington, D.C. 20503

Dear Mr. Greczmiel:

Pursuant to the November 28, 2005, Memorandum on Environmental Conflict Resolution jointly issued by the Chairman of the Council on Environmental Quality and the Director of the Office of Management and Budget, enclosed please find the Department of Energy's fourth annual progress report.

If you or your staff have questions concerning the report, you may contact Kathleen Binder, Director of the Department's Office of Conflict, Prevention, and Resolution at 202-586-6972 or Kathleen.Binder@hq.doe.gov

Sincerely yours,

Sean A. Lev
Deputy General Counsel for
Environment and Nuclear Programs

Enclosure

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Environmental Conflict Resolution

Fourth Annual Report

January 2010



U.S. Department of Energy

EXECUTIVE SUMMARY

The Department of Energy (DOE or the Department) defines environmental conflict resolution (ECR) as the use of any collaborative process to prevent or resolve environmental conflicts, including, but not limited to, those processes involving the use of third-party neutrals. This definition is consistent with that provided in the Administration's 2005 Memorandum on Environmental Conflict Resolution, which acknowledged the value of all types of dispute resolution and collaborative problem solving.

Collaborative approaches to avoiding or resolving environmental conflicts have been used by DOE sites prior to the issuance of the ECR memorandum and continue to be used today. Facilitators and third-party neutrals are used in ECR processes as the situation warrants.

In FY 2009, 16 sites and program offices reported 152 ECR cases. Of that number, 94 were completed, and the remaining 58 are in progress. The most frequently cited areas in which ECR was used were groundwater issues, conflicts in environmental cleanup decisions, and relationships with regulators. It should be pointed out that, consistent with the Department's definition of ECR, the use of ECR in these areas is often attributable to the desire to prevent conflict.

I. INTRODUCTION

A. Background

On November 28, 2005, the Chairman of the Council on Environmental Quality (CEQ) and the Director of the Office of Management and Budget (OMB) issued the Memorandum on Environmental Conflict Resolution (ECR Memorandum). This joint policy memorandum directed Federal agencies to increase the effective use of, and their institutional capacity for, ECR and collaborative problem solving.

Section 2 of the ECR Memorandum defines ECR as "third-party assisted conflict resolution and collaborative problem solving," but acknowledges the value of a variety of collaborative partnerships and arrangements used by Federal agencies to implement their programs and missions. The policy espoused in the memorandum "recognizes the importance and value of the appropriate use of all types of ADR [alternative dispute resolution] and collaborative problem solving."

Consistent with the memorandum's recognition of the value of all types of collaborative dispute resolution, DOE defines ECR as the use of any collaborative process to prevent or resolve environmental conflicts, including, but not limited to, those processes involving the use of third-party neutrals. This report reflects that ECR definition and describes several of the third-party and non-third party dispute resolution processes successfully used in the Department.

The report constitutes the Department's fourth annual progress report to CEQ and OMB, as directed by section 4(g) of the ECR Memorandum. In accordance with guidance provided by CEQ and OMB, this report includes FY 2009 information on DOE progress in implementing the ECR Memorandum.

B. Report Methodology

To provide guidance to Federal agencies implementing the ECR Memorandum, a staff-level interagency ECR Steering Committee consisting of representatives from various agencies was formed. This committee, with assistance from the U.S. Institute for Environmental Conflict Resolution, developed a report template and questionnaire to be used by agencies for this fourth annual report. DOE used the questionnaire developed by the ECR Steering Committee, but with minor modifications. (See Attachment).

This DOE report survey was distributed to points of contact from various programs and site offices throughout the DOE complex. The structure of this report follows the format of the DOE survey and contains the information supplied by 16 respondents.

II. CAPACITY DEVELOPMENT AND PROGRESS MADE

During the reporting year, DOE sites and program offices availed themselves of training opportunities. They also continued the institutionalized collaborative relationships formed with regulators and community members.

A. Training

Personnel from several sites and program offices participated in Department-based ECR training programs. Three DOE offices sponsored the September 25, 2009 Environmental Conflict Resolution Training session, which was facilitated by a representative from the U.S. Institute for Environmental Conflict Resolution. Session topics ranged from assessing whether and when to use ECR, to overcoming resistance to ECR, to the tools and resources available to ECR points of contact. The session drew 53 participants on-site and 23 via video teleconference.

The Department's annual ECR Environmental Attorneys' Training Workshop held on October 20 - 21, 2009 featured training on the National Environmental Policy Act (NEPA) categorical exclusion policy, collaboration in Indian country, natural resources damages, and environmental justice. The attendees included 45 on-site participants; 11 via video teleconference, and six via an audio phone connection.

B. Collaborative Relationships

The Department has a long-standing commitment to collaborative conflict resolution. The following are site-specific examples in which DOE has advanced conflict resolution through the establishment of collaborative relationships:

Savannah River Operations Office (South Carolina): The Savannah River Operations and the South Carolina Department of Environmental Control developed a "pre-dispute resolution" strategy in 2003. As part of the strategy, the Savannah River Site can earn "Cleanup Credits" when it accelerates environmental cleanup and waste or material disposition activities. When needed, earned Cleanup Credits can be redeemed to extend certain enforceable commitments thereby avoiding extensive negotiations or the potential conflict associated with proposed enforcement actions.

Richland Operations Office (Washington State): The collaboration formed among the Department of Energy, the State of Washington, and the U.S. Environmental Protection Agency (EPA) and implemented in the Hanford Tri-Party Agreement (TPA) is designed primarily to avoid conflict thereby minimizing the number of conflicts requiring resolution through the TPA's formal process. The TPA contains over 1,500 separate enforceable and unenforceable commitments controlling the cleanup or compliance requirements for over 2,000 individual waste sites in a 40-year time frame. Collaborative environmental conflict avoidance and resolution begins at the staff level of all three organizations with staff meeting frequently to discuss projects and resolve differences of opinions at the earliest stages.

C. Field Counsel Calls

The DOE Office of the General Counsel organizes a monthly conference call with DOE environmental attorneys to review cases and, as appropriate, to discuss the potential use of ECR. ECR support also is provided to DOE sites and DOE program offices by DOE's Office of Conflict Prevention and Resolution. This office assists in determining if a dispute may benefit from the use of a third-party neutral and in identifying and engaging appropriate individuals. Approximately 15 attorneys, on average, participate in these monthly calls.

III. CHALLENGES TO EFFECTIVE ECR USE

The ECR survey listed 17 possible challenges or barriers to effective ECR use and allowed respondents to list additional challenges or barriers. These potential obstacles include lack of staff expertise, funding, incentives, and access to qualified mediators and facilitators. Topics concerning the reluctance of parties to become involved, and the perception that ECR is time-and resource-intensive were also covered.

Only 4 of the 15 respondents who completed this section of the survey identified issues as major challenges/barriers. One of the four listed 12 of the 17 challenges/barriers as major and the remaining five as minor. Three of the four respondents identified uncertainty about whether to engage in ECR as a major obstacle. Lack of staff expertise or availability of staff, limited or no funds for facilitators and mediators, and lack of travel costs were each cited by two respondents as major barriers. Two respondents also cited the perceived time and resource intensive nature of ECR and uncertainty about its net benefits as major obstacles.

Thirteen of the respondents identified some of the listed barriers/challenges as minor. Uncertainty about the net benefits of ECR and lack of staff expertise to participate in ECR were each listed as a minor obstacle by six respondents. Funding limitations, the perception of ECR as being time-and resource-intensive, and lack of resources for staff capacity building were each cited by five respondents.

The two respondents with the highest reported ECR cases, each with 63, did not cite any listed challenge/barrier as a major obstacle.

IV. ECR CASES IN FY 09

A. ECR Case Summary

The total number of reported ECR cases in FY 09 was 152; three of the respondents had no cases to report. Of the total number of reported cases, 94 have been completed and 58 are in progress.

A case is considered completed when involvement in a particular matter ended during FY 09. This does not necessarily mean that the parties concluded their collaboration, negotiation, or dispute resolution process; that all issues are resolved; or that agreement has been reached. A case is still in progress if the collaboration, negotiation, or dispute resolution began prior to or during FY 09 and did not end in that year.

Table 1, ECR Cases Summary Table, depicts the distribution of completed and in progress cases and the context for application of ECR. Almost one-third of the cases reported in Table 1 as "Other," were related to requested modifications of the Hanford TPA.

Based on the reported allocation of ECR case sponsorship, almost 50 percent of the ECR cases were sponsored by the Department. Sponsorship of a case indicates that DOE contributed financial or in-kind resources (e.g., a staff mediator's time) to provide the neutral third-party's services for that case. It should be noted that more than one sponsor is possible for a given case.

In the cases in which DOE participated but did not sponsor, the Department was a party to the case or contributed in some significant way, such as providing expert technical advice.

Table 1: ECR Cases Summary Table

Context for ECR Applications:	[redacted]	[redacted]	Total FY 2009 ECR Cases	[redacted]	[redacted]	[redacted]	[redacted]	Of the total FY 2009 ECR cases indicate how many your agency/department	
								Sponsored	Participated in but did not sponsor
Planning	7	3	10	10				1	9
Rulemaking		3	3						
Compliance and enforcement action	6	8	14		12		2	3	7
Other (specify): A. Tri-Party Agreement Change Requests Submitted and Approved; B. Tribal Consultation Under Section 106, National Historic Preservation Act C. National Environmental Policy Act Public Participation	A. 21 B. 2 C. 1	A. 20	A. 41 B. 2 C. 1	B. 2 C. 1			A. 30	A. 12 B. 2 C. 1	A. 29
[redacted]	[redacted]	[redacted]	152	[redacted]	[redacted]	[redacted]	[redacted]	76*	66*

* Due to inconsistent information provided by respondents regarding sponsorship, these columns do not total 152 cases.

B. ECR Use Areas

Ten respondents either selected the areas in which they use environmental conflict resolution from an established list of potential areas or added new areas to the list. The areas and the number of respondents are as follows:

Groundwater Issues:	9
Conflicts in Environmental Cleanup Decisions:	8
Relationships with Regulators:	8
Multi-issue and Multi-party Environmental Disputes:	7
Hazardous Waste Facility Permit Modifications:	6
NEPA:	5
Public Engagement Activities:	2
NPDES Permit:	1
Environmental Cleanup Decisionmaking:	1
Natural Resources Damage Liability Settlement:	1

A site reported that it used expanded public participation to aid it in future budget planning related to its regulatory commitments.

C. ECR Metrics

Only a few sites reported that they track the outcomes of ECR. The sites that are part of the Hanford TPA monitor the use of ECR by way of submitted and approved changes to the TPA; another metric is the number of formal disputes which have arisen through the years.

One site relies on its National Environmental Policy Act (NEPA) Compliance Officer to monitor and track the use and outcome of cooperating agency designations for its environmental impact statements. The positive outcomes of ECR are tracked at another site by the avoidance of potential fines and penalties, as well as missed schedules due to delays in receiving permits. A third site reported that its ECR factors are captured in project status reports developed on a monthly basis.

One site explained that collecting ECR data is challenging because the very nature of environmental issues contributes to differing opinions as to the appropriate options. For this reason, another site pointed out that environmental conflict avoidance begins at the staff level where the differing opinions might first arise.

V. DEMONSTRATIONS OF ECR USE AND VALUE

Environmental conflict avoidance and environmental conflict resolution takes many forms at DOE sites. The process may take the form of collaboration, expanded public participation, or incorporation of a neutral party. Most sites rely on several forms to resolve environmental conflicts but, more importantly, to avoid the escalation of issues into conflicts. In their descriptions of how environmental conflicts were avoided or resolved, site personnel also conveyed the benefits that accrued from their ECR efforts.

A. ECR Through Collaboration

Examples of collaborative decision making within the DOE complex include the following as well as the examples described at section II.B of this report:

National Energy Technology Laboratory – Albany Site (Oregon): As a result of its desire to balance the interests of the state regulator, the Oregon Department of Environmental Quality (ODEQ), and the public during an investigation of the nature and extent of possible environmental contamination, the National Energy Technology Laboratory (NETL) opted for a cooperative approach to the investigation. As the investigation proceeded, NETL shared its data and reports with the ODEQ and in return received advice and recommendations from the regulator. This cooperative and collaborative process is resulting in a more effective groundwater investigation, which saves both site and ODEQ resources.

Oak Ridge Office (Tennessee): As a party to the federal facility agreement made pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Oak Ridge Office adheres to the agreement's dispute resolution protocols. In addition, it developed an Environmental Program Council with its regulators which allows for a less formal resolution of disputes. The Environmental Program Council, comprised of senior management representatives from each regulatory agency and the Oak Ridge Office, meets quarterly to quickly resolve issues raised by staff members of each organization.

Portsmouth/Paducah Project Office (Kentucky): In 2009, the Portsmouth/Paducah Project Office initiated a collaborative effort with the State of Ohio Environmental Protection Agency to establish a roadmap for conducting future decontamination and decommissioning activities. An agreed upon process is expected to expedite the cleanup process.

B. ECR and Expanded Public Participation

Carlsbad Field Office (New Mexico): An extensive public participation program precluded the need for a lengthy and costly public hearing on proposed changes to the Waste Isolation Pilot Project (WIPP) Hazardous Waste Facility Permit. Formal and informal meetings were held with stakeholders to share WIPP monitoring results and for stakeholders to communicate their concerns. Stakeholders also participated in meetings with EPA and the State of New Mexico Environment Department while the proposed permit modification was being prepared and after it was submitted. Through this concerted effort to engage public participation, the publics' concerns were evaluated by the regulator and incorporated into the final permit modification submission which was approved by the regulator.

Office of River Protection (State of Washington): The terms of a partial tentative agreement resolving missed cleanup deadlines were shared with the public in workshops as well as public meetings.

Richland Operations Office (State of Washington): The Hanford Advisory Board is an independent and non-partisan group that is broadly representative of the interests affected by cleanup of the Hanford site. The Board is consulted on numerous cleanup issues and provides informed recommendations and advice to DOE, EPA, and the State of Washington Department of Ecology.

National Nuclear Security Administration Nevada Site Office (Nevada): The Nevada Site Office used the comments generated at public scoping meetings to refine the alternatives to be analyzed in the development of the draft Site-wide Environmental Impact Statement for Continued Operation of the Nevada Test Site and Off-site Locations in the State of Nevada. Environmental conflicts were addressed and/or prevented through this process.

Sandia Site Office (New Mexico): Rather than engaging in the normal process of written communications among the State of New Mexico regulator, the Sandia Site Office, Sandia National Laboratories/NM, and the public to resolve the permit-related issues the New Mexico Environment Department, requested a series of face-to-face meetings with all the parties. All agreed that the process would be confidential. The expanded approach to public participation resulted in an expedited process and a permit that was accepted by the public.

C. ECR and Third-party Neutrals

An example of the use of ECR and the use of third-party neutrals within the DOE complex is as follows:

Office of River Protection (State of Washington): A third-party neutral helped parties in a protracted negotiation reach a partial tentative settlement and avoid litigation. Negotiations regarding missed milestones in the Hanford TPA began in the spring of 2007 resulting in a tentative agreement in the summer of 2008. The third-party neutral aided all parties in identifying the issues most important to them.

Pantex Site Office (Texas): The Pantex Core Team has relied on third-party facilitators since 2001. The Core Team, comprised of the Department's Pantex Site Office, the site's contractor, the Texas Commission on Environmental Quality, and the U.S. Environmental Protection Agency, meets on an as-needed basis to resolve environmental cleanup issues. In 2009, the Core Team dealt with the need to quickly develop a mutually acceptable definition of a key term by independently researching the issue and then reconvening, with the aid of a facilitator, to reach agreement on the definition. Use of a third-party neutral helped the Core Team focus its work.

U.S. v. Union Pacific Railroad Company (Oklahoma): *U.S. v. Union Pacific Railroad Company* is the result of a CERCLA enforcement action regarding an oil refining facility in Oklahoma City, Oklahoma. DOE contractors at Pantex sent waste oil to the site in the mid-1980's. Union Pacific has filed an amended answer and counterclaim for contribution against DOE and other federal and private entities. Settlement discussions are ongoing, and the trial is set for January 2010. In the meantime, the parties have decided to use a mediator to resolve the outstanding issues.

Westinghouse Electric Co. v. U.S. (Missouri): *Westinghouse Electric Co. v. U.S.* is the result of a CERCLA contribution action against DOE and several private corporations concerning the cleanup of a metal and uranium manufacturing site in Missouri. The plaintiffs' sole remaining claim is one for CERCLA cost recovery. The parties have decided to use a mediator to proceed.

West Valley Demonstration Project (New York): In FY 07, the State of New York filed a lawsuit in federal district court concerning a long-standing dispute between DOE and the State of New York relating to respective obligations for cleanup and disposal of radioactive wastes at New York's West Valley Demonstration Project Site in West Valley, New York. With the assistance of a mediator, the parties were able to resolve some of the plaintiffs' claims, resulting in a proposed consent decree, which was filed with the court (in October 2009), but not approved, pending the outcome of a 30-day public comment period by the State of New York. The comments are still being addressed by New York.

D. Benefits of ECR

Eleven respondents provided brief examples of their use of ECR in FY 09 and followed that description with an assessment of the benefits that arose from ECR use. Eight of them reported that they were able to avoid protracted and costly environmental litigation. Nine further indicated that they believe that environmental plans and decisions are of lower quality and opportunities are lost if the process is not informed by all available information and perspectives.

Six respondents cited the desire to minimize hostility among stakeholders as their reason for using ECR methods. The benefit of ECR to four respondents was that it avoided unnecessarily lengthy project and resource planning processes. Three respondents reported that ECR eliminated costly delays in implementing needed environmental protection measures.

VI. CONCLUSION

Given the Department's history of collaboration with stakeholders, which began long before the ECR Memorandum was issued, most sites experienced very few barriers or challenges to the use of ECR. Accordingly, consistent with its definition of ECR, DOE sites use collaborative decision-making processes and third-party neutrals and facilitators in order to prevent or resolve environmental disputes.