

FY 2016 TEMPLATE
Environmental Collaboration and Conflict Resolution (ECCR)¹
Policy Report to OMB-CEQ

On September 7, 2012, the Director of the Office of Management and Budget (OMB), and the Chairman of the President's Council on Environmental Quality (CEQ) issued a revised policy memorandum on environmental collaboration and conflict resolution (ECCR). This joint memo builds on, reinforces, and replaces the memo on ECR issued in 2005.

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year in implementing the ECCR policy direction to increase the effective use and institutional capacity for ECCR.

ECCR is defined in Section 2 of the 2012 memorandum as:

“. . . third-party assisted collaborative problem solving and conflict resolution in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and water and land management.

The term Environmental Collaboration and Conflict Resolution encompasses a range of assisted collaboration, negotiation, and facilitated dialogue processes and applications. These processes directly engage affected interests and Federal department and agency decision makers in collaborative problem solving and conflict resolution.

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 policy and regulatory disputes to administrative adjudicatory disputes, civil judicial disputes, intra- and interagency disputes, and disputes with non-Federal persons and entities.

Environmental Collaboration and Conflict Resolution can be applied during policy development or planning in the context of a rulemaking, administrative decision making, enforcement, or litigation with appropriate attention to the particular requirements of those processes. These contexts typically involve situations where a Federal department or agency has ultimate responsibility for decision making and there may be disagreement or conflict among Federal, Tribal, State and local governments and agencies, public interest organizations, citizens groups, and business and industry groups.

Although Environmental Collaboration and Conflict Resolution refers specifically to collaborative and conflict resolution processes aided by third-party neutrals, there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that Federal agencies may pursue with non-Federal entities to plan, manage, and implement department and agency programs and activities. The Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving are presented in Attachment B. The Basic Principles provide guidance that applies to both Environmental Collaboration and Conflict Resolution and unassisted collaborative problem solving and conflict resolution. This policy recognizes the importance and value of the appropriate use of all forms collaborative problem solving and conflict resolution.”

¹ The term ‘ECCR’ includes third-party neutral assistance in environmental collaboration and environmental conflict resolution

This annual report format below is provided for the 10th year of reporting in accordance with the memo for activities in FY 2016.

The report deadline is February 24, 2017.

We understand that collecting this information may be challenging; however, the departments and agencies are requested to collect this data to the best of their abilities. The 2016 report, along with previous reports, will establish a useful baseline for your department or agency. Departments should submit a single report that includes ECCR information from the agencies and other entities within the department. The information in your report will become part of an analysis of all FY 2016 ECCR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, prior year synthesis reports are available at <http://www.ecr.gov/Resources/FederalECRPolicy/AnnualECRReport.aspx>

FY 16 ECCR Report Template

Name of Department/Agency responding:	United States Army
Name and Title/Position of person responding:	Marc Van Nuys, Director of Dispute Resolution
Division/Office of person responding:	Office of General Counsel
Contact information (phone/email):	(703) 614-6861 marc.vannuys.civ@mail.mil
Date this report is being submitted:	5 December 2016
Name of ECR Forum Representative	Carrie M. Greco, Environmental Litigation Attorney

- ECCR Capacity Building Progress:** Describe steps taken by your department or agency to build programmatic and institutional capacity for environmental collaboration and conflict resolution in FY 2016, including progress made since FY 2012. Include any efforts to establish routine procedures for considering ECCR in specific situations or categories of cases. To the extent your organization wishes to report on any efforts to provide institutional support for non-assisted collaboration efforts include it here. If no steps were taken, please indicate why not.

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

Pursuant to the Department of Defense (DoD) Instruction 5145.05, Alternative Dispute Resolution (ADR) and Conflict Management, the Army maintains its ADR program to resolve disputes at the earliest possible stage of conflict and the lowest possible organizational level. The Army encourages the use of proactive measures to identify and resolve conflicts as early as possible before they grow into disputes requiring resolution through more formal means. The Army's ADR program, established by a 22 June 2007 memorandum issued by the Secretary of the Army, designates the Principal Deputy General Counsel as the Army Dispute Resolution Specialist (ADRS). In this capacity, the ADRS carries out the ADR program, which includes conflict resolution across the

spectrum of disputes. The ADRS coordinates the preparation of the annual ECCR report for Army, a portion of which is written by the Environmental Law Division of the U.S. Army Legal Services Agency. The report is submitted to the Army ADR Specialist who develops and implements ECCR initiatives, activities, and training throughout the Army. Pursuant to the ADRS' management and written guidance, the Army Environmental Law Specialists (ELs) assigned to the U.S. Army Legal Services Agency (USALSA), the Army Judge Advocate General's Corps Legal Center and School (TJAGLCS), Army Commands, Army Service Component Commands, and all of their subordinate commands and installations, support the ADR Policy and employ ECCR in those circumstances where it proves beneficial.

The Army continued to build its institutional and programmatic capacity for ECCR in 2016 through the following activities:

1. **Proactive Engagements**. Army ELs routinely seek to avoid disputes by engaging with Federal and state regulators, local stake holders and the public in non-third-party-assisted collaboration and partnering. These include quarterly meetings of the installation Environmental Quality Control Committee chaired by the Garrison Commander as provided for in Army Regulation 200-1 and outreach through social media about ongoing environmental concerns such as cultural resources issues (See Item 7).
2. **Training**. TJAGLCS provided a block of ADR training as part of its annual General Litigation Course. In FY 16, four (4) attorneys from the Environmental Law Division, as well as other counsel from USALSA and throughout the Army, attended this course. Joint Base Lewis-McCord ELs attended the Negotiation and Appropriate Dispute Resolution Course sponsored by the U.S. Air Force JAGC School.
3. **Agreements**. In FY 16, Army ELs negotiated dispute resolution provisions in federal facilities agreements, direct sales agreements, and partnering agreements requiring the resolution of disputes through informal cooperative measures including ECCR. Additionally, programs such as the Army Compatible Use Buffer (ACUB) program and many Programmatic Agreements for the management of cultural resources include ECCR provisions. Dispute resolution provisions are enforced as needed.
4. **Case by case assessment**. ELD counsel assess all matters in litigation on a case-by-case basis to determine if ECCR is appropriate. Attorneys balance litigation risks and potential costs against the benefits of using a dispute resolution processes. Factors considered include: (1) the likelihood of adverse court decision; (2) payment of claims and penalties; (3) personnel man hours; and (4) precedential value of the case.

2. ECCR Investments and Benefits

- a) Please describe any methods your agency uses to identify the (a) investments made in ECCR, and (b) benefits realized when using ECCR.

Examples of investments may include ECCR programmatic FTEs, dedicated ECCR budgets, funds spent on contracts to support ECCR cases and programs, etc.

Examples of benefits may include cost savings, environmental and natural resource results, furtherance of agency mission, improved working relationship with stakeholders, litigation avoided, timely project progression, etc.

Investments. Though the Army does not have a dedicated budget for ECCR, nor does it formally track its investments in ECCR, Army ELSs are required to review all Army environmental matters on a case-by-case basis to see if they are appropriate for ECCR. In this capacity, ELSs take proactive measures to resolve conflicts as early as possible before they grow into disputes requiring formal resolution.

Benefits. In FY16, the counsel handling matters using ECCR informally noted the benefits of ECCR in case trackers, databases, or within the case file itself. Benefits of ECCR included settling matters before formal litigation is required and arriving at a settlement acceptable to all parties while fulfilling the Army's stated policy of complying with applicable environmental laws and regulations. Concrete savings in terms of attorney time, court costs, document production, and other inevitable products of formal litigation have resulted from the use of the informal ECCR process.

- b) Please report any (a) quantitative or qualitative investments your agency captured during FY 2016; and (b) quantitative or qualitative results (benefits) you have captured during FY 2016.

Matters in ECCR. The Army used ECCR in two (2) matters in FY16. Army realized benefits by using ECCR in these two (2) matters by avoiding litigation costs in the form of extensive personnel hours, travel costs, and other resources typically required to settle a case or bring it through full litigation. Specifically, the quantitative benefits of using a mediator to negotiate an allocation agreement among multiple parties involved a significant saving of costs and human resources, including costs to conduct extensive discovery, document searches, fact and expert witness preparation, and travel to attend court hearings and prepare for trial. The qualitative benefits of using a facilitator to move a case forward comprised of increased open communications among the parties, a narrowing of the issues in dispute, and improved working relationships throughout the dispute resolution process.

Non-third-party-assisted collaboration. For matters using non-third-party-assisted collaboration, the Army invested man hours to hold meetings with the public, various stakeholders, and regulators. Command leadership and

environmental staff conducted information briefings in the community and solicited stakeholder feedback, both in-person and via social media. This enabled the Army to resolve disputes at the lowest possible level. Army personnel negotiated dispute resolution clauses in federal facilities agreements, and participated in tiered-partnering with regulators. These actions allowed the Army to reach timely and appropriate agreements with stakeholders and regulators, while avoiding the costs of extended formal dispute resolution or litigation (See Item 7).

Improved open communications and increased trust between parties, agency counsel, regulators and stakeholders resulted from these efforts. These methods improved working relationships, narrowed disputed issues, minimized the adoption of entrenched opinions, resolved emerging concerns, and avoided unnecessary escalation resulting in improved planning processes. In turn, these relationships yielded more efficient environmental cleanups and more efficient processes for protecting the species and natural resources, and ultimately resulted in the resolution of disputes at a lower level, avoiding the need for a third-party-assisted dispute resolution process.

- c) What difficulties have you encountered in generating cost and benefit information and how do you plan to address them?

The Army has no formal method of capturing the costs and benefits of Army efforts. A report of the actual number of hours saved per case or matter by using ECCR is speculative at best. An ad hoc cost-benefit analysis may be done on a case-by-case basis by the lead attorneys, but not on a global scale. Additionally, most Army matters use non-third-party-assisted collaboration, negotiation or other proactive methods of resolution. The benefits are relational, subtle and difficult to quantify. They are documented as achievements and agreed upon results in meeting minutes and after action reports.

3. **ECCR Use:** Describe the level of ECCR use within your department/agency in FY 2016 by completing the table below. [Please refer to the definition of ECCR from the OMB-CEQ memo as presented on page one of this template. An ECCR “case or project” is an instance of neutral third-party involvement to assist parties in a collaborative or conflict resolution process. In order not to double count processes, please select one category per case for decision making forums and for ECCR applications.

	Total FY 2016 ECCR Cases ²	Decision making forum that was addressing the issues when ECCR was initiated:				ECCR Cases or projects completed ³	ECCR Cases or Projects sponsored ⁴	Interagency ECCR Cases and Projects	
		Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)			Federal only	Including non federal participants
<i>Context for ECCR Applications:</i>									
Policy development	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Planning	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Siting and construction	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Rulemaking	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
License and permit issuance	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Compliance and enforcement action	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Implementation/monitoring agreements	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__	__0__
Other (specify): <u>__ CERCLA __</u>	__2__	__0__	__0__	__0__	__2__	__0__	__0__	__0__	__2__
TOTAL	__2__	__0__	__0__	__0__	__2__	__0__	__0__	__0__	__2__
		(the sum of the Decision Making Forums should equal Total FY 2016 ECCR Cases)							

² An “ECCR case” is a case in which a third-party neutral was active in a particular matter during FY 2016.

³ A “completed case” means that neutral third party involvement in a particular ECCR case ended during FY 2016. 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.

⁴ Sponsored - to be a sponsor of an ECCR 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 ECCR case.

Note: If you subtract completed ECCR cases from Total FY 2016 cases it should equal total ongoing cases. If you subtract sponsored ECCR cases from Total FY 2016 ECCR cases it should equal total cases in which your agency or department participated but did not sponsor. If you subtract the combined interagency ECCR cases from Total FY 2016 cases it should equal total cases that involved only your agency or department with no other federal agency involvement.

4. ECCR Case Example

Using the template below, provide a description of an ECCR case (preferably completed in FY 2016). 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 ECCR effort was funded
<p>This is a CERCLA site where, in 2013, numerous parties, including some Federal agency parties, were identified by the Environmental Protection Agency as potentially responsible parties. The private parties agreed to assist in managing the cleanup, but failed to agree on the allocation of past and future cleanup costs and natural resource damage claims. Regulator deadlines required a quick resolution. The private parties funded a third-party neutral to mediate an allocation agreement among the numerous parties, to include the Federal agency parties. The mediator and the private parties entered into an agreement without Federal agency signatories due to confidentiality concerns. The resulting settlement agreement incorporated a proposed settlement amount for Settling Federal agencies.</p>
Summary of how the problem or conflict was addressed using ECCR, including details of any innovative approaches to ECCR, and how the principles for engagement in ECCR outlined in the policy memo were used
<p>The mediator met separately with the private parties and helped them to reach an agreement in principle regarding cost allocation. The mediator then approached Department of Justice (DOJ) counsel to address the Federal agency parties' allocable share of the site costs. The mediator presented an allocation formula, the evidence against that party, estimated amount of costs, and the proposed allocation. These separate meetings with the mediator allowed participation, transparency, and accountability. The result was an informed process where the mediator gathered information about the site, the costs, and allocation methodologies and ensured the relevant information was accessible and understandable by all parties. Private parties governed the process and used the mediator to resolve disputes regarding allocation, while allowing the mediator to develop proposals with party input prior to sending the offer to the Federal agency parties. The process allowed for a timely result as the mediator worked with the parties on a schedule to reach agreement in principal that met the timelines of the regulator.</p>
Identify the key beneficial outcomes of this case, including references to likely alternative decision making forums and how the outcomes differed as a result of ECCR

The Army was able to participate in the mediation process without incurring any costs to fund the mediator or the mediation process, as those funds were included in the final settlement amount to be paid by the Judgment Fund. The mediator acted as a facilitator of information between the Federal agency parties and the private parties. This helped the parties reach consensus in a timely matter. The Army was included in an informed and open process that provided Army access to general information about the site, the cleanup costs, the proposed allocation formulas and how the formula calculations applied to different groups of private parties, and each of the Federal agency parties. The Army was able to review this information and a cost allocation offer from the private parties, ask questions, and then provide a response to the mediator, who would brought the Federal agency parties' response to the private parties, who would then decide on whether to agree to disagree with the Federal agency parties' position. The use of the mediator avoided significant transaction costs as it allowed the Federal agency parties to communicate directly to one person rather than numerous individual parties. The process also allowed for accountability between the private parties, the mediator and the Federal agency parties in how the allocation was calculated.

Reflections on the lessons learned from the use of ECCR

The use of ECCR helped the Federal agency parties participate in a streamlined process and timely reach an agreement on the allocation of costs, avoiding significant costs and human resources that would otherwise be required to communicate, coordinate and reach an agreement with such a large diverse group of parties.

5. **Other ECCR Notable Cases:** Briefly describe any other notable ECCR cases in the past fiscal year. (Optional)

In another case Federal agency parties, including the Army, private parties, and state regulators are using a facilitator to work through the terms of a proposed consent decree to settle claims for past and future response costs and natural resource damages. The facilitator guides open discussions between the parties, facilitating a productive working relationship while narrowing the issues in dispute. This process provides for openness, as all parties are informed on the process, and accountability. All parties participate in the process of drafting, editing, and reviewing the consent decree. Parties are engaged in developing the consent decree, resulting in greater autonomy. Parties may seek assistance from the facilitator if needed. The facilitation ensures the balanced inclusion of affected interests and lets all parties participate in the process.

6. **Priority Uses of ECCR:**

Please describe your agency's efforts to address priority or emerging areas of conflict and cross-cutting challenges either individually or in coordination with other agencies. For example, consider the following areas: NEPA, ESA, CERCLA, energy development, energy transmission, CWA 404 permitting, tribal consultation, environmental justice, management of ocean resources, infrastructure development, National Historic Preservation Act, other priority areas.

The Army's main priority is dispute avoidance through open communication with stakeholders and through open meetings, collaboration, tiered partnering, consultation, public meetings, and negotiated agreements with dispute resolution provisions. This allows the Army to minimize the number of matters that require ECCR.

In matters such as CERCLA litigation, the Army's priority is to utilize ECCR to timely resolve those claims to avoid costly litigation and reduce or eliminate extensive discovery, and narrow the issues of dispute as parties work toward settlement. In FY16, for example, a mediator helped a large number of parties reach an agreement in principal on the allocation of response costs in a short amount of time, avoiding years of litigation and an inconceivable amount of man hours and resources.

Army Emerging ECCR Areas of Conflict. The Army continues to use ECCR in complex, multiparty CERCLA matters before litigation ensues and after a suit is filed. The Army also uses non third-party-assisted collaboration in areas of installation restoration, sustainment, and management of natural resources to avoid disputes.

7. Non-Third-Party-assisted Collaboration Processes: Briefly describe other significant uses of environmental collaboration that your agency has undertaken in FY 2016 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not include a third-party neutral. *Examples may include interagency MOUs, enhanced public engagement, and structural committees with the capacity to resolve disputes, etc.*

Below are areas where the Army used non-third-party-assisted collaboration in FY16.

Anniston Army Depot (ANAD) used a partnering approach to manage installation restoration matters. The Tier 1 meetings were very productive in addressing issues at a low level.

Pursuant to a Federal Facility Agreement (FFA), ANAD held quarterly meetings with the appointed Program Managers to address issues associated with investigation and remediation activities at ANAD sites.

ANAD included dispute resolution clauses in FFAs, Environmental Annexes of Direct Sales and other Partnering Agreements that ANAD can use as needed in future discussions with private contractors who operate on ANAD.

ANAD continued to maintain interagency Memorandums of Agreements (MOAs) with the Alabama State Historic Preservation Office to better manage cultural resources at ANAD.

Open discussions with the Thurston County Washington Assessors regarding storm water fees allowed Joint Base Lewis McCord (JBLM) personnel to negotiate exempt

status for certain JBLM parcels, resolving the claims for past and future storm water fees.

Fort Carson Garrison leadership met quarterly with the Southern Colorado Working Group (SCWG) to engage with the community stakeholders and institutions regarding Army projects related to training and stewardship activities at the Piñon Canyon maneuver site. The Army observed an increase in positive statements of support for the Army's training presence at Piñon Canyon Maneuver Site.

Fort Carson personnel utilized two previously negotiated Programmatic Agreements (PAs) with the State Historic Preservation Officer (SHPO), thirteen Tribal Historic Preservation Officials and the Advisory Council on Historic Preservation (ACHP) to engage an Advisory Committee when evaluating appropriate mitigation projects. By using the streamlined process and parameters set forth in the PAs, the Army was able to participate in an efficient decision making process that was transparent, collaborative and responsive to legitimate community concerns.

To address matters regarding the Rocky Mountain Arsenal, Fort Carson used Interest-based negotiation processes and engaged three-tiered working group with Federal, state, and local regulatory agencies to address environmental concerns. Emerging issues were addressed by mid-level managers. When disagreements arose that threatened a lack of progress on the matter, potential solutions were raised to the director level and ultimately to senior agency executives. This resulted in the development of interim measures that were acceptable and effective to resolve the issue, and avoided areas of disagreement and potential conflicts that could give rise to polarized entrenched positions.

8. **Comments and Suggestions re: Reporting:** 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.

None.

Please attach any additional information as warranted.

Report due February 24, 2017.

Submit report electronically to: kavanaugh@udall.gov

**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