

FY 2013 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 seventh year of reporting in accordance with the memo for activities in FY 2013.

The report deadline is March 3, 2014.

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 2013 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 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 2013 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 13 ECCR Report Template

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|--|--|
| Name of Department/Agency responding: | US Army |
| Name and Title/Position of person responding: | Carrie Greco, Attorney |
| Division/Office of person responding: | US Army Legal Services Agency, Environmental Law Division |
| Contact information (phone/email): | 703 693-0399 Carrie.M.Greco.civ@mail.mil |
| Date this report is being submitted: | Feb 13, 2014 |
| Name of ECR Forum Representative | Carrie Greco |

1. **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 2013, 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.]

In FY 2013, a busy work load, furloughs and budget cuts all impacted Army's ECCR Capacity Building Progress. Limited funding impacted Army's ability to invest in ECCR programs or training. Furloughs and a busy case/work load encouraged personnel to continue to identify for potential conflicts early on and take proactive measures to avoid or minimize conflict.

The Army continues to manage an ECCR program based on individual case or matter assessment and management. Matters in litigation are assessed on a case by case basis for the appropriateness and use of ECCR. For all matters, Army personnel engage the Federal, state and local stakeholders and the public in consultation collaboration, partnering, and training. In addition, the Army maintains its commitment to ECCR by

negotiating for and entering into agreements (federal facilities agreements direct sales and partnering agreements) with Federal and state regulators or other parties that contain a commitment by the Army to resolve disputes through informal cooperative measures, to include ECCR.

Army personnel sought various ECCR training opportunities, but most of the courses required funding and Army did not authorize funds to attend. ELD personnel attended ADR training as part of a General Litigation Course sponsored by the Army Jag School and the Department of Energy's annual ECCR training. Course information was made readily available for reference and for those who were unable to attend.

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.

Methods used to identify investments made in ECCR. Due to budget constraints, Army's main investments in support of ECCR cases or programs were in the form of hours spent on a case or matter. These investments were identified through individual case/work management. For each environmental matter in dispute, Army personnel assessed whether and to what extent Army personnel should make an investment of time and travel funds to pursue ECCR. This assessment originated with the action officer and was raised to management for review and approval. For matters in litigation, the Department of Justice funds ECCR costs and manages the methods to identify investments in ECCR.

Methods to identify benefits realized when using ECCR. Army employees incorporate ECCR principals in their daily management of their environmental cases/matters. Army personnel attended free training on ADR and ECCR to educate personnel on the benefits of ECCR. For cases/matters that use ECCR, Army personnel assess the benefits and note the benefits of ECCR in each case file and in the annual ECCR Report.

- b) Please report any (a) quantitative or qualitative investments your agency captured during FY 2013; and (b) quantitative or qualitative results (benefits) you have captured during FY 2013.

Investments are captured on a case by case basis. Quantitatively, ECCR has resulted in a reduction in hours litigating disputes. Qualitatively, ECCR has provided open communication, trust and support from regulators and stakeholders. Parties are able to understand each other and better evaluate the matter and generate a plan that protects the environment and Army interests and goals.

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

Difficulties in generating cost benefit information. Army hasn't generated a user friendly and cost efficient method to assess the number of hours spent on ECCR for a particular matter. Generating an actual number of hours a case or matter might have required without ECCR is speculative at best. Cost and benefit analysis is done on a case by case basis and not on a global scale. Most Army matters do not use ECCR, but rather collaboration, negotiation or other proactive method of resolution that does not involve a third party neutral.

3. **ECCR Use:** Describe the level of ECCR use within your department/agency in FY 2013 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 2013 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): CERCLA Litigation | __2__ | __0__ | __1__ | __1__ | __0__ | __0__ | __0__ | __0__ | __2__ |
| TOTAL | __2__ | __0__ | __1__ | __1__ | __0__ | __0__ | __0__ | __0__ | __2__ |
| | | (the sum of the Decision Making Forums should equal Total FY 2013 ECCR Cases) | | | | | | | |

² An “ECCR case” is a case in which a third-party neutral was active in a particular matter during FY 2013.

³ A “completed case” means that neutral third party involvement in a particular ECCR case ended during FY 2013. 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 2013 cases it should equal total ongoing cases. If you subtract sponsored ECCR cases from Total FY 2013 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 2013 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 2013). 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 |
| In one case the parties retained the mediator from a prior mediation to continue on as a facilitator in settlement discussions to reach a global settlement with all parties that could fund the proposed remedial action. |
| 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 |
| Throughout the process, all of the principals of engagement of ECCR were in play. All participants were at the table, including state agencies, private parties and their contractors/experts. The ECCR meetings and discussions allowed for open communication and accountability. The parties demonstrated a commitment to participate and work diligently toward resolving tough issues. Confidentiality was the main roadblock, but it was addressed early on to ensure parties were comfortable in discussions. The parties were determined to resolve the issues and saw the benefits of working together and using the facilitator to overcome roadblocks. |
| 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 |
| Without the use of ECCR, each party would take its own steps to manage its case, creating great divides among parties and preventing any movement toward settlement. With ECCR, the parties worked together well and conducted open communications on their own, but utilized the facilitator to work through roadblocks in main decision points. When a party shifted 'off track' or delayed movement, the mediator would move in and steer them back into the proper path forward. |
| ECCR is still in process and case is not yet resolved. The process is long, but more manageable through the use of the facilitator who directs the parties in effective discussions, positive work flow, and a quicker resolution. |
| Reflections on the lessons learned from the use of ECCR |

Ensure you have clear understanding of the role of the Facilitator, address confidentiality early and establish clear procedures so parties are comfortable moving forward and can communicate openly. Use the Facilitator to help the parties maintain accountability.

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

In another case, the parties could not reach a settlement prior to trial. The trial decision was unfavorable to both parties, and they both appealed. ECCR helped the parties reach a tentative settlement before appellate briefs were filed with the court. The ECCR effort was funded by the court.

Under the court's rules whenever someone appeals they must complete a mediation questionnaire. This questionnaire was reviewed by the court's mediation office to see if mediation was worthwhile. Mediation was deemed appropriate, and the judge required both parties to attend a mediation conference in person. Before meeting, both parties sent a confidential settlement memo to the mediator. Writing this memo required the parties to discuss the negotiation position and establish the principles of openness and informed commitment. The mediator first heard the positions of each party in a joint meeting. Then, the mediator caucused with each side, identifying the issues and the strengths and weaknesses of the positions taken. Both sides then began working through the issues through caucusing with the mediator. When an issue could not be resolved, the mediator brought both sides together to clear up the misunderstanding, ensuring an informed process. Once both sides were reasonably close to settlement, the mediator offered a proposal to each side. The mediator set a response deadline, ensuring timeliness and accountability. Both sides then submitted a confidential response to the mediator's proposal. The mediator then communicated to both sides that there was a tentative settlement.

The key beneficial outcomes from this case were avoiding litigation costs, vacating the decision of the district court, and providing a certain outcome. Although this case could have settled without mediator intervention, it probably would have taken significantly more time and money.

The greatest lesson learned was the huge benefit of a court-mandated mediation process, especially given the court's significant backlog. The other lesson learned, is that while working through the issues, it can be useful to reconvene with the opposite side to clear misunderstandings that block resolution.

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.

ECCR is used foremost in matters in litigation to help reduce the litigation costs and resources. ECCR is also considered in administrative environmental matters with a focus on issue avoidance through open communication, involving all stakeholders and partnering or other negotiation processes. The focus is to minimize the number of issues that need formal dispute resolution.

7. Non-Third-Party-assisted Collaboration Processes: Briefly describe other significant uses of environmental collaboration that your agency has undertaken in FY 2013 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.*

The Army participated in a variety of matters involving non-third-party-assisted collaboration process with stakeholders and other agencies. Enhanced public engagement is a critical part of Army dispute avoidance and dispute resolution. Consultation with other agencies is another method of dispute resolution that is frequently used by the Army. Because these methods are so successful, the Army is able to avoid the dispute and the need to use ECCR. The Army uses public engagement, consultations in matters involving development and maintenance of a Natural Resource Management Plan, land management and environmental management of installations, transfer of responsibility for waste management to another agency, amend a RCRA permit, projects and initiatives coordinated with stakeholders through the NEPA process and the installations Strategic Planning Process, Strategic Planning Forums, Restoration Advisory Boards, partnerships and cooperative agreements with local governments and communities on matters such as the reduction of water and energy consumption, and recycling.

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 March 3, 2014.

Submit report electronically to ECRReports@omb.eop.gov

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

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|---|--|
| 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 |