

FY 14 ECCR Report

Name of Department/Agency responding:	Environmental Law Division US Army Legal Services Agency on behalf of the U.S. Army
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Date this report is being submitted:	Jan 23, 2015
Name of ECR Forum Representative	_____

- 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 2014, including progress made since FY 2013. 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.]

The Army's ECCR program is managed by the Army's 22 June 2007 Alternative Dispute Resolution Policy Memorandum. The Army continues to fund a position for a Principal Deputy Counsel who serves as the Army's Dispute Resolution Specialist and manages the 2014 ECCR program. The Dispute Resolution Specialist implemented the ECCR program, managed the ECCR budget, and encouraged, developed and implemented ECCR initiatives, activities and training throughout the Army. Pursuant to his management and written guidance, the Environmental Law Specialists assigned to the Army Legal Services Agency, the Army JAGC Legal Center and School, Army Commands, Army Service Component Commands and all of their subordinate commands and installations supported the ADR Policy and employed ECCR in those circumstances where it proved beneficial.

ECCR was routinely considered by the Army in the following manners:

1. **Cases in Litigation.** The environmental counsel at USALSA assessed all matters in litigation on a case-by-case basis for the appropriateness of using ECCR.
2. **Agreements.** Army Environmental Law Specialists negotiated provisions that require the resolution of disputes through informal cooperative measures, to include ECCR, in its Federal Facilities Agreements, direct sales agreements and partnering agreements. Dispute resolution provisions are enforced as needed. For example, at Anniston Army Depot, the parties came close to invoking the dispute resolution provisions of a Federal Facility Agreement but fortunately the matter was resolved informally through conferencing among party/agency representatives.
3. **Proactive Engagements.** Army Environmental Law Specialists seek to avoid disputes by engaging the Federal and state regulators, local stakeholders and the public in non-third-party-assisted collaboration, and partnering. For example, at Fort Carson, the garrison leadership maintained a strong presence in a regional sustainability working group where Environmental Law Specialists made presentations to regulators and the public on a regular basis and adopted and published a Regional Sustainability Statement of Commitment. At Fort Stewart, Environmental Law Specialists engaged with local communities and environmental stakeholders in their NEPA process, strategic planning, land use planning, sustainable and renewable energy projects, and Army compatible use buffer programs.
4. **Training.** The JAGC Legal Center and School includes ADR training as part of its General Litigation Course. This course is attended by new environmental counsel within USALSA and throughout the Army. USALSA personnel also attend the Department of Energy's annual ECCR training. Course information for these training events was readily available for reference to 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 to identify investments in ECCR. The Army routinely utilizes ECCR but has yet to develop a formal method to track investments in ECCR in either third party or non-third party assisted cases. In cases that require actual third-party neutral involvement, the Army invests personnel resources but is not required to make a financial investment. In the rare occasion that special ECCR funding is required, the Department of Justice provides funding or the court appoints an administrative law judge at no cost to the Army.

The Army ADR Program budget is also used to support ECCR efforts and we can consider those expenditures as investments in ECCR. Those expenditures are primarily used to fund positions necessary to perform the ECCR functions. (See Part b for specifics on those investments)

Methods to Identify Benefits of ECCR. The Army does not currently have a formal method to identify the benefits of ECCR. This methodology would require tracking of man hours and dollars spent on litigation compared to those spent on ECCR. Army counsel who work environmental matters do not generate a record of the specific number of hours spent or dollar investments made on each case. Occasionally, the benefits of ECCR may be captured in the individual case file maintained by the environmental attorneys working the case. In most cases, the benefits of ECCR are not captured until reported on the annual ECCR report. The Army Environmental Law Division representative canvasses the field of Army environmental attorneys to get feedback on ECCR efforts to include in the annual report.

- b) Please report any (a) quantitative or qualitative investments your agency captured during FY 2014; and (b) quantitative or qualitative results (benefits) you have captured during FY 2014.

Investments. The Army does not have a dedicated budget specifically for ECCR, nor does it maintain a record of ECCR investments. Rather, the ECCR investments are reflected in the budget for the Army's overall ADR program. Below are some examples of quantitative and qualitative investments in ECCR made by the Army in 2014:

1. **Investments in ECCR Personnel.** The Army's ADR Program budget is used to fund the Army's FTE Dispute Resolution Specialist position. This person oversees the Army's ECCR program and the Army's overall ADR program. Additionally, each Army legal office invests in ECCR through budgeting for general attorney advisor FTEs who provide general legal advice, to include the ability to initiate ECCR as needed.

2. **Investments for ECCR Training.** The JAGC Legal Center and School invests in an annual Litigation Course that includes a training block on ADR. This budget includes preparation, travel and training time for the entire course. Army does not generate a separate record of investment costs for the ADR training portion of the Litigation Course.

3. **Investments for non-third-party-assisted collaboration.** Army Environmental Law Specialists invest time and resources on negotiation, partnership and collaboration to avoid conflicts. The Army Environmental Law Specialists do not typically record the number of hours spent or other investments made on a particular matter. Should any project rise to ECCR, a special funding request is submitted on a case by case basis.

Benefits. The benefits of ECCR may be captured in each attorney case file and reported in the annual ECCR Report. Generally, the Army's quantitative benefits have been a reduction in number of hours necessary to litigate disputes. Qualitatively, ECCR has provided open communication, trust and support from regulators and stakeholders, at all levels. Parties are able to understand each other and work together to generate a solution that is specifically tailored to protect the environment and Army's interests and goals. Below are more specific benefits resulting from the use of ECCR in 2014:

1. **Improved open communications.** The use of third-party neutrals for those cases in litigation helped to facilitate open communication amongst the parties. The parties are more willing to discuss the matter to a third-party neutral in open meetings forums and caucuses. These discussions help the parties understand the strengths and weaknesses of their position, the positions of the other parties, clear up any misunderstandings, identify areas of agreement and clarify the disputed issues. Open communication creates an informed process that permits the parties to focus on resolution of the disputed issues.

2. **Enabled communication at multiple levels of government.** Commands communicate with regulators and stakeholders at Federal, state and local levels in strategic planning forums and NEPA planning and consultation processes. Garrison leadership are involved in quarterly working groups with community leaders and environmental groups to discuss environmental stewardship. Tiered partnering with

regulators resolves issues related to studies and investigations conducted during CERCLA remedial actions. Tier one involves the action personnel, tier two their supervisors and tier three the directors commanders.

3. **Built trust amongst all stakeholders.** Increased public engagement and collaboration encouraged open communication which built trust among the parties. Some advisory boards were no longer needed because parties trusted one another. Many Environmental Law Specialists in the field commented that they have not found it necessary to use formal third-party neutral ECCR because their regular meetings with regulators and stakeholders provide open communication and an understanding amongst the parties, resulting in fewer conflicts. Potential conflicts are identified and resolved early and at the lowest level. These communication forums are extremely beneficial to the Army because we are able to discuss the Army's policies on the use of resources, land management, sustainability and energy and help the stakeholders understand the Army's position.

4. **Facilitates conflict resolution planning.** The Army enters into Federal Facility Agreements and Cooperative Agreements with enforceable dispute resolution provision that can be utilized to resolve future conflicts. The Army continues to put conflict or dispute resolution language into the environmental annexes of Direct Sales Partnering Agreements with private industry. Army also includes ADR type clauses in the environmental provisions of ISSAs with federal tenant activities. At Anniston Army Depot, the parties were about to implement the dispute resolution processes of an agreement, but they were able to resolve the issue through negotiations.

5. **Improved working relationships.** When the Army utilized ECCR, the parties developed improved working relationships. For example, the Army used ECCR to resolve an issue regarding a permit at JBLM. Working through the mediator, the parties began an ongoing dialogue that improved their long-term working relationship.

6. **Narrows issues in dispute.** Third-party neutrals use open meetings and caucuses to identify areas in common and narrow the issues in dispute and work toward resolution of those issues in dispute. At Fort Carson, the parties used collaboration to narrow issues and generated a common ground that resulted in an agreement that all parties could sign. A third-party neutral stepped in to help the parties identify the issues so the parties could focus their discussions on those issues in dispute and reach a resolution.

7. **Reduced litigation costs.** All reported instances when ECCR was utilized reflected that ECCR brought the parties closer to settlement quickly, thereby reducing litigation costs, including the costs of discovery and trial preparation if the case went to trial.

- 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. The Army routinely applies ECCR to litigation and non-litigation matters but has no formal method of capturing our efforts. Generating an actual number of hours per case or matter that might have been avoided 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 collaboration, negotiation or other proactive methods of resolution that does not involve a third-party neutral. These benefits are not easily measured, are relational, subtle and difficult to quantify.

3. **ECCR Use:** Describe the level of ECCR use within your department/agency in FY 2014 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 2014 ECCR Cases ¹	Decision making forum that was addressing the issues when ECCR was initiated:				ECCR Cases or projects completed ²	ECCR Cases or Projects sponsored ³	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__
Planning	__0__	__0__	__0__	__0__	__0__		__0__	__0__	__0__
Siting and construction	__0__	__0__	__0__	__0__	__0__		__0__	__0__	__0__
Rulemaking	__0__	__0__	__0__	__0__	__0__		__0__	__0__	__0__
License and permit issuance	__1__	__0__	__1__	__0__	__0__		__1__	__0__	__0__
Compliance and enforcement action	__0__	__0__	__0__	__0__	__0__		__0__	__0__	__0__
Implementation/monitoring agreements	__0__	__0__	__0__	__0__	__0__		__0__	__0__	__0__
Other (specify): _____ CERLCA _____	__5__	__0__	__0__	__2__	__3__	CERCLA	__1__	__0__	__5__
TOTAL	__6__	__0__	__1__	__2__	__3__		__2__	__0__	__5__
		(the sum of the Decision Making Forums should equal Total FY 2014 ECCR Cases)							

¹ An “ECCR case” is a case in which a third-party neutral was active in a particular matter during FY 2014.

² A “completed case” means that neutral third party involvement in a particular ECCR case ended during FY 2014. 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.

³ 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 2014 cases it should equal total ongoing cases. If you subtract sponsored ECCR cases from Total FY 2014 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 2014 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 2014). 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>EPA issued a 404A stormwater permit to Joint Base Lewis-McChord (JBLM) under the Clean Water Act. The Army had concerns with the EPA's inclusion of certain provisions and timelines in the stormwater permit. The Army appealed the permit to the Environmental Appeals Board (EAB). The EAB offered ECCR to the parties. The parties agreed to go forward with mediation, conditioned on EPA's filing a response brief to the EAB that sets out the specific issues to be resolved. EPA filed its brief and the matter went into ECCR with an administrative law judge. After four days of mediation, all the issues were resolved and the permit was modified.</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 EAB sent the matter to mediation with an assigned ALJ working as the neutral third party. The Army counsel provided confidential briefs to the ALJ. Each party provided opening statements addressing the issues. The ALJ caucused with each party, identifying the strengths and weaknesses of each party's case. In an open meeting forum, the ALJ addressed each issue and permitted the parties to work toward resolution of the disputed issues.</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
<p>The ECCR generated a better working relationship between Army, the Regional EPA Office and the State regulators. The parties reached a mutually satisfactory revision of the permit and the installation was able to meet the permit requirements imposed by the state and EPA, thereby avoiding litigation. Use of this process most certainly fed into EPA's timely approval of the permit. ECCR also helped the parties generate a more creative solution that addressed the unique environmental problems of the region, thereby achieving environmentally sound approaches for this particular problem.</p>
Reflections on the lessons learned from the use of ECCR

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

Below are comments about other ECCR matters.

1. In the Chubb v. U.S. case, mediation was utilized right before the parties were set for trial. Prior settlement, negotiations were unsuccessful and lengthy discovery was imminent. Both sides were several million dollars apart. The parties agreed to use ECCR to reach a settlement and selected a senior Federal judge as third-party mediator. The ECCR effort was funded by the Department of Justice. Both parties filed mediation briefs and submitted them to the mediator and the opposing party. The mediator first met with the parties together where the mediator helped the parties identify the disputed issues. The mediator then met with the parties individually to address the strengths and weaknesses of their arguments. The mediator brought the parties together occasionally to clear up any misunderstandings regarding any of the issues. The parties worked through each issue in open meetings and separate caucuses. Both sides eventually agreed to a mutually beneficial settlement. This case likely would have gone to trial without the use of ECCR. ECCR benefited the Army by avoiding the substantial time and costs associated with discovery, trial preparation and conduct of a trial. The greatest lesson learned from this case is the importance of understanding the other side's concerns and identifying those key issues that would impede settlement. Knowing what issues were deal breakers allowed the parties to craft a settlement that was agreeable to all parties.

2. In the National Fireworks Site case, the Army, private parties and the state regulators are using a facilitator to assist the parties as they work through the proposed remedial action plan, the settlement of a natural resource damage claim and the allocation of costs to conduct the remedial action. The facilitator guides open discussions between the regulators and the parties which helped the parties to maintain a productive working relationship. The parties have narrowed the issues of dispute through shuttled discussions. Thus far, this process has allowed the parties to develop a remedial action plan tailored to the specific site needs, and to work to resolve the natural resource damage claim and response cost allocation.

3. In the 68th Street Site case, the parties hired a mediator to review the evidence and develop an allocation of site response costs amongst a large number of potential responsible parties. The mediator caucused with the parties individually to address the proposed allocation and to reach a consensus on the allocation. The process is ongoing. The parties are anticipating that an agreement will be reached, thereby avoiding litigation and saving the Army and numerous parties substantial litigation costs and resources.

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.

Army Priority ECCR Areas of Conflict

Generally, the Army's focus in litigation and non-litigation matters is dispute avoidance through open communication, involving all stakeholders and partnering or other negotiation processes. This allows the Army to minimize the number of issues that need formal dispute resolution.

CERCLA litigation. The Army's priority is to always utilize ECCR to resolve matters before litigation ensues and after suit is filed. This becomes a priority in CERCLA litigation case where there are multiple parties with varying interests. The use of ECCR enables us to narrow the issues and handle only those in dispute. Litigation in CERCLA cases can take years to resolve and an inconceivable amount of man hours to complete. In most CERCLA cases, ECCR has avoided litigation and reduced or eliminated extensive discovery and other costs of litigation

Non-third-party-assisted ECCR. The Army's main priority is to resolve all conflicts through collaboration, tiered partnering, consultation, public meetings, and negotiated agreements with dispute resolution provisions. Below are examples of activities in which non-third-party-assisted ECCR is a priority for the Army:

- NEPA early project and proposal development
- NHPA programmatic agreement for the protection of cultural resources
- Cooperative Agreements for the development of renewable energy, prescribed burning, habitat preservation, emergency management
- Compatible land use and encroachment projects involving Army training activities, transportation, airfield activities, conservation easements, road and land development and construction
- Partnering for installation restoration and regional sustainability
- Strategic Planning Forums

Army Emerging ECCR Areas of Conflict.

Groundwater permits. A new use of ECCR is the resolution of water permit disputes with state and Federal regulators by filing an appeal with the Environmental Appeals Board (EAB). ECCR was successfully implemented at JBLM to resolve its CWA permitting issues and will serve as an example for water permit disputes in the future.

7. Non-Third-Party-assisted Collaboration Processes: Briefly describe other significant uses of environmental collaboration that your agency has undertaken in FY 2014 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 ways in which the Army used non-third-party-assisted collaboration in 2014:

1. Army practice is to routinely negotiate the inclusion of dispute resolution provisions in all its Federal Facilities Agreements, environmental annexes of direct sales partnering agreements with private industry, and interagency service agreements with Federal tenant activities. The inclusion of dispute resolution provisions forces parties to implement ECCR before a matter is litigated.
2. Army encourages, and in some instances requires, the development and implementation of environmental sustainment and stewardship programs and plans. These programs and plans ensure Army installations and agencies are in compliance with environmental laws, regulations and Executive Orders. Some examples can be seen in the activities at Fort Stewart. The Fort Stewart leadership partnered with local governments and communities on reducing water and energy consumption and implementing renewable energy sources to ensure the sustainability of the environment in their area. Fort Stewart also initiated a recycling program with the local community was developed through extensive collaboration. In addition, Fort Stewart entered into a partnership with a power company resulted in the development of solar power source.
3. Army ensures the protection of its cultural resources through negotiation and facilitation. At JBLM, structural committees were formed to handle historic preservation issues regarding the management of residential property on post. Fort Carson used a negotiator and facilitator to engage with the state, tribal, and historic preservation officials, along with an advisory council on historic preservation to develop a programmatic agreement. This enabled Fort Carson to continue training while protecting or mitigating impacts to numerous cultural resources that were eligible for listing on the National Register of Historic Places.
4. Partnering has been utilized in the CERCLA process. Anniston Army Depot utilized a tiered partnering arrangement to resolve ARARs issues in route to an IROD at an installation. Under tiered partnering the ANAD and the regulators convened to discuss and resolve issues relative to the remedial actions being developed following studies and investigations completed under the CERCLA process. Tier one is composed of project manager representatives and contractors from each of the parties to the Federal Facility Agreement. Tier two is composed of the next level of supervision above the project managers, usually directors of divisions within the installation, agency, or regional office. Finally, tier three is composed of the EPA

regional director, state director, and the installation commander.

5. The Army encourages participation in community outreach via town hall meetings and other public forums. Fort Jackson, in conjunction with the Army Environmental Command, initiated and continues involvement in community outreach, to include a website, to address the discovery and initial investigation of munitions constituents located off of operational ranges and the installation. This action has resulted in positive responses from affected residents and land owners. Fort Carson participated in collaboration with the City of Colorado Springs, Fort Carson, El Paso County, City of Fountain, Air Force and other community agencies and organizations during a Feasibility Assessment Study on a Regional Trails and Transportation Plan providing bicycle, pedestrian and other non-motorized transportation and trail systems for the constituents. Fort Carson also hosts an Environmental Quality Control Committee that meets quarterly to assess progress, communicate priorities and inform Army leaders and their representatives of the relative strengths and weaknesses of environmental quality and compliance.

6. The Army utilizes collaboration to develop its Army Compatible Use Buffer and Joint Land Use Study programs. At Fort Carson, public meetings were held to collaborate with stakeholders and agencies. Through continued coordination with The Nature Conservancy and El Paso County, Fort Carson was able to obtain numerous conservation easements in sensitive areas surrounding the border of the installation.

7. Leadership engagement also facilitates Army's land use management and planning initiatives. At Fort Stewart, leadership engaged with the local communities to address local land use planning initiatives and joint or compatible developments outside the installation. Through engagement with Native American Tribal Leaders, JBLM entered into Memoranda of Agreement regarding noise, and Native American fishing, hunting, and gathering activities on post.

8. Army uses collaboration in its NEPA planning process. Fort Stewart collaborated with the stakeholders and the public on the implementation of NEPA requirements helped the Army to address airfield activities, and road construction.

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 15, 2014.

Submit report electronically to: ECRReports@omb.eop.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