

**FY 2016 Department of Transportation  
Environmental Collaboration and Conflict Resolution (ECCR)<sup>1</sup>  
Policy Report to OMB-CEQ**

The U.S. Department of Transportation (DOT) submits its annual report on environmental collaboration and conflict resolution (ECCR), pursuant to the reporting requirements set forth in the revised policy memorandum that the Director of the Office of Management and Budget (OMB) and the Chairman of the President's Council on Environmental Quality (CEQ) issued on September 7, 2012. This report covers activities in Fiscal Year (FY) 2016. In keeping with guidance from OMB and CEQ, DOT has collected and aggregated information from its operating administrations and components and is submitting a single report using the template provided.

**FY 16 ECCR Report Report**

Name of Department/Agency responding:	<u>U.S. Department of Transportation</u>
Name and Title/Position of person responding:	<u>Amy Coyle, Senior Attorney</u>
Division/Office of person responding:	<u>Office of the General Counsel</u>
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Date this report is being submitted:	<u>30 October 2017</u>
Name of ECR Forum Representative	<u>Amy Coyle and Krystyna Bednarczyk</u>

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 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.

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<sup>1</sup> The term 'ECCR' includes third-party neutral assistance in environmental collaboration and environmental conflict resolution.

The U.S. Department of Transportation (DOT) took the following steps to build programmatic and institutional capacity for ECCR in FY 2016:

**The Federal Aviation Administration (FAA)**

FAA used the U.S. Institute for Environmental Conflict Resolution (USIECR) to provide ECCR training at its annual Environmental Forum. Additionally, FAA has updated its Community Involvement Manual, which identifies the use of facilitated conflict resolution as a means to address project issues. In conjunction with this manual, the FAA is working to develop and implement practices that facilitate community involvement and partnership with airports, both earlier in the process for proposed actions and on an ongoing basis.

**The Federal Highway Administration (FHWA)**

FHWA invested in training its environmental staff on ECCR through a two-day training for its headquarters staff provided by the USIECR, and a webinar on ECCR for all environmental staff – both headquarters and Division offices in all States -- also delivered by USIECR.

**The Federal Transit Administration (FTA)**

FTA increased internal infrastructure support for the environmental review process, including ECCR, by increasing the number of permanent Environmental Protection Specialist (EPS) positions. FTA now employs at least one EPS in nine of its ten Regional Offices. These EPSs manage the environmental process, including preventing, identifying, and resolving environmental issues and conflicts.

**FHWA and FTA jointly**

FHWA and FTA continue to work on updating joint guidance to implement 23 U.S.C. § 139 (titled Efficient Environmental Reviews for Project Decisionmaking), which includes dispute resolution provisions. The agencies made the guidance available for public comment in FY 2015.

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.

**FTA**

To identify investments that have been made in ECCR, FTA relies on regularly-scheduled monthly environmental discussions between Headquarters and Regional Offices. The Regional Offices may also contact Headquarters' subject matter experts to discuss individual projects and their potential need for ECCR.

**FHWA**

FHWA has an interagency agreement with USIECR to provide training for agency staff and third-party neutral services to Division offices and their stakeholders.

- 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.

**FHWA**

- a) FHWA invested \$100,000 in an interagency agreement with the USIECR.
- b) USIECR assisted FHWA with third-party neutral services to resolve environmental conflicts in three State Division offices. FHWA does not formally track cost and benefit information.

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

**FAA**

The ECCR process in FAA's one ongoing case has not progressed sufficiently to generate cost/benefit information. Determining what would have occurred and the costs associated with the ECCR process, if negotiation and collaboration were not used, is difficult. However, this process clearly has led to better working relationships between FAA and the public and private stakeholders involved.

**FTA**

In the current fiscally-constrained environment, it is difficult for transit providers to set aside money for possible ECCR expenses. It is likely that transit providers

would use funds from their projects' contingency funds, but contingency funds can be used for a variety of tasks. Thus, it is difficult to pinpoint or guarantee the availability of ECCR funds, making generating cost information near impossible.

Additionally, FTA does not have a tracking system in place to generate cost and benefit information.

**FHWA**

Although FHWA has data for its interagency agreement, it does not have a way to track any third-party neutral services that its stakeholders may procure to benefit relationships that affect the Federal-aid highway program.

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 <sup>2</sup>	Decision making forum that was addressing the issues when ECCR was initiated:				ECCR Cases or projects completed <sup>3</sup>	ECCR Cases or Projects sponsored <sup>4</sup>	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	___	___	___	___	___	___	___	___	___
Planning	<u>2</u>	<u>1</u>	___	<u>1</u>	___	<u>1</u>	<u>1</u>	___	<u>1</u>
Siting and construction	___	___	___	___	___	___	___	___	___
Rulemaking	___	___	___	___	___	___	___	___	___
License and permit issuance	<u>1</u>	<u>1</u>	___	___	___	<u>1</u>	___	___	<u>1</u>
Compliance and enforcement action	<u>1</u>	___	<u>1</u>	___	___	___	___	___	<u>1</u>
Implementation/monitoring agreements	<u>3</u>	___	___	___	<u>3</u>	Tribal consultation(2) and agency/stakeholder NEPA program process (1)	<u>3</u>	___	<u>3</u>
Other (specify): _____	___	___	___	___	___	___	___	___	___
<b>TOTAL</b>	<u>7</u>	<u>2</u>	<u>1</u>	<u>1</u>	<u>3</u>		<u>5</u>	<u>1</u>	<u>6</u>

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

<sup>3</sup> 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.

<sup>4</sup> 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
The Indiana FHWA Division needed assistance establishing a better process for engaging multiple tribes in consultation under Section 106 of the National Historic Preservation Act (NHPA) regarding traditional cultural resources throughout the State.
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
The USIECR provided services to help FHWA and Indiana DOT (INDOT) improve tribal coordination practices with tribes having cultural and ancestral ties to Indiana. Services included assessing the feasibility of a workshop, gathering information on process design, and convening a two-day workshop with representatives from a number of tribes, FHWA, and INDOT to discuss developing a Memorandum of Understanding (MOU). As a result of the workshop, a sub-group of tribal representatives was formed to draft an MOU. The sub-group met regularly and engaged additional tribes at several points in the MOU process. Parties to the MOU circulated drafts for comments then circulated the final draft to all involved tribes and organizations for signature. The MOU is now in its final stages, where a consensus has been reached on the draft MOU. The last step is to finalize it and send it to the tribes for signature.
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 FHWA Indiana division and INDOT now have a process in place to consult with tribes, which will have beneficial impacts on multiple projects throughout the State.
Reflections on the lessons learned from the use of ECCR
Engaging multiple stakeholders with varying interests fosters better communication and clearer expectations of respective roles.

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

**FAA**

Tule Lake Municipal Airport, in Modoc County, California is located on property that was part of a Japanese-American internment camp during World War II. The National Park Service operates the nearby Tule Lake National Monument, which covers only a portion of where the historic camp was located. The airport is proposing upgrades to enhance the safety of air operations for visitors to the National Monument and surrounding area. Former camp residents and their descendants are concerned that these upgrades will negatively impact the Tule Lake National Monument and surrounding areas.

The USIECR entered into a reimbursable agreement in FY 2015 with Modoc County, the sponsor of the Tule Lake Municipal Airport, to serve as a neutral facilitator to address stakeholder concerns associated with development at the airport. Stakeholder meetings were conducted in February and April 2016, but the parties did not reach a consensus. Stakeholder engagement is now continuing through the National Environmental Policy Act (NEPA) process. The ECCR mediation process is ongoing and it is unclear if it will proceed beyond the current stage.

**FTA**

The Beverly Hills School District and the City of Beverly Hills filed a complaint in U.S. District Court alleging that FTA violated NEPA and Section 4(f) of the DOT Act (now codified at 23 U.S.C. § 138 and 49 U.S.C. § 303). Plaintiffs requested mediation, and the parties held two mediation sessions in July, 2014 and May, 2016. The U.S. Department of Justice (DOJ) paid the 25% share of mediation expenses for the Federal defendants, the Los Angeles County Metropolitan Transit Authority paid 25%, and each plaintiff paid 25%. During mediation, the parties identified interests, but determined that proceeding with litigation was the only way to move forward, because the parties' interests were too far apart.

**Maritime Administration (MARAD)**

Since mid-2011, MARAD has participated in a liability allocation process supervised by third-party neutrals to apportion liability for contamination at the Portland Harbor Superfund Site (Site), in Portland, Oregon. The Site is a complex, mega site involving contaminated sediments. In accordance with the Environmental Protection Agency's (EPA) regulations at 42 CFR Part 300 and in an effort to seek an efficient and mutually beneficial resolution of the dispute and potential lawsuit(s) related to the Site cleanup, the Federal parties (represented by DOJ) have engaged in the voluntary mediated allocation process with private parties identified as potentially responsible parties. Pursuant to a framework and timeline set forth in a confidentiality and mediation agreement governing the

proceedings, participants are continuing to gather information and establish the allocation record that will form the basis for subsequent stages of the allocation.

## 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.

### **FHWA**

FHWA has an ongoing agreement with USIECR that FHWA has used over the years on multiple different environmental issues, with tribal engagement being the most common use of the agreement.

**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.*

### **FAA**

FAA has managed and resolved several environmental conflicts without the assistance of a third party neutral. FAA works collaboratively with other parties, including the public and other stakeholders, to resolve potential environmental conflicts. For example, FAA is actively involved in community roundtables surrounding numerous airports.

To encourage early coordination with stakeholders, FAA has released a desk reference for FAA's NEPA procedures which outlines coordination and consultation practices for each environmental category (i.e. water resources, air quality, biological impacts, etc.), to ensure that stakeholders are notified early in the environmental process and that their concerns are heard and addressed prior to release of a final document. FAA has also developed a community involvement manual, and associated training, that encourages early, open, and frequent communication with project stakeholders as well as the use of facilitated conflict resolution.

### **FRA**

FRA worked with the Advisory Council on Historic Preservation in developing Programmatic Agreements (PA) and other processes for the Section 106 process for FRA projects pursuant to the NHPA. These PAs involve collaboration with other

agencies.

FRA practices also include holding additional public meetings to assure receipt of public input.

### **FHWA**

FHWA has multiple interagency agreements with resource and regulatory agencies to develop innovative ways to establish and maintain relationships with these agencies and to expedite environmental review processes at the national and regional level. FHWA's liaison program provides funding for dedicated staffing (research and innovation liaisons) at national offices of six resource and regulatory agencies to work with FHWA subject-matter experts in the development of innovations such as programmatic approaches to accelerate environmental reviews and project delivery.

### **MARAD**

A West Oakland community group brought a civil rights claim alleging a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., against the City and the Port of Oakland related to truck management issues associated with the Port's redevelopment. MARAD and DOT, along with the Department of Homeland Security, notified the parties involved that the Federal entities would support the continuing efforts of EPA's regional office to facilitate a resolution of the alleged Title VI violation at the lowest level possible, and would monitor progress towards a resolution. The West Oakland community group raised additional Title VI claims against the Port/City of Oakland arising from the transportation of coal through a terminal to be constructed at the Port. DOT, along with other Federal agencies, wrote to the Mayor of Oakland in late June 2016 offering assistance in resolving the environmental justice matters. MARAD's Gateway Director will attend meetings between EPA, Federal and local agencies, the Mayor of Oakland, port officials, and the West Oakland Community group to assist addressing the raised concerns.

During FY 2016, MARAD and the United States Coast Guard (USCG) continued collaborative efforts with the New York Department of State (NYDOS) and held a joint final public licensing hearing for the final decision-making process for the Port Ambrose Deepwater Port License application. MARAD and USCG collaborated with the NYDOS for two reasons. First, the public hearing provided the State with a reasonable opportunity to participate in the final Federal assessment of New York's State-specific Coastal Zone Management Act (CZMA) and other State decision-making efforts. While State-specific CZMA requirements are usually conducted as a separate and independent process from MARAD's and USCG's deepwater port licensing hearings, USCG and MARAD sought to ensure a smooth and efficient public hearing process that was comprehensive and transparent to the public. Secondly, this effort allowed the State to inform the public of State-specific requirements of the CZMA, and provided a first-hand opportunity for State representatives to hear directly from the citizens of New York regarding their concerns and comments relating to the Port Ambrose project.

**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.

*Please attach any additional information as warranted.*

Submit report electronically to: [kavanaugh@udall.gov](mailto:kavanaugh@udall.gov)

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

<b>Informed Commitment</b>	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
<b>Balanced, Voluntary Representation</b>	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
<b>Group Autonomy</b>	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
<b>Informed Process</b>	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
<b>Accountability</b>	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
<b>Openness</b>	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
<b>Timeliness</b>	Ensure timely decisions and outcomes
<b>Implementation</b>	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