

FY 2017 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.”

This annual report format below is provided in accordance with the memo for activities in FY 2017.

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

The report deadline is February 23, 2018.

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 2017 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 2017 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 17 ECCR Report

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
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Date this report is being submitted:	11 January 17
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 2017, including progress made since FY 2016. 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 FY17, the Army Dispute Resolution Specialist (ADRS) continued to maintain the Army's Alternative Dispute Resolution program in accordance with the 22 June 07 memorandum issued by the Secretary of the Army and the Department of Defense (DoD) Instruction 5145.05, Alternative Dispute Resolution (ADR) and Conflict Management. During FY17, all Environmental Law Specialists (ELs) at all Army Commands, Army Service Component Commands, and all of their subordinate commands and installations continued to build the Army's institutional and programmatic capacity for ECCR through the following

activities.

1. Proactive Engagements. Army ELSs routinely seek to avoid disputes by engaging with Federal and state regulators, local stakeholders and the public in non-third-party-assisted collaboration and partnering.

2. Training. In FY17, TJAGLCS provided a block of ADR training as part of its annual General Litigation Course. Those in attendance included three attorneys from the Environmental Law Division, as well as other counsel from USALSA and throughout the Army. One attorney from the Environmental Law Division attended the Facilitation Fundamentals course offered by the Udall Institute in FY17. Army personnel also attended the Negotiation and Appropriate Dispute Resolution Course sponsored by the U.S. Air Force JAGC School. All incoming Litigation Attorneys now receive a block of instruction during their introductory training emphasizing the importance of considering the use of ECCR in environmental litigation.

3. Agreements. Current federal facilities agreements (FFAs), direct sales agreements, and partnering agreements require the resolution of disputes through informal cooperative measures, to include ECCR.

4. Case by case assessment. In FY17, Army ELSs assessed 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 dispute resolution processes. Factors considered include: (1) the likelihood of adverse court decision; (2) payment of claims and penalties; (3) personnel hours and resources; 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. The Army has no formal method for tracking investments in ECCR or non-third-party-assisted collaboration processes, however, travel costs incurred to attend ECCR events are documented in the Defense Travel System and qualitative investments are informally noted in the case reports, databases, or case files. The ECCR Coordinator queries all Environmental Litigation Attorneys and all ELS's in the field to identify all investments made in ECCR and non-third-party collaboration.

Benefits. In FY17, the Army informally noted the benefits of ECCR or non-third-party-assisted collaboration processes in meeting minutes, after action reports, or within the case database or case file. The ECCR Coordinator queries all Environmental Litigation Attorneys and all ELS's in the field to identify all benefits obtained from ECCR and non-third-party collaboration.

- b) Please report any (a) quantitative or qualitative investments your agency captured during FY 2017; and (b) quantitative or qualitative results (benefits) you have captured during FY 2017.

Investments. For the five ECCR events reported in FY17, the Army's quantitative investments included staff salaries, travel costs, and office resources required to prepare for and attend ECCR conferences or meetings. The Army did not fund the salaries of any third-party neutral or the costs of the ECCR process. The Army invested \$2099.78 in travel costs to attend four settlement conferences. The Army incurred internal resources and salary costs to prepare for those conferences and to prepare for and participate in other ECCR events via conference calls or emails. The Army invested in office resources and salaries to engage with regulators, stakeholders, and the public in non-third-party-assisted collaboration processes.

Benefits: Overall the ECCR process encouraged the accountability of participating parties and benefited the litigation process when used. ECCR generated improved working relationships, increased trust, and opened communications among the parties. The process facilitated efficient case progression through issue spotting and narrowing. The Army avoided the travel costs, salaries, and other resources required for formal discovery and full litigation by quickly resolving two matters and continuing to use a facilitator to

move a third matter toward resolution.

- 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 somewhat speculative. The Army relies on reporting of cost-benefit analysis by the involved attorneys at headquarters and in the field. Additionally, most Army matters use non-third-party-assisted collaboration, negotiation or other proactive methods of resolution. The benefits can be indirect and difficult to quantify. Army ELSs document these benefits as achievements and agreed upon results in case databases, case files, meeting minutes, and after action reports. For coming FYs, Army will review the potential to implement environmental law best practices meetings in furtherance of reviewing, among other things, ECCR activities.

3. **ECCR Use:** Describe the level of ECCR use within your department/agency in FY 2017 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 2017 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	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
Planning	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
Siting and construction	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
Rulemaking	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
License and permit issuance	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
Compliance and enforcement action	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
Implementation/monitoring agreements	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>	<u> 0 </u>
Other (specify): _____	<u> 5 </u>	<u> 0 </u>	<u> 2 </u>	<u> 3 </u>	<u> 0 </u>	<u> 2 </u>	<u> 0 </u>	<u> 0 </u>	<u> 5 </u>
TOTAL	<u> 5 </u>	<u> 0 </u>	<u> 2 </u>	<u> 3 </u>	<u> 0 </u>	<u> 2 </u>	<u> 0 </u>	<u> 0 </u>	<u> 5 </u>
		(the sum of the Decision Making Forums should equal Total FY 2017 ECCR Cases)							

² An “ECCR case” is a case in which a third-party neutral was active in a particular matter during FY 2017.

³ A “completed case” means that neutral third party involvement in a particular ECCR case ended during FY 2017. 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 2017 cases it should equal total ongoing cases. If you subtract sponsored ECCR cases from Total FY 2017 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 2017 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 2017). 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
Pursuant to local court rules, the parties participated in an early-neutral-evaluation (ENE) conference before a magistrate judge prior to the initial case management conference. The court funded the use of the magistrate and the ENE process.
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 parties submitted position papers to the Magistrate prior to the first settlement conference. At the first conference, the Magistrate identified a need for additional information and directed a limited document exchange. The parties were accountable to the neutral in providing documents in a timely manner. The neutral encouraged dialogue during the document exchanges, which allowed the parties to identify and address issues and data gaps, and develop a positive working relationship that continued in the second settlement conference. During the second settlement conference, the Magistrate continued to encourage discussion of the issues and possible solutions, which ultimately opened the doors to finding a mutually agreed upon settlement.
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 use of ENE in the initial stage of the litigation helped the Army and other Federal agency parties participate in a streamlined process and reach a timely settlement, avoiding significant costs and resources otherwise required to litigate the case. The use of a court sponsored Magistrate allowed the parties to participate in ENE without incurring any costs to fund the Magistrate or the ENE process. While document exchange occurs in the discovery process of litigation, the ENE process provided the opportunity for an expedited document exchange that was more efficient and linked to specific issues. This efficiency reduced costs related to protracted discovery. During the settlement conferences, the Magistrate facilitated discussions between the Federal agency parties and the private parties. Through this dialogue, the parties were able to narrow the scope of settlement options. An offer was made at the end of the second conference that was accepted after further review and discussion.
Reflections on the lessons learned from the use of ECCR

Through ENE, the parties were able to address the issues and clarify the facts, which led to a settlement offer, which was accepted. ENE avoided litigation, saving the Army considerable time and expense.

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

The Army used ECCR in four additional CERCLA cases.

1. In one CERCLA case filed in Federal District Court, the magistrate judge acted as a mediator/facilitator in the course of two settlement conferences. The magistrate judge facilitated open communications so the parties could identify and narrow the issues and address potential settlement options. The case was not resolved, however, and the parties returned to court to file motions to resolve some linchpin legal questions, after which settlement discussion/mediation with the magistrate judge may resume.

2. The Federal agency parties and the private parties continued to use a facilitator during the negotiation of a proposed cleanup plan and cost allocation. The facilitator guides open discussions between the parties, generating trust through a productive working relationship. The parties use the facilitator to narrow and resolve issues in dispute, sometimes through caucusing. This facilitation ensures the balanced inclusion of all parties' interests and provides for accountability as parties work together to move the matter forward to resolution.

3. The Federal agency parties and private parties used two mediation sessions and subsequent facilitation with a third-party-neutral to allocate costs of a CERCLA cleanup. Before mediation, the parties exchanged position papers and relevant documents. During the mediation, the mediator encouraged open discussions, which generated a positive working relationship and built trust. Although the parties failed to reach settlement, they were able to narrow the remaining issues and make significant progress. After mediation, the parties have continued to use the facilitator as they work toward resolution. The tone of the discussions remains positive.

4. The private parties hired a third-party neutral to mediate the allocation of site cleanup costs among the numerous parties. Due to confidentiality issues, the Federal agency parties were not allowed to participate in the mediation directly with the private parties. The mediator first mediated with the private parties before meeting with the Federal agency parties. The Federal agency parties addressed their concerns with the mediator, who took them back to the private parties for response. After two mediation sessions and follow up discussions with the mediator, the parties reached resolution. This mediation allowed the private parties to maintain confidentiality, while allowing the Federal agency parties to participate in a global settlement and avoid extensive litigation costs.

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.

When the Army obtains a demand or suit from a regulator or private party, 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 some matters, the Army merely follows local court rules or judicial orders to participate in settlement conferences with a Magistrate or other third-party neutral who helps the parties reach an agreement in a short amount of time. Whether court ordered or Army initiated, the result is expedited case processing and potential early settlements that limit or avoid years of litigation and an avoidable expenditure of time 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 2017 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.*

In FY17, the Army's use of non-third-party collaboration generated a more efficient process to identify, narrow and address the stakeholders or regulators' interests and to reach timely and appropriate agreements with stakeholders and regulators, avoiding the need for a third-party-assisted dispute resolution process. The Army invested in proactive measures, such as meeting attendance or site visits. The participants created solutions tailored to fit the needs of each specific project, which resulted in better protection of the natural resources. Below are areas where the Army used non-third-party-assisted collaboration in FY17.

1. Army's existing Federal Facilities Agreements (FFAs), direct sales partnering agreements with private industry, and interagency service agreements with Federal tenant activities contain dispute resolution provisions, which direct the parties into ECCR before a matter becomes the subject of litigation.

2. The Army encouraged participation in community outreach via town hall meetings and other public forums in FY17. Below are some examples at Anniston Army Depot (ANAD), Fort Carson, and Presidio of Monterey (POM).

a. Through outreach with regional and county regulators, the POM resolved environmental regulatory issues regarding a construction project. The POM provided a site visit for the regulators to demonstrate the scope of the project and to discuss how the project could meet the regulators' concerns. These cooperative efforts with regulators allowed the Army to proceed with a construction project in a timely manner, without any amendments to the project.

b. Through partnering, ANAD holds quarterly meetings with the appointed state and federal agencies to discuss and resolve issues associated with investigations and remediation at the National Priorities List (NPL) site and other sites at ANAD. The Tier 1 meetings have been very productive for ANAD in raising and discussing issues, particularly the selection of remedial alternatives. In addition to quarterly meetings with the appointed regulators, ANAD participates in annual meetings with the Restoration Advisory Board (RAB) to facilitate communication and enhance public engagement within the community on issues relative to its installation restoration projects.

c. Fort Carson maintains an outreach group that has significantly enhanced open communication, and increased transparency and interaction on issues of concern. This process has nearly eliminated the occurrence of more polarized one-way information demands from interested parties. Specifically, Fort Carson hosted a Community Day at the Piñon Canyon Maneuver Site, a Tribal consultation visit to Turkey Creek Rock Art District, a site visit for descendants of early homestead ranchers, and a three-day event, which included cultural tours of remote sites, with a longstanding community group. The expansion of these outreach programs to new community groups has expanded community knowledge of Fort Carson's activities and paved the way for an even more expansive future community engagement with other stakeholders. Fort Carson also participates in an EPA-designated Site Specific Advisory Board representing community and regional interests in the cleanup of the Rocky Mountain Arsenal.

3. The Army uses non-third-party collaboration in their consultation and NEPA planning process. Below are some examples from ANAD and POM.

a. ANAD entered into Memorandums of Agreement (MOAs) with the Alabama State Historic Preservation Office to address certain complexes on the installation that have significant importance to the broad patterns of history. These MOAs provide a process for collaboration that allows the Army to manage cultural resources more efficiently.

b. As a cooperating agency for an environmental impact statement, the POM continues to collaborate with local, state, and federal regulating agencies regarding a peninsula-wide water augmentation project that began in October 2016. This project proposes the use of Army property for key pipelines, aquifer storage and recovery wells. Its cooperating agency status allows the Army to ensure that all proposed actions which would affect the Army and Army property are thoroughly analyzed.

c. In support of the Native American Graves Protection and Repatriation Act (NAGPRA), the POM collaborates with federally recognized tribes, locally unrecognized tribes, and other federal and local agencies to ensure the city's use of leased land was adequately protective and respectful of Native American remains throughout the leased site. In FY17, senior leadership from Army and Army National Military Cemeteries (ANMC) hosted four sovereign Native American tribal nations, and a local state recognized tribal nation in the repatriation and reburial of Native American remains in the POM cemetery. The reburial ceremony represents the culmination of 2 years of coordination between Army and four Federally recognized tribal governments for the final repatriation and reburial of the remains of 17 Native Americans and over 300 associated funerary objects discovered on the POM between 1910-1985. This is the first time ANMC has authorized the reburial of repatriated Native American remains in a military post cemetery, and this will serve as an example for other installations in similar circumstances. The remains and funerary objects were reburied with honors in a private ceremony closed to the public at the request of tribal leaders. "This cooperative effort has resulted in appropriate respect being rendered to these long-departed American Natives and is now the model for other U.S. Army installations across the country," said Col. Lawrence Brown, garrison commander for the POM. Prior to reburial in the post cemetery, the Army and tribes drafted and signed a "Reburial Agreement," a first of its kind for the Army, requiring close coordination between ANMC and Army officials.

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 23, 2018.

Submit report electronically to: owen@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