

FY 2017 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 in accordance with the memo for activities in FY 2017.

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 Template

Name of Department/Agency responding:	Department of the Navy
Name and Title/Position of person responding:	Detria Liles Hutchinson Acting Assistant General Counsel (ADR)
Division/Office of person responding:	Office of the General Counsel ADR Program Office
Contact information (phone/email):	202-685-6974 / detria.lileshutchins@navy.mil
Date this report is being submitted:	02/23/2018
Name of ECR Forum Representative	Perry H. Sobel, Assistant Director AGC (Environmental)

- 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.]

NLO approaches ECCR on a case-by-case basis and therefore does not approach it programmatically.

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.

The following is the response of the Naval Litigation Office (NLO) that handles environmental litigation for the DON, other than environmental tort litigation, which is handled by JAG.

a) The NLO litigation case tracking system has a separate “ADR” field which requires trial attorneys to identify whether or not ADR was offered, when, the ADR type and source, the dispute type, and whether or not the case was resolved using ADR.

b) ADR helps NLO to identify the prospects for settlement or whether full litigation is necessary. Many times this can be done prior to the filing of litigation.

- 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.

During FY 2017, the DON, in cooperation with the DOJ, has been engaged in mediation concerning the cleanup of environmental contamination in the vicinity of the former Naval Weapons Industrial Reserve Plant (NWIRP) Bethpage, New York. This mediation has been ongoing since FY2011 and, due to various other cleanup issues arising, saw very little activity in FY2017. Notwithstanding that the parties (U.S. and Northrop Grumman) have not moved forward in settlement negotiations, the parties have otherwise engaged in cooperative dialogue concerning a variety of environmental issues related to the site cleanup efforts at Bethpage.

In addition, during FY2017, the DON, in cooperation with the DOJ, has been engaged in a “global mediation” concerning the cleanup of environmental contamination associated with a site at Naval Weapons Station (NWS) Seal Beach designated “Site 70,” as well as concerning the cleanup of environmental contamination at several Air Force sites. There is only one potentially responsible party (PRP) for NWS Seal Beach Site 70: The Boeing Co. (Boeing) on the basis of the past activities of its predecessor. Boeing is not

currently a government contractor at the site. This mediation has been termed “global mediation” because it is an effort by DOJ, the DON, and the Air Force to resolve issues that may have certain similarities at multiple Government Owned/Contractor Operated sites. This mediation has been on-going since FY2016 and during FY2017 continued with exchange of positions on certain legal issues and efforts by the third-party neutral (the mediator) to meet with parties individually. These cases are all pre-litigation. No complaint has yet been filed in any of them.

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

Funding of the mediator was split between Northrop Grumman (NG) and the DOJ. We are not privy to the funding amounts expended by the parties on the mediator. The DON funded supporting DON consultants and DON personnel, travel, and litigation support. We have not separately tracked mediation-related costs. Nor have we been able to quantify the benefits.

Similarly, for NWS Seal Beach Site 70, funding of the mediator has been between DOJ and the government contractor PRPs. We are not privy to the funding arrangements expended by the parties on the mediator. We have not separately tracked mediation-related costs nor have we been able to quantify benefits.

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 2015 ECCR Cases	Decision making forum that was addressing the issues when ECCR was initiated:				ECCR Cases or projects completed	ECCR Cases or Projects sponsored ²	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	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____	_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	53	_____	_____	_____	53	_____	53 ³	_____	_____
Other (specify): _____	_____	_____	_____	_____	_____	_____	_____	_____	_____
TOTAL	53	_____	_____	_____	53	_____	53	_____	_____
		(the sum of the Decision Making Forums should equal Total FY 2015 ECCR Cases)							

² The DON has 53 facilitated partnering teams, organized in a three-tier structure, which address installation restoration issues. Collectively, these teams work with 257 active environmental restoration sites. Note that NAVFAC Southeast did not report.

³ These 53 facilitated partnering teams collaborate to implement environmental restoration regulations. The third-party partnering team facilitators are sponsored by DON.

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

As previously stated, during FY 2017, the DON, in cooperation with the DOJ, has been engaged in mediation concerning the cleanup of environmental contamination in the vicinity of the former Naval Weapons Industrial Reserve Plant (NWIRP) Bethpage, New York and the equitable allocation of response costs between the parties (U.S./DON and Northrop Grumman (NG)). A third-party evaluative neutral has been involved since early in FY2011. As previously stated, funding of the mediator was split between NG and the DOJ. We are not privy to the funding amounts expended by the parties on the mediator. The DON funded supporting DON consultants and DON personnel, travel, and litigation support. We have not separately tracked mediation-related costs. Nor have we been able to quantify the benefits.

[For NWS Seal Beach Site 70, please see sections 2.b and 2.c above.]

ECCR Question #4 A CERCLA Third-party defensive claim litigation for clean-up, removal and remediation costs contribution. This case involves the following: CERCLA case filed by Whittaker Corp., Inc., a company with a number of activities related to the manufacture of missiles, particularly Sidewinder missiles, and some alleged aspects of Jet Assisted Take-off (JATO). Perchlorate is the contaminate of concern. The site location is the same one as in Castaic Lake and the AISLIC [Steadfast Insurance] case(s) [22116 West Soledad Canyon Road in Santa Clarita, CA, USA]. Perchlorate as a CERCLA hazardous substance; and, it is not a contaminant of issue in the present case, due to the U.S. District Court's ruling in the Castaic Lake case, finding that, perchlorate is a CERCLA hazardous substance.

ECCR Question #4: A CERCLA Third-party defensive claim litigation for clean-up, removal and remediation costs contribution. This case involves the following: The Navy received a Notice of Potential Liability for Lower Darby Creek Area Super Site, Operable Unit 1- Clearview Landfill, in Philadelphia, Pennsylvania, USA, from the U.S. Environmental Protection Agency (EPA). With this notice, it is reasonable to anticipate litigation. The anticipated litigation is based on Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §9607(a), with respect to the Clearview Landfill, Operable Unit 1 (Clearview Landfill) of the Lower Darby Creek Area Superfund Site ("Site") located in Philadelphia, Pennsylvania, USA. The federal EPA believes that that waste from the Philadelphia Navy Shipyard was disposed of by Landfill Eastern Industrial Corp. and Tri-

County Industrial, Inc., at the Clearview Landfill. The Clearview Landfill operated from 1950's to the 1970's and was closed in the mid-1970s.

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

Generally, for both NWIRP Bethpage and NWS Seal Beach Site 70, the parties engaged in discussion/debate of the technical/legal issues, with ongoing feedback from the mediator. Other than this, we cannot divulge the details of the privileged discussions and process.

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

NWIRP Bethpage has not yet been resolved and may yet go to litigation. However, the mediation has served as a vehicle for building trust between the parties generally and for cooperation on cleanup issues outside the mediation.

NWS Seal Beach Site 70 also has not been resolved and may yet go to litigation. So far, the mediation has served as a vehicle for identifying more precisely the key issues that divide the parties.

Reflections on the lessons learned from the use of ECCR

The ability to reach resolution is highly dependent upon the willingness of the parties to compromise, their motivation to reach settlement resolution, and the ability of the mediators to engage on complex issues.

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

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.

See response to Question 4 for 2 CERCLA cases.

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.*

ECCR Question #7: The Department of the Navy's, Office of the General Counsel, Naval Litigation Office or NLO, in cooperation with our other federal or U.S. Government agency, department or instrumentality partners (e.g., the US DOJ; the federal EPA; NOAA; the US Coast Guard; and the like), seek annually to anticipate, prevent, better manage, and/or resolve our presented environmental CERCLA-based 'litigation' issues (i.e., through either defensive claims litigation or affirmative claims litigation) in all conflicts which do not include a third-party neutral, by the use of good common-sense and best negotiation-mediation-pre-litigation discovery, and if need be, 'actual' lawsuit and litigation practice(s). As good federal stewards of the federal or U.S. Government's fiscal resource(s), we seek to enhance the federal or U.S. Government's litigation posture(s) through the utilization of Memorandum's of Agreement/Memorandum's of Understanding, Intra-Service Support Agreements (ISA's)/Inter-Service Support Agreements (ISSA's), where suitable, with the advice and consent of our federal, state and local-municipal partners; as well as, public-corporate and private citizen organizations/entities. This allows us to engage the overall American citizenry-public, in an enhanced 'negotiation-and-mediation-like' fashion wherever, required by the appropriate and applicable laws, regulations, directives, instructions, guidelines, policies, practices and procedures. And, as stated previously, these sui generis and case-based tailored efforts are initiated usually by the US DOJ's AUSA's and the Navy's NLO trial attorney(s); they do not involve a third-party neutral.

e. LCTM Case Detail 48264: In re Lower Darby v. Navy [Clearview Landfill Unit 1 - Philadelphia Naval Shipyard]

(1) Navy of Department or Agency: Department of the Navy,

Office of the General Counsel, Naval Litigation Office

(2) Name of Person Responding : Michael W. S. Hayes, Esq.
Senior Attorney-Advisor(Trial), Naval Litigation Office, Env. Trial Team II

(3) Division/Office of Person Responding: NLO, Environmental
Trial Team II

(4) Contact: Please see the Footer Salutation

(5) Date of Report: 09 FEB 2018; for, 23 FEB 2018.

(6) Name of ECR Forum Representative: Andrea Geiger,
Esq./Detria Liles-Hutchinson, Esq., Navy OGC ADR

> US DOJ and Navy - "Sponsor(s)" of - The
agreement to enter into Mediation...

(1) First - Mediation Session - October 2017

(2) This matter is presently in settlement
agreement "negotiation(s)" between the Department of the Navy, The US DOJ,
and the federal Environmental Protection Agency (EPA).

(3) Presently, in settlement "negotiations" with
document exchanges proceeding weekly/monthly....

(4) Follow-on mediation Session(s) have been
discussed as 'highly probable', if necessary....

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.

The reporting instructions are somewhat verbose, nuanced, and repetitive.
Recommend redrafting in plain language.

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