

Environmental Collaboration and Conflict Resolution

Thirteenth Annual Report

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DRAFT



U.S. Department of Energy

EXECUTIVE SUMMARY

The September 7, 2012 Memorandum on Environmental Collaboration and Conflict Resolution (ECCR Memorandum) issued by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) supersedes an OMB/CEQ joint memorandum issued in November 28, 2005, on Environmental Conflict Resolution and broadens the efforts called for under the 2005 memorandum by explicitly encouraging appropriate and effective upfront environmental collaboration to minimize or prevent conflict. The ECCR Memorandum defines ECCR as “third-party assisted collaborative problem solving and conflict resolution in the context of environmental, public lands, or natural resources issues or conflicts.”

Recognizing the role of collaboration in conflict resolution and its history of collaborative approaches, both with and without third-party neutrals, to prevent or resolve environmental conflicts, the Department of Energy (Department or DOE) defines ECCR more expansively than the ECCR Memorandum. The Department defines ECCR as the use of any collaborative process to prevent or resolve environmental conflicts, whether or not the process involves the use of third-party neutrals. This definition is consistent with the spirit of the ECCR Memorandum which stated the following.

The challenge of implementing Federal policies and programs can often be met with collaborative, constructive, and timely approaches to identify and address affected interests, consider alternatives, and reach solutions before different positions or opinions result in conflict. Collaborative efforts involving the public and policy and program coordination within and across multiple levels of government are important for addressing these challenges.

Thus, this annual report, prepared pursuant to section 4(g) of the ECCR Memorandum, presents information on the Department’s use of third parties and other collaborative problem solving approaches in the reporting year.

In Fiscal Year 2018, a total of 21 DOE sites and program offices completed the ECCR survey template. A total of 29 ECCR cases were reported. Three of the 29 reported ECCR cases involved third-party assistance, 1 of these was completed in 2018. Six of the 26 cases that did not involve third parties were reported as completed in 2018.

I. INTRODUCTION

A. Background

On September 7, 2012, the Chairman of the Council on Environmental Quality (CEQ) and the Director of the Office of Management and Budget (OMB) issued the Memorandum on Environmental Collaboration and Conflict Resolution (ECCR Memorandum). Section 2 of the ECCR Memorandum defines ECCR as “third-party assisted collaborative problem solving and conflict resolution in the context of environmental, public lands, or natural resources issues or conflicts.”

Due to its long history of using a variety of collaborative problem solving methods the Department of Energy (Department or DOE) defines ECCR more broadly as the use of any collaborative process to prevent or resolve environmental conflicts, including, but not limited to, those processes involving the use of third-party neutrals.

However, to assure comparability of its data with the CEQ/OMB definition of ECCR, the Department tracks those ECCR cases in which third-party assistance was used and those in which third-party assistance was not used. This report, required by section 4(g) of the ECCR Memorandum, presents ECCR case data in both categories and describes third-party and non-third-party dispute resolution processes used by the Department in Fiscal Year 2018 (FY 2018).

B. Report Methodology

To provide guidance to Federal agencies implementing the ECCR Memorandum, a staff-level interagency ECCR Steering Committee consisting of representatives from various agencies was formed. This committee, with assistance from the U.S. Institute for Environmental Conflict Resolution, developed a survey template for agency use for this annual report. The Department modified the template to accommodate gathering the data necessary to report separately those DOE cases that used third-party assistance and those that did not. The DOE-modified template is provided as Attachment A.

The DOE template was distributed to points of contact from various programs and site offices throughout the DOE complex. This report contains the information supplied by 21 respondents.

II. ECCR CAPACITY BUILDING PROGRESS MADE IN FY 2018

The DOE sites and program offices maintain and enhance their awareness of ECCR methods and opportunities through monthly environmental attorneys' conference calls and the annual joint DOE/DOE contractor environmental attorneys' training. On average, 20 participants join the monthly calls. A total of 89 site and program office representatives participated in the annual training conducted on May 2, 2018.

An example of continuing to build ECCR capacity through the use of a third-party neutral service is the West Valley Demonstration Project (WVDP). The WVDP has entered into a

tripartite agreement with the New York State Energy Research and Development Authority (NYSERDA) and a third-party neutral to retain the services of all necessary subject matter experts (SMEs), an Independent Scientific Panel (ISP), and a professional facilitator to coordinate the process of reaching a final decision regarding the decommissioning and/or remediation of all remaining facilities at the Western New York Nuclear Service Center (Center). This process, known as the Phase 1 Study, is aimed toward reaching interagency consensus on a Phase 2 decision, with all costs to be divided equally between WVDP and NYSERDA. The Phase 1 Study was completed in 2018 with the submission of final reports from the Technical Working Groups. In addition, WVDP and NYSERDA jointly hosted multiple public meetings as part of the Phase 1 Study Process with a professional facilitator always present and the third-party neutral available when appropriate. These ECCR efforts are proving to be extremely useful conflict avoidance and conflict resolution tools.

The Environmental Management – Los Alamos Field Office (EM-LA) also utilizes the services of an outside facilitator in a critical and long-term conflict resolution process. Specifically, DOE EM-LA participates in monthly meetings of the Los Alamos National Laboratory (LANL) Natural Resource Damages Assessment (NRDA) Trustee Council, which consists of representatives from the State of New Mexico, several nearby Pueblos, and the Forest Service. EM-LA is one of the two co-lead Trustees (along with the State of New Mexico), and in that role contracts for a facilitator to assist in the important discussions amongst Trustees during the monthly meetings. EM-LA finds that the use of a facilitator in monthly meetings improves the overall relationship between DOE and the Trustees. The meetings with the Trustee Council are essential in gathering necessary information for future discussion and decision-making as well as building a useful working relationship amongst the Trustees.

An example of continuing to build ECCR capacity through collaborative problem solving without the use of a third-party neutral is the approach that the Richland Operations Office (RL) uses to administer the Hanford Federal Facility Agreement and Consent Order, more commonly referred to as the Tri-Party Agreement (TPA). The TPA is an agreement among DOE, the U.S. Environmental Protection Agency (EPA), and the State of Washington Department of Ecology for achieving compliance with the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) remedial action provisions and with the Resource Conservation and Recovery Act (RCRA) treatment, storage, and disposal unit regulations and corrective action provisions at the Hanford Site. When disputes arise under the TPA, RL project managers develop negotiation strategies that incorporate ECCR principles. RL Senior Management and environmental legal counsel strongly encourage projects to use collaborative negotiations for environmental conflict resolutions, including the use of facilitators or mediators, as appropriate. Most issues are resolved informally and never rise to the dispute level. The issues are resolved collaboratively through monthly Project Manager meetings, quarterly milestone review meetings and other meetings as necessary to address issues. Over the course of a year, hundreds of such meetings are held. It is the intent of RL to continue to use the informal collaborative approach to resolve issues before it becomes necessary to enter into formal, third-party supported environmental conflict resolution.

Similarly, Brookhaven National Laboratory (BNL) is part of an Interagency Agreement Group (IAG), which is comprised of the EPA, New York State Department of Environmental

Conservation (DEC), Suffolk County, and the DOE. This group is an outgrowth of the original Interagency Agreement (IAG) that was signed by EPA, DEC, and DOE to govern the cleanup of BNL after it was listed as a Superfund Site. The IAG is given, and provides comments for, any document or study that is required by the IAG, and the group is kept apprised of all future operations at BNL that may affect the environment. BNL also responds to all inquiries of the Citizen's Advisory Board, which is a third party facilitated forum. BNL did not report any ECCR cases for FY 2018.

III. INVESTMENTS IN AND BENEFITS OF ECCR

The benefits of integrating ECCR into DOE site and program office projects include expanded and clearer communication that leads to smoother relationships with regulators and the public.

As explained in the 2017 and 2018 ECCR reports, at the WVDP, the use of a third-party neutral as part of the Phase 1 Study process enabled WVDP and NYSERDA to utilize the talents of SMEs and an ISP to focus on the areas of technical disagreement between the parties and, thereby, facilitate reaching an interagency consensus on the future Phase 2 decisions (anticipated in 2022). A significant benefit of applying ECCR techniques is that they enable the WVDP to better anticipate, evaluate and resolve environmental issues and potential disputes before they become a larger problem. The third-party neutral attends Quarterly Public Meetings that update stakeholders on all Phase 1 Studies, when appropriate, and serves as a conduit between stakeholders and the SMEs and ISP members. A professional facilitator leads the monthly Citizens Task Force meetings which are hosted by WVDP and NYSERDA in order to inform the local interest group of all ongoing activities and respond to any concerns. Finally, WVDP and NYSERDA executed a Consultation and Coordination Plan that guides the routine communications between the parties involving in ongoing activities, enabling more effective and consistent communication aimed to resolve conflict as soon as possible.

Staff of the EM-LA believe that the monthly LANL NRDA Trustee Council meetings are essential in gathering necessary information for future discussion and decision-making as well as building a useful working relationship amongst the Trustees. The facilitator assists the Trustees by encouraging them to engage in candid discussions on the sensitive issue of potential damages to local natural resources in order to reach timely resolution on important issues and relevant studies. The work of the LANL NRDA Trustee Council is a multi-year process and is ongoing.

The DOE Idaho Operations Office routinely engages in collaborative discussions with regulatory and state government officials, as well as Native American Tribal representatives related to the operation of the Idaho National Laboratory Site. In FY 2018 the Idaho Operations Office had no issues requiring third party assistance for resolution.

Sandia National Laboratories (SNL) maintains a strong collaborative relationship with its regulators. Although SNL did not need the services of a third-party neutral in FY 2018, it recognizes the potential for that need. Accordingly, the laboratory maintains contact with ECCR resources through the DOE monthly environmental attorneys' conference calls and the annual training to keep up-to-date on agency-wide capacity for the provision/availability of third-party

neutrals. Also, the laboratory's Legal Management Plan incorporates provisions for consideration of alternative dispute resolution in every legal proceeding.

The Southeastern Power Administration is a small Federal agency with the authority to market hydroelectric power and energy in the states of Alabama, Florida, Georgia, Illinois, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia, from reservoir projects operated by the U.S. Army Corps of Engineers (COE). Southeastern staff regularly meets with the COE in the area to discuss water control plans, operational impacts on the COE's hydropower projects, and current legal and regulator developments affecting public power systems. Southeastern strategic planning efforts promote negotiations with all stakeholders and business partners. These efforts have enabled Southeastern and its stakeholders to develop solutions in accordance with congressional intent and current conditions in the management of federal water resources projects. Frequent negotiations and continued participation in these stakeholder meetings are deemed positive and represent steps forward by Southeastern in its strategy to seek amiable conflict resolution.

IV. ECCR CASES IN FY 2018

Respondents reported 4 ECCR case in which third parties were involved and 25 ECCR cases in which they were not. One case involving third parties was completed in FY 2018, all four cases included non-federal participants. Of the 25 cases not involving a third party neutral, six were completed in FY 2018 and all but two involved non-federal participants. Attachment B contains tables summarizing the ECCR survey results.

A. ECCR CASE EXAMPLE USING A THIRD-PARTY

The WVDP case using a third-party neutral was also reported by WVDP for the FY 2017 report. The FY 2018 update stated that this Phase 1 study process case is now complete. For this case, the third-party neutral retained and utilized the services of both SMEs and an ISP to assist with the overall goal of facilitating interagency consensus. Additionally, the third-party neutral used the services of a professional facilitator to moderate all public meetings as part of the associated comprehensive public participation plan to ensure transparency with stakeholders. The effective use of a third-party neutral has allowed WVDP and the state to keep the decision-making process on track and avoid work stoppages due to interagency disagreements. The project is on course to reach mutual and final decisions on the ultimate disposition of the Site in 2022.

B. ECCR CASE EXAMPLES WITHOUT A THIRD-PARTY

Many ECCR cases are handled without the use of a third-party and instead use collaborative discussions to provide information to the public, elected officials and regulatory bodies through formal and informal presentations. It also gives DOE the opportunity to brief those bodies, receive their comments and concerns, and address those comments and concerns throughout the decision-making process. For FY 2018, five DOE offices reported cases handled without the use of a third-party neutral; these offices were: Argonne National Laboratory, Fermilab, Idaho

Operations Office, Savannah River Operations Office, and Richland Operations Office (see Attachment B, Table 2). Several examples of the FY 2018 reported cases follow.

In FY 2018 Argonne National Laboratory used ECCR to resolve a Notice of Violation from EPA regarding a RCRA underground storage tank issue. This eventually saved the laboratory about \$15,000 because alternative methods of resolution were explored with EPA that lowered the original cost estimate, and fines were avoided. Argonne also had several NEPA issues that presented potential issues with the public in FY 2018. One involved potential visual obstruction issues with construction of power lines. Working with the laboratory community advisory board, local government officials, and a community civics association, Argonne was able to discuss and inform the public and proactively address any concerns about placement. The laboratory was then able to issue a Categorical Exclusion instead of an Environmental Assessment, with an estimated cost savings of \$50,000.

At Fermilab, an issue arose involving an upgrade to a system component. Communicating with the local community advisory board, local government officials, federal officials at the FWS, the lab was able to proactively address concerns which lessened the burden and time required responding to public comments. In addition, there were endangered species issues involved and early cooperation and negotiation with FWS allowed submission of documentation that avoided the need for a biological assessment, resulting in cost savings.

Another FY 2018 example of a case resolved without third party neutral involvement was collaborative discussions and problem solving sessions held by the Idaho Operations Office with the Shoshone Bannock Tribes regarding a cultural resource survey and collection of cultural materials on the Idaho National Laboratory Site.

The DOE Savannah River (SR) site submitted a case resolved without third party neutral involvement. It involved a bird nest inhabited by a Northern Mockingbird, protected under the Migratory Bird Treaty Act, which was read to contain high levels of radiation. DOE-SR proposed a plan allowing its contractors to handle the potentially radioactive birds in the manner determined to best suit the situation, while focusing on the human and public safety considerations. Following approval of the plan by USFW, further assessment of the nests found them to be radiologically clean. There being no finding of radiological contamination, the nest was allowed to stay in the facility resulting in successful hatching of the eggs, saving the hatchlings, and avoidance of any compliance problem under the MBTA.

The Richland Operations Office reported eleven cases as part of its work under the Tri-Party Agreement (see Section II above). All of these cases included non-federal participants. Three related to planning issues, 4 to rulemaking, 1 to license and permit issuance, and 4 to compliance and enforcement actions.

V. PRIORITY USES OF ECCR

The Department's sites and program offices used third-party and non-third-party ECCR collaboration with regulators and stakeholders in the following areas in FY 2018:

- Site remediation, decontamination, and decommissioning under CERCLA and RCRA;
- Site permits;
- Collaborative discussion with stakeholders (both federal and non-federal);
- Cultural resources protection;
- Natural resource protection; and
- Multi-issue and Multi-party Environmental Disputes

VI. COMMENTS AND SUGGESTIONS REGARDING REPORTING

No comments or suggestions were submitted regarding the ECCR reporting process. Several survey respondents requested training and lessons learned information be provided to the Site and Program Offices. The training schedule for the Udall Institute for Environmental Conflict Resolution that is available to all federal agencies is made available to all site and program offices as well as the annual Joint DOE and DOE contractor environmental attorneys' training, which includes a portion on environmental conflict resolution and collaboration, and the monthly conference calls for DOE environmental attorneys, which include participation by a representative from the Udall institute.

Attachment A

Modified Department of Energy FY 2018 ECCR Survey

Attachment B

Department of Energy FY 2018 ECCR Cases With and Without the Use of a Third-Party