

FY 2019 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 reporting template is provided in accordance with the memo for activities in FY 2019.

The report deadline is February 22, 2020.

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 FY 2019 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 2019 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: <https://udall.gov/OurPrograms/Institute/ECRReport.aspx>

FY 19 ECCR Report Template

Name of Department/Agency responding:	U.S. Army
Name and Title/Position of person responding:	Marc Van Nuys, Director of Dispute Resolution
Division/Office of person responding:	Office of General Counsel
Contact information (phone/email):	703-614-6861 marc.vannuys.civ@mail.mil
Date this report is being submitted:	18 January 2020
Name of ECCR Forum Representative:	Carrie M. Greco, Litigation Attorney, ELD, USALSA

1. ECCR Capacity Building Progress

- a) Describe any **NEW, CHANGED, or ACTIVELY ONGOING** steps taken by your department or agency to build programmatic and institutional capacity for environmental collaboration and conflict resolution in FY 2019, including progress made since FY 2018. Please also include any efforts to establish routine procedures for considering ECCR in specific situations or categories of cases, including any efforts to provide institutional support for non-assisted collaboration efforts. Please refer to your agency's FY2018 report to only include new, changed or actively ongoing ECCR capacity building progress. **If none, leave this section blank.**

(Please refer to the mechanisms and strategies presented in Section 5 and attachment C of the [OMB-CEQ ECCR Policy Memo](#) for additional guidance on what to include here.

Examples include but are not restricted to efforts to

- integrate ECCR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning;
- assure that your agency's infrastructure supports ECCR;

- 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 FY19, the Army Dispute Resolution Specialist 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 and Conflict Management of 27 May 16 (DODI 5145.05) through the following activities.

1. Army Commands continue to recognize the need for continued engagement with community stakeholders and Federal and state regulators as a valuable tool to foster stronger relationships. The increase in engagements with our community stakeholders and Federal and state regulators fosters stronger relationships and promotes the Army's mission.
2. The Army continues to encourage parties include dispute resolution provisions in Federal Facilities Agreements (FFAs), direct sales agreements, and partnering agreements. The Army utilizes these provisions as needed to resolve disputes.
3. ELD continues to implement its policy for each counsel to assess each assigned matter to determine whether ECCR is appropriate and how non-third-party-assisted collaboration or partnering could help resolve potential disputes.

- b) Please describe the trainings given in your department/agency in FY 19. Please include a list of the trainings if possible. If known, provide the course names and if possible, the total number of people trained. Please refer to your agency's FY2019 report to include only trainings given in F 2019. **If none, leave this section blank.**

The Army Office of Dispute Resolution funded one person to attend the Advanced Multi-Party Negotiation of Environmental Disputes course sponsored by the U.S. Institute for Environmental Conflict Resolution. The Judge Advocate General's Legal Center and School provided one hour of ADR training as part of its annual General Litigation Course. Attorneys throughout the Army attended, including many attorneys from the U.S. Army Legal Services Agency, and three attorneys from ELD. Twelve Army attorneys attended the Negotiation and Appropriate Dispute Resolution Course sponsored by the U.S. Air Force Judge Advocate General's School.

2. ECCR Investments and Benefits

- c) Please describe any **NEW or CHANGED or INNOVATIVE** investments made in ECCR in FY2019. Examples of investments may include ECCR programmatic FTEs, dedicated ECCR budgets, funds spent on contracts to support ECCR cases and programs, etc.

Please refer to your agency's FY2018 report to only include new, changed, or innovative investments made in ECCR. **If none, leave this section blank.**

The Army has no formal method of capturing the costs and benefits of Army efforts. The actual amount of investments made and benefits obtained are speculative and difficult to quantify.

Investments. For the ECCR events reported in FY19, the Army's investments included staff salaries, travel costs, and office resources required to prepare for and attend ECCR meetings and training events. The Army did not fund the salaries of any third-party neutral or the costs of the ECCR process. The Army invested \$1,118.00 for one person to attend a mediation, \$895.00 for one person to attend ECCR training, and an unknown amount of resources to set up the General Litigation Course training block on ADR. The Army invested in office resources and salaries to engage with regulators, stakeholders, and the public in non-third-party-assisted collaboration processes.

Benefits. The Army benefited through the use of ECCR in one case where mediation helped the parties resolve a dispute over cleanup costs. Mediation brought the parties together, opened communications, increased trust, and generated a resolution of the issues so the cleanup can proceed. The Army avoided the travel costs, salaries, and other resources required for formal discovery and full litigation in that one case.

d) Please describe any **NEW or CHANGED or INNOVATIVE** benefits realized when using ECCR.

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.

Please refer to your agency's previous report to only include new or innovative methodology to identify ECCR investments and benefits. **If none, leave this section blank.**

None

3. ECCR Use

Describe the level of ECCR use within your department/agency in FY 2019 by completing the three tables 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.

<i>Context for ECCR Applications:</i>	Total FY 2019 ECCR Cases ²	Decision making forum that was addressing the issues when ECCR was initiated:			
		Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)
Policy development	__0__	__0__	__0__	__0__	__0__
Planning	__0__	__0__	__0__	__0__	__0__
Siting and construction	__0__	__0__	__0__	__0__	__0__
Rulemaking	__0__	__0__	__0__	__0__	__0__
License and permit issuance	__0__	__0__	__0__	__0__	__0__
Compliance and enforcement action	__0__	__0__	__0__	__0__	__0__
Implementation/monitoring agreements	__0__	__0__	__0__	__0__	__0__
Other (specify): CERCLA Cost Recovery	__2__	__0__	__0__	__2__	__0__
TOTAL	__2__	__0__	__0__	__2__	__0__
		(the sum of the Decision Making Forums should equal Total FY 2019 ECCR Cases)			
		Interagency ECCR Cases and Projects			
		Other Federal Agencies Only	Including non federal participants (includes states, Tribes, and non governmental)		
<i>Context for ECCR Applications:</i>					
Policy development	__0__			__0__	
Planning	__0__			__0__	
Siting and construction	__0__			__0__	
Rulemaking	__0__			__0__	
License and permit issuance	__0__			__0__	
Compliance and enforcement action	__0__			__0__	
Implementation/monitoring agreements	__0__			__0__	
Other (specify): CERCLA cost recovery	__0__			__2__	
TOTAL	__0__			__2__	

² An "ECCR case" is a case in which a third-party neutral was active in a particular matter during FY 2019.

<i>Context for ECCR Applications:</i>	ECCR Cases or projects completed ³	ECCR Cases or Projects sponsored ⁴
Policy development	__0__	__0__
Planning	__0__	__0__
Siting and construction	__0__	__0__
Rulemaking	__0__	__0__
License and permit issuance	__0__	__0__
Compliance and enforcement action	__0__	__0__
Implementation/monitoring agreements	__0__	__0__
Other (specify): CERCLA cost recovery	__1__	__0__
TOTAL	__1__	__0__

4. ECCR Case Example

Using the template below, provide a description of an ECCR case (preferably **completed** in FY 2019). If possible, focus on an interagency ECCR case. Please limit the length to **no more than 1 page**.

Name/Identification of Problem/Conflict
Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance, and how the ECCR effort was funded.
<p>Mediation arose in a cost recovery action brought under the Comprehensive Environmental Response Compensation and Liability Act regarding a site in New Mexico. In 2001, EPA placed the site on the National Priorities List after discovering the site contained a groundwater plume contaminated with perchloroethylene. EPA estimated the site cleanup would cost \$22 million.</p> <p>After failed attempts to negotiate a settlement on the allocation of response costs, two parties sued DoD and other private parties. Discovery followed. Subsequently, the</p>

³ A “completed case” means that neutral third party involvement in a particular ECCR case ended during FY 2019. 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 2019 cases it should equal total ongoing cases. If you subtract sponsored ECCR cases from Total FY 2019 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 2019 cases it should equal total cases that involved only your agency or department with no other federal agency involvement.

court ordered the parties to mediation and selected a Federal magistrate judge to serve as the mediator.

The court funded the costs for the mediator and the mediation process. Each party paid its own costs to participate in the mediation. During mediation, the parties reached agreement on cost allocation and the mediation concluded. Without the assistance of the mediator, the parties negotiated the proposed terms of the consent decree (CD).

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 had previously obtained information through discovery, so the parties moved directly to the exchange of demands and settlement offers. The parties also submitted confidential mediation statements to the magistrate. The magistrate hosted an ex-parte call to establish the mediation process. This established an informed process and ensured accountability for all parties.

At mediation, the magistrate briefed the parties on the ground rules, issues, and goals. The parties caucused so each party could openly address its issues with the mediator. Caucusing allowed the mediator to understand the rationale behind the proposals, work with the parties to narrow the gap, and reach settlement. Ultimately, the parties agreed on an allocation of costs and the mediation concluded in one day.

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.

Mediation helped the parties build trust so they could resume negotiations and tailor a consent decree that meet their needs for this particular case.

By reaching settlement through mediation, the parties avoided the expense and expanded timeline of going to trial. The Army avoided the costs and resources that would have been required for trial.

Reflections on the lessons learned from the use of ECCR.

Over years of negotiations, the parties voiced a desire to reach an agreement, demonstrating an openness to resolving the matter through mediation.

The parties participated in extensive document exchange, both informally and through discovery, gathering the needed facts prior to the mediation. This allowed the parties to bypass the document exchange in the mediation process and move immediately to prepare their mediation papers, generating a streamlined mediation process.

The parties used the mediation process to get to yes. By caucusing, the parties were free to communicate their issues to the mediator. The mediator helped communicate

these concerns to the other parties in a way that would help them identify ways to resolve the issues and reach agreement.

The parties gained trust as they identified, addressed, and resolved the issues underlying the conflict. This process paved the way for the parties to reach agreement. The gained trust allowed the parties to end the mediation process and negotiate the remaining terms of the CD on their own.

Reaching an agreement regarding cost allocation avoided protracted litigation and thereby saved the Army considerable time and expense.

5. Other ECCR Notable Cases

Briefly describe any other notable ECCR cases in the past fiscal year. **(OPTIONAL)**

At a third party CERCLA site, the parties were litigating the allocation of response costs when one party asked the court for a stay of litigation to resolve the dispute through mediation. The court agreed and issued a revised scheduling order implementing a stay of litigation for mediation. The parties hired a private mediator. The mediation costs were shared among the parties. Each party paid its own costs to participate in the mediation. The mediator established a staged process. During one session, a private party presented its claims against the Federal parties, and during a follow-up session, the Federal parties responded to those claims. These two sessions occurred in FY19. The mediation continued into FY20, but ultimately ended unsuccessfully in early FY20. The parties are now preparing for trial.

6. Priority Uses of ECCR

Please describe your agency's **NEW or CHANGED** 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. Please refer to your agency's FY2018 report to only include new or increased priority uses. **If none, leave this section blank.**

No change. The Army continues to use ECCR in CERCLA cost recovery matters.

7. Non-Third-Party-assisted Collaboration Processes (Optional)

Briefly describe other **significant** uses of environmental collaboration that your agency has undertaken in FY 2019 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.* **If none, leave this section blank.**

In FY19, the Army used non-third-party collaboration to resolve issues prior to their becoming formal claims or litigation, and to provide a more efficient and more comprehensive review of matters being addressed. In FY19, the Army used three methods to informally resolve disputes. First, the Army utilized alternative dispute resolution provisions in its federal facilities agreements (FFAs) and in the environmental annexes to its direct sales and partnering agreements. These provisions set forth options for parties to resolve disputes early and more efficiently. Second, the Army encouraged participation in community outreach via town hall meetings and other public forums. This open communication allowed stakeholders to address issues of concern before any disputes could arise. Third, the Army used non-third-party collaboration in its consultation and NEPA planning processes. Below are some specific examples of areas where the Army used non-third-party-assisted collaboration in FY19.

1. Tobyhanna Army Depot (TYAD) was active in all three areas of non-third-party dispute resolution. First, TYAD ensured all of its FFAs, public-private partnering agreements, interagency support agreements with tenants, and union agreements contained dispute resolution provisions. This provided TYAD a forum to resolve issues before they reach formal action or potential litigation. Second, TYAD opened its quarterly Tier I meetings to video teleconferences, allowing more people to attend. Additionally, the scope of Tier 1 meetings have been expanded to include non-NPL issues such as emerging contaminants, green initiative, continuous improvement, pending permit modifications, and new developments. This provided the regulators and stakeholders a more comprehensive view of TYAD's environmental program. Regulators were given the opportunity to offer guidance and assist in expediting reviews of these matters. TYAD also continued to hold Tier II meetings three times per year with Federal and multi-state regulators to maintain open communications among more senior management officials; the Tier II exists to address any potential unresolved issues from a Tier I meeting. Third, TYAD operated under a 2015 programmatic agreement with a State Historic Preservation Office and the Advisory Council on Historic Preservation to address historic preservation issues related to TYAD.

2. The Presidio of San Francisco (Presidio) used informal non-third-party collaboration and FFA dispute resolution provisions to resolve potential issues regarding remediation. The Presidio is a closed former military installation that is being remediated by the Presidio Trust, a wholly-owned federal government corporation created by Congress in 1996. The Army meets quarterly and as needed with the Presidio Trust, the National Park Service, and other stakeholders to collaborate on issues regarding the environmental remediation at the Presidio. Remediation issues that are not resolved through informal meetings are addressed through a formal dispute resolution provision of a 1999 Memoranda of Agreement. In FY19, the parties conducted both informal meetings and utilized formal dispute resolution for certain issues regarding three areas within the Presidio.

3. The Rocky Mountain Arsenal (RMA) used informal non-third-party collaboration and FFA dispute resolution provisions to resolve potential issues regarding remediation. RMA is a former military installation that has been remediated by the Army and a portion of which was transferred to the U.S. Fish and Wildlife Service for inclusion into the RMA

National Wildlife Refuge. The remediation program is conducted in accordance with and FFA that was signed in 1989. The FFA contains a dispute resolution provision. In FY19, the Army frequently collaborated with federal and state regulators and other stakeholders to address issues pertaining the remaining remediation projects and the long term operation and maintenance of RMA's completed remediation projects. On occasion, the parties invoked formal dispute resolution, pursuant to the FFA, to address some disputes that were not resolved through informal collaboration.

4. Fort Drum used non-third-party collaboration to help identify mitigation measures in a permitting process for wind farms. In 2011, the State of New York established a formal process for obtaining authorization to build wind farms. This process included a permitting process. After a private entity filed a permit for a wind farm, DoD and Fort Drum, as interested parties, entered into informal collaborations with the state regulators to help them identify the potential impacts and corresponding mitigation measures that would address those impacts. The regulator invited the Army to informal discussions to define mitigations for the potential impacts. These discussions allowed the parties to develop mitigation measures that meet the needs of the Army.

5. Fort Leonard Wood used non-third-party collaboration in its cultural resources consultation and NEPA planning processes. In FY19, the Fort Leonard Wood's cultural resource team and Commander engaged in meetings with five federally recognized Native American tribes to identify mitigation options for potential adverse impacts to ongoing projects. Through collaboration, the parties were able to develop a memorandum of agreement which set forth mitigation actions appropriate to the potential impacts of the particular projects.

6. Fort Benning used non-third-party collaboration to negotiate an easement for land subject to the Army's Compatible Use Buffer Program. A county issued a condemnation action to widen a road without seeking Army approval. The Army participated in several months of non-third-party collaboration with all the stakeholders. During these discussions, the Army informed the all parties about the ACUB process and the needs of the Army. The parties' relationships were improved, and they developed an easement that meet the needs of all parties. Once the easement was finalized, the county dismissed its condemnation action.

8. Comments and Suggestions on Reporting

Please comment on any **NEW or CHANGED** 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 reference your agency's FY2018 report to identify new/increased difficulties. **If none, leave this section blank.**

None

Please attach any additional information as warranted.

Report due February 21, 2020.

Submit report electronically to: kavanaugh@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