

Environmental Collaboration and Conflict Resolution

Sixteenth Annual Report

2022

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 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 party neutrals and other collaborative problem-solving approaches in the reporting year.

In Fiscal Year 2021, a total of 24 DOE site and program offices responded to the ECCR survey request. There were four reports of ECCR mediations or other conflict resolution activities involving third-party neutrals. Two sites reported ECCR cases; that did not involve third-party assistance.

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 2021 (FY 2021).

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 has been formed. This committee, with assistance from the U.S. Institute for Environmental Conflict Resolution, develops a survey template annually for agencies’ use. The FY 2021 survey template changed substantively from the template used in FY 2020. The committee made changes to the previously used questionnaire, including the following:

- The ECCR Capacity Building Progress and ECCR Investment and Benefits sections were combined into one question
- ECCR Use tables were combined into an optional ECCR Case Number and Context data table
- Removed optional Other Notable ECCR Cases question
- Removed Priority Uses of ECCR question
- Removed optional non-third party-assisted collaboration process question
- Removed comments and suggestions on reporting question
- Removed support from the Office on Conflict Prevention and Resolution question section

The DOE modified the template to request information on whether DOE cases reported included use of third-party assistance. 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 19 site and program offices.

II. ECCR CAPACITY BUILDING AND INVESTMENT PROGRESS MADE IN FY 2021

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.

The DOE site 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, 12 participants join the monthly calls. The DOE Savannah River Operations Office (DOE-SR) Chief Counsel requested that the annual ECCR training conducted by the ECCR Forum Representative be expanded to include all environmental staff, including DOE and contractor environmental specialists and subject matter experts. A total of 86 site and program office representatives participated in the annual training conducted on October 6, 2021.

In FY 2021, a total of 24 DOE site and program offices responded to the ECCR survey request. Three cases involving a third-party neutral are described above. Several other sites provided information about their ongoing ECCR programs and cases not involving third party neutrals, as detailed below.

Argonne Site Office, Fermi Site Office, Ames Site Office, Consolidated Service Center.

The Consolidated Service Center utilizes public engagement in siting/construction issues prior to commencing the start of projects to keep the public informed of issues that may arise to prevent litigation later. The Service Center continues to use public outreach, such as community round tables, to bring awareness to the public so concerns can be addressed at that time. The Service Center utilizes internal personnel, no third-party neutrals are involved. There are no FTEs or dedicated budgets for ECCR.

Brookhaven National Laboratory (BNL). To address conflict resolution BNL utilizes several groups designed to keep local government entities, Federal and state environmental regulators, and the public apprised of ongoing and planned activities at BNL including environmental cleanups. These groups include: the Brookhaven Executive Roundtable (local government representatives), the Interagency Group (EPA, New York State Department of Environmental Conservation, Suffolk County, and DOE), and the Citizen's Advisory Council (local community representatives and environmental groups). By use of these groups and receipt of their feedback, Brookhaven Site Office is able to avoid environmental conflicts.

Southeastern Power Administration (SEPA). SEPA is a small Federal agency with the authority to market hydroelectric power and energy from reservoir projects operated by the U.S. Army Corps of Engineers (COE) to 11 states in the Midwest and Southeast. SEPA continues to participate in biannual Alliance meetings that consist of SEPA's Administrator, Assistant Administrators, other SEPA staff, and various stakeholders. The Alliance is a partnership formed in 1991 among SEPA's stakeholders which include customers and the COE. These Alliance

meetings provide an opportunity for participants to discuss hydropower operations, to discuss and coordinate among stakeholder's critical water issues, and other current and long-term issues affecting all partners, and to plan future strategies. They also attend quarterly Southeastern Federal Power Customer (SeFPC) meetings. These meetings provide an opportunity for SEPA and its customers and stakeholders to discuss operational and industry issues of mutual interest and concern.

Ongoing are the periodic meetings between SEPA and the COE in the Cumberland, Georgia-Alabama-South Carolina, Kerr-Philpott, and Woodruff Systems; issues for discussion include water control plans, operational impacts on the hydropower purpose of the Corps' multipurpose projects, and current legal and regulatory developments affecting public power systems.

SEPA utilizes its strategic planning efforts to promote continued negotiations with all stakeholders and business partners. These efforts have enabled SEPA and its stakeholders to carry forward 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 SEPA in its strategy to seek amiable conflict resolution.

III. ECCR CASES IN FY 2021

ECCR Cases with Third Party Neutrals

Richland Operations Office and Office of River Protection – Hanford Site.

Since June 2020, DOE, the State of Washington, and EPA have been engaged in mediated negotiations to identify a mutually agreeable path forward for the Hanford tank waste treatment mission, including the construction and operation of the WTP.

On behalf of the Hanford Natural Resource Damages (NRD) Trustee Council, DOE is preparing to fund a joint Trustee Council contractor. The contractor will be required to have extensive NRD experience. The Council is preparing a consensus Statement of Work. The contractor is intended to assist all trustees in making well informed, consensus decisions. DOE continues to fund a Legal Work Group. Each trustee is represented by an attorney, and the attorneys work the U.S. Department of Justice in addressing legal barriers identified by technical trustees that require resolution to complete the injury assessment.

West Lake Landfill Mediation, Bridgeton, Missouri

The United States (Department of Energy and Department of Justice and the Environmental Protection Agency) are participating in mediation sessions, facilitated by retired judge Richard

Dana, with other potentially responsible parties in connection with the cleanup of the West Lake Landfill in Bridgeton, Missouri under the Comprehensive Environmental Response, Compensation, and Liability Act. The principal issue covered by the mediation is the allocation of cleanup costs for the partial excavation of the Landfill, in accordance with EPA's Record of Decision.

Pantex Plant, Panhandle, Texas

ECCR processes have been a proactive part of the Pantex Environmental Program. Pantex used a third-party neutral to facilitate environmental cleanup decision-making through Core Team meetings with the Texas Commission on Environmental Quality (TCEQ) and EPA, Region 6 beginning in Fiscal Year (FY) 2001. Since initiation of the Core Team:

- 1) Pantex negotiated an Interagency Agreement with EPA, Region 6 and the TCEQ. This tri-party agreement contains a dispute resolution process.
- 2) A CERCLA Record of Decision regarding final clean-up actions at Pantex was signed.
- 3) A Groundwater Compliance Plan was issued which recognizes the remedy selected under the ROD as the RCRA Corrective Action Systems for cleanup.
- 4) Two Five-Year Review Reports were issued with concurrence by EPA Region 6 and TCEQ.

There have been no other projects or issues at Pantex that required ECCR, however ECCR-experienced staff have been retained as part of the environmental programs. These staff routinely interact with regulatory points-of-contact and stakeholders to maintain effective working relationships established through efforts spanning more than a decade.

Honest, timely, and effective communication among the National Nuclear Security Administration, EPA, and TCEQ is the cornerstone of the program. ECCR principles have been incorporated to maintain functional and goal-oriented decision-making amongst the team during remedial action O&M and long-term monitoring.

ECCR Cases Without Third Party Neutrals

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. This collaborative process 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 2021 one DOE office reported a case handled without the use of a third-party neutral; this office was Environmental Management (EM) Nevada, which reported on a case involving the Nevada National Security Site (NNSS) requirements for waste characterization that was completed in 2021.

EM-Nevada Case

Between 2013 and 2018, 33 packages (10 shipments) of classified Weapons Related Material (WRM) were transferred from the Y-12 National Security Complex (Y-12) to the NNSS for disposal. The shipments were non-compliant with NNSS requirements for waste characterization, as self-identified by Y-12. In June 2020, the Nevada Division of Environmental Protection (NDEP) issued DOE a Finding of Alleged Violation (FOAV) indicating this waste violated solid waste permit requirements. While DOE disputed this conclusion, DOE entered into discussions with NDEP to resolve the FOAV. Beginning in July 2020, DOE engaged in extensive collaborative conversations with NDEP to reach a resolution to the FOAV. While the negotiations did not utilize a neutral third-party moderator, discussions were intentionally structured to promote collaborative problem solving and maximize conflict avoidance/resolution. On June 22, 2021, a final Settlement Agreement resolving all outstanding regulatory actions was signed by the NDEP Administrator, National Nuclear Security Administration/Nevada Field Office (NNSA/NFO) Field Manager, and EM Nevada Program Manager.

Richland Operations Office/Office of River Protection

An example of continuing to build ECCR capacity through collaborative problem solving without the use of a third-party neutral is the approach used at Hanford to administer the Hanford Federal Facility Agreement and Consent Order, or 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, Hanford project managers develop negotiation strategies that incorporate ECCR principles. Hanford Senior Management and Office of Chief Counsel encourage project managers, supporting personnel to use collaborative negotiations for environmental conflict resolutions. Most issues are resolved informally and never rise to the formal dispute level because informal resolution precludes a project manager from invoking TPA dispute resolution procedures. The issues are resolved collaboratively through monthly Project Manager meetings, quarterly milestone review meetings, Interagency Management Integration Team meetings, and other meetings. 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 TPA dispute resolution procedures, or third-party supported environmental conflict resolution.

Per the policy memo, ECCR, “encompasses a range of assisted collaboration, negotiation, and facilitated dialogue processes and applications,” and further that, “there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that Federal agencies may pursue” to promote ECCR best practices. In this case, the DOE EM Nevada Program, in partnership with NNSA/NFO, considered and implemented techniques to conduct sensitive negotiations with NDEP, which included:

- Informed Commitment – key managers were present and engaged in the negotiations.

- Balanced Representation – multiple DOE program offices, State of Nevada agencies, and DOE contractor representatives were present and active in the process.
- Group Autonomy – participants were encouraged to and did participate in the collaborative conversations.
- Informed Process – participants brought multiple concepts and proposals to be vetted during the negotiations, many of which were adopted into the final Settlement Agreement.
- Accountability – it was overtly stated during the conversations that, while the organizations involved may have differing operational priorities and prerogatives, all shared a common goal to act in the best interest of the citizens of Nevada and the Nation.
- Timeliness – regular meetings were held with agendas set beforehand and actions tracked throughout.
- Implementation – the collaborative conversations ultimately led to a mutually beneficial Settlement Agreement that establishes nearly a dozen unique commitments made by DOE to resolve the FOAV.

Matters involving DOE radioactive waste management have a propensity to lead to heightened attention from and potential conflict with regulators, stakeholders, and the public. By utilizing a collaborative approach that implicitly adopted key principles of ECCR, DOE was able to bring about a mutually beneficial resolution for all parties.

The collaborative conversations and approaches utilized by DOE to resolve a sensitive matter with a state regulatory agency could be a best practice for conflict avoidance/resolution in the future.

IV. PRIORITY USES OF ECCR

The Department's sites and program offices reported the use of third-party neutrals and non-third party ECCR collaboration with regulators and stakeholders in the following areas over many years:

- Collaborative discussion with stakeholders (both Federal and non-Federal);
- Multi-issue and multi-party environmental disputes;
- Natural resource protection; and
- Site permits.

V. COMMENTS AND SUGGESTIONS REGARDING REPORTING

Previous ECCR survey forms included the following question: *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.*

Comments on the FY20 form noted that the form was not clear enough on where information regarding cases not involving third-party natural assistance should be recorded. The changes to the FY21 form were intended to simplify the reporting questions and addresses the comments received.

Attachment A

Modified Department of Energy FY 2021 ECCR Survey