FY 2018 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."*

This annual report format below is provided in accordance with the memo for activities in FY 2018.

[1] The term 'ECCR' includes third-party neutral assistance in environmental collaboration and environmental conflict resolution

The report deadline is February 22, 2019.

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 2018 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 2018 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 18 ECCR Report Template

Name of Department/Agency responding:	Department of Navy____
Name and Title/Position of person responding:	Multiple attorneys in the Navy Litigation Office provided content responses, and Nicole Coward representing NAVFAC EPA Regions 1 to 5 provided data for chart in response to #3___
Division/Office of person responding:	ADR Program Office for OGC__
Contact information (phone/email):	Andrea Geiger 202-685-6990_
Date this report is being submitted:	February 21, 2019_____
Name of ECR Forum Representative	Detria Liles Hutchinson_____

1. **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 2018, 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.]

The Navy Litigation Office (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 Naval Litigation Office (NLO) can only respond for their own office, which handles environmental litigation for the DON, other than environmental tort litigation which is handled by Judge Advocate General (JAG).

a) NLO's 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 us to identify the prospects for settlement or whether full litigation is necessary. Many times this can be done prior to the filing of litigation by or against the DON.

b) Please report any (a) quantitative or qualitative investments your agency captured during FY 2018; and (b) quantitative or qualitative results (benefits) you have captured during FY 2018.

a) NLO cannot speak on behalf of the agency to summarize all such activities.

(b) During FY 2018, the DON, in cooperation with the DOJ, has been engaged in mediation concerning allocation of response costs among PRPs for cleanup of environmental contamination at the Yosemite Slough site, which is a third-party CERCLA site near the former Hunters Point Naval Shipyard (HPNS), San Francisco, California. Although the mediation has been ongoing since at least 2015, the DON did not become a formal participant until 2018. The DON, in coordination with DOJ Environmental Defense Section, engaged in information exchange with mediation participants in FY 2018, which culminated in a face-to-face meeting of all participants in early FY 2019. Allocation discussions are ongoing but the parties have made progress toward settlement.

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 the non-federal PRPs and the DOJ. We are not privy to the funding amounts expended by the parties on the mediator. DOJ funded one of our experts and the DON is not privy to that cost information. The DON funded other 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.

3. **ECCR Use:** Describe the level of ECCR use within your department/agency in FY 2018 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 2018 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
Context for ECCR Applications:										
Policy development	_____	_____	_____	_____	_____		_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____		_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____		_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____		_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____		_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____		_____	_____	_____	_____
Implementation/monitoring agreements	_____	_____	_____	_____	_____		_____	_____	_____	_____
Other (specify): _____	__31[5]__	_____	_____	_____	_31__		_____	__31___	_____	_____
TOTAL	**__31__**	_____	_____	_____	**_31__**		_____	**__31___**	_____	_____

[2] An "ECCR case" is a case in which a third-party neutral was active in a particular matter during FY 2018.

[3] A "completed case" means that neutral third party involvement in a particular ECCR case ended during FY 2018. 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 2018 cases it should equal total ongoing cases. If you subtract sponsored ECCR cases from Total FY 2018 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 2018 cases it should equal total cases that involved only your agency or department with no other federal agency involvement.

[5] The DON has 31 facilitated partnering teams, organized in a three-tier structure, which address installation restoration issues. Collectively, these teams work with 446 active environmental restoration sites. These 31 facilitated partnering teams collaborate to implement environmental restoration regulations. The third-party partnering team facilitators are sponsored by DON.

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		(the sum of the Decision Making Forums should equal **Total FY 2018 ECCR Cases**)				

4. **ECCR Case Example**

Using the template below, provide a description of an ECCR case (preferably completed in FY 2018). 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 2018, the DON, in cooperation with the DOJ, has been has been engaged in mediation concerning allocation of response costs among PRPs for cleanup of environmental contamination at the Yosemite Slough site, which is a third-party CERCLA site adjacent to the former Hunters Point Naval Shipyard, San Francisco, California. Due to proximity of the sites, there is some inter-relationship between cleanup efforts at both sites. A third-party evaluative neutral has been involved in the mediation since at least 2015. As previously stated, funding of the mediator was split between the non-federal PRPs and DOJ, but we do not know the split of funding. 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.

Not much has changed from what was reported for the Bethpage case for 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. 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.

In addition, during FY2018, the DON, in cooperation with the DOJ, continued to be 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.

20+ year CERCLA cleanup dispute over Navy share of cleanup costs at a site in Virginia; used third-party mediation to resolve Navy's share of liability against the State of Virginia. Mediation occurred after Navy/EPA issues were resolved and resulted in resolution of case. DOJ funded mediation.

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, 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. (Yosemite Slough Site)

Similarly, for NWS Seal Beach Site 70, the parties have engaged in discussion and debate of common legal and technical issues with feedback and "shuttle diplomacy" being conducted by the mediator. 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.

Generally, 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. (Bethpage)

Both parties submitted opening statements to the other party and then a confidential statement to the mediator (May-June 2018). Both parties and the mediator met one week after confidential statements were submitted to the mediator by each party. Initial meeting was focused on developing a better understanding of the site where the subsequent few in-person meetings focused on settlement amount and clarification of alleged costs by plaintiffs. In between the in-person meetings, the parties exchanged information and responses to questions via email and phone. Final settlement was agreed upon in December 2018 for the cost and covered matters in the agreement, but the agreement has not been signed or finalized. (Birdsboro Power v. United States, et al.)

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Whittaker Corp. v. United States:
US DOJ and Navy - "Sponsor(s)" of - The agreement to enter into Mediation...
      First Mediation Session - August 2017
     Second Mediation Session - October 2017
      Mediation ongoing for 2017; and 2018
      Third - 'Pending' completion of a Settlement Agreement/Court-ordered
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Consent Decree; in 2018.

Pasco Landfill v. Navy [Companion Case: Basin Disposal, Inc. v. Navy]
US DOJ and Navy - "Sponsor(s)" of - The agreement to enter into Mediation...
First Mediation Session- August 2013
Second Mediation Session - October 2016
In pre-litigation discovery with F.R.C.P. 30(b)(6) Depositions
'pending' the week of February 11, 2018.
Third Mediation Session - 'Pending' scheduling timeframe March-May 2018
Thus, Mediation ongoing for 2017 and 2018.

Basin Disposal, Inc. v. Navy [Companion Case: Pasco Landfill v. Navy]
US DOJ and Navy - "Sponsor(s)" of – The agreement to enter into Mediation...
First Mediation Session- August 2013
Second Mediation Session - October 2016
In pre-litigation discovery with F.R.C.P. 30(b)(6) Depositions
'pending' the week of February 11, 2018
Third - Mediation Session -occurred during the October 2018 time-period.
Fourth - Mediation Session scheduled for the January-March 2019 timeframe
Thus mediation continuing and ongoing during: CY-2017; CY-2018; and F/Y 2019

ZRZ Realty v. United States [Zidell/ZRZ Realty v. United States]
US DOJ and Navy - "Sponsor(s)" of – The agreement to enter into Mediation...
First - Mediation Session -February 2000
Second - Mediation Session -October 2000
Court-ordered Consent Decree/Settlement Agreement reached in February 2001.
Presently, in Post-consent decree/settlement agreement compliance with a minimum of tri-annual invoice reviews of remitted environmental clean-up and remediation payments. To date, the federal or U.S. Government has paid in excess of $8.0M dollars in this effort. This effort involves "ongoing" 'negotiations'/'mediation-like' efforts over each submitted invoice line item amount and overall value; and, it has so been involved, since 2001.
Thus, invoice reviews with negotiation //mediation-like effort(s)/discussion(s)- ongoing for 2017; 2018; and, presently, Calendar year 2019.

In re Lower Darby v. Navy [Clearview Landfill Unit 1 - Philadelphia Naval Shipyard]
US DOJ and Navy - "Sponsor(s)" of – The agreement to enter into Mediation...
First - Mediation Session – October 2017
This matter is continuing in settlement agreement "negotiation(s)" between the Department of the Navy, tThe US DOJ, and the federal Environmental Protection Agency (EPA).
Presently, in protracted settlement negotiations" with document exchanges proceeding, as necessary or required on an annual, weekly/bi-weekly, or monthly basis....
Follow-on mediation Session(s) have been discussed as 'highly probable.'

What follows is a description of the previous five cases:

Whittaker Corp: 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.

Pasco Landfill: A CERCLA Third-party defensive claim litigation for clean-up, removal and remediation costs contribution. This case involves the following: CERCLA Third Party Site, landfill in Pasco, WA, USA. The major identified contributor to the Pasco Landfill was the Department of the Navy's, Puget Sound Naval Shipyard(PSNS). This case had a settlement agreement almost signed but the U.S. Supreme Court's decision in Aviall severely impacted the settlement agreement. The case re-awakened in light of U.S. Supreme Court's decision in the ARC case.

Basin Disposal: A CERCLA Third-party defensive claim litigation for clean-up, removal and remediation costs contribution. This case involves the following: Basin Disposal,Inc. [The Landfill Group] v. Navy [Puget Sound Naval Shipyard], 15cv-05078-SMJ (Filed: 11 September 2015) {a.k.a.: Basin Disposal, Inc. v. Puget Sound Navy Shipyard (PSNS) (Navy) (Pasco Landfill)} - 15cv-05078-SMJ -- Eastern District of Washington (Filed: 11 September 2015). The Basin Disposal, Inc. [The Landfill Group] v. Puget Sound Navy Shipyard (PSNS) (Navy) (Pasco Landfill) case involves a CERCLA Third Party Site. It involves hazardous waste disposal by PSNS at an Industrial Waste Area landfill/Sanitary Waste Area landfill site (Pasco Landfill) located in the City of Pasco, Washington. The major Navy contributor was the Puget Sound Naval Shipyard (PSNS).

ZRZ Realty: A CERCLA Third-party defensive claim litigation for clean-up, removal and remediation costs contribution. This case involves the following: ZRZ Realty/Zidell issued the U.S. under CERCLA, claiming a portion of the pollution at a hazardous waste site along the Willamette River in the City of Portland, OR, USA, was due to the building and dismantling of U.S. Navy ships before and after WWII. The case was mediated, settlement agreed to, and court ordered consent decreed, in February 2001. The U.S. agreed to pay thirty-five percent (35.0%) of past and future investigation costs and the future clean-up costs. The case remains open as NLO and the US DOJ is/are responsible for reviewing invoices submitted to the federal or U.S. Government for payment of our share of the Sites' response costs pursuant to the court ordered Settlement and Consent Decree Order dated 06 February 2001.

Lower Darby: 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.

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 Yosemite Slough Site case has not yet been resolved and may yet go to litigation. However, the mediation has served as a vehicle for increasing the likelihood of resolving potential cross-claims between the parties and for consideration of inter-related cleanup issues between the HPNS and the Yosemite Slough Site.

The Bethpage case 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.

The third party mediator provided an individual that could help both parties focus on the information needed and focus on the areas of concerns for each party. Many times the mediator provided a re-focus of the issues of concern for us to be able to reach settlement. (Birdsboro Power v. United States, et al.)

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 mediator to engage on complex issues. (Yosemite Slough Site)

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 mediator to engage on complex issues. (Bethpage)

Resolution of the case would not have occurred without mediation.

In person meetings were very beneficial and helped address many of the concerns on the spot without having to actually provide carefully worded language, however, having

the mediator in one location, the plaintiffs in another and the defendants in yet another did not provide for many in person meetings and required at least a month ahead of time for planning an in-person meeting. (Birdsboro Power v. United States, et al.)

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

Former Mare Island Naval Shipyard – Insurance Company paid $32 Million to the DON as part of the settlement of Lennar Mare Island LLP v. Steadfast Insurance Company ("LMI v. Steadfast"), Nos. 2:12-cv-02182-KJM-KJN and 2:16-cv-00291, U.S.D.C., E.D. California

On October 16, 2017, the Department of the Navy (DON) and Department of Justice Corporate/Financial Litigation Section (in the Civil Division's Commercial Litigation Branch) (DOJ) consummated a settlement with all parties of LMI v. Steadfast, an insurance coverage case, pursuant to which Steadfast paid $32 million to the Department of the Navy in exchange for a release of all of Steadfast's obligations under the Environmental Insurance Policy ("ELI Policy") at issue. Mediation was a critical force employed at a propitious moment in getting the parties "over the hump" of their differences on many unique and complex issues to reach a settlement of all issues.

The DON owned and operated a portion of Mare Island known as the "Eastern Early Transfer Parcel" ("EETP") from 1853 to 1996 and has a responsibility for clean-up under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, *et seq*. (CERCLA). In 2001, the DON transferred the EETP to the City of Vallejo, California and its developer Lennar Mare Island LLP ("LMI") for re-development and provided them approximately $86 million in grant funds to complete the necessary clean-up, including purchase of the ELI Policy. The ELI Policy was designed to insure LMI as well as the DON (as an Additional Insured), against the risk of millions of dollars of environmental clean-up cost overruns at the EETP. In addition, the policy was a "manuscript" insurance policy, meaning that its language was almost entirely negotiated by the parties. In other words, Steadfast did not simply present a "form" policy of standard language approved by a state insurance commissioner on a take-it-or-leave-it basis as much insurance business is conducted. The language of the ELI Policy was tailored to the unique realities of the clean-up that was necessary at the EETP and the interplay of insurance terms with clean-up at the EETP to identify the triggers of insurance coverage. As might be imagined, such a situation was fraught with the potential for disagreements.

Unfortunately, cost overruns for clean-up greatly exceeded expectations. This development placed the ELI Policy front and center as the source of funds necessary for clean-up to continue. Continued clean-up was, of course,

necessary for LMI's re-development projects to progress. Moreover, of greatest concern to the DON, under the terms of the ELI Policy, the responsibility for funding clean-up reverted to the DON once a certain clean-up cost amount was exceeded, and in addition, the ELI Policy was limited only to ten years of coverage. After expiration of the ten years, the DON would have responsibility to fund all further clean-up. But, even the ELI Policy protection proved illusory. Steadfast, the issuer of the ELI Policy, refused to pay millions of dollars in claims submitted by the clean-up contractor.

LMI, as Named Insured, filed a complaint against Steadfast in 2012 to enforce Steadfast's obligations under the ELI Policy. LMI asserted not only claims for breach of the insurance contract but also claims for intentional interference with contract, declaratory judgment, and tortious breach of implied covenant of good faith and fair dealing and requested punitive damages. The clean-up contractor also joined the litigation, asserting claims against Steadfast under a separate policy it had negotiated with Steadfast. The DON monitored the case for several years without becoming a party to it. In 2014, the DON even participated in a mediation with LMI, the clean-up contractor, and Steadfast for which the mediator was a Magistrate Judge in the court where the case was pending. This first mediation was unsuccessful although the parties had made progress. There seemed to be an impediment which the mediation process failed to adequately identify and address. This first mediation process did not continue, and the parties resumed litigation in earnest.

In October 2016, out of concern for whether the litigation was proceeding effectively, the DON and DOJ intervened on behalf of the United States and joined LMI's breach of contract and declaratory judgment causes of action to better protect the DON's interest. Full blown discovery soon ensued, including both written discovery, document productions, and dozens of depositions around the country on a myriad of issues related to clean-up and insurance. Trial was scheduled to begin October 16, 2017 and was going to be massive and long.

Following the expert phase of discovery, however, the parties, perhaps having the benefit of the perspective on trial given by months of vigorous discovery, returned to the idea of having another mediation. They agreed upon a mediator in California whom all parties regarded highly. Unlike the mediator in the McGregor case, this mediator was not retained because of any specialized subject matter expertise such as CERCLA or insurance nor was the mediator asked to give neutral evaluation on a set of discrete legal or factual issues. The mediator did not ask the parties to provide him extensive briefs on substantive issues or factual background. The mediator did not view the mediation task as requiring extensive knowledge of operational history at the EETP, the sources of contamination, the applicable clean-up standards, and whether coverage was triggered under the ELI Policy for each clean-up site. The mediator focused principally on understanding the dynamics of the relationships among the parties. What was the "temperature" of each party after slugging it out through intensive

discovery? What did each want? What was each willing to do? How did each view the prospects of a long, expensive trial? The mediator more or less left it to the parties themselves to do their own litigation risk analysis with little input from the mediator. A one-day mediation session was held. There were no opening statements in a group setting. The mediator went directly to shuttle diplomacy with each party in a separate room. Remarkably, by the end of that one day, the parties had agreed on a proposed settlement-in-principal for consideration by their respective managements. Although the terms of the settlement agreements required much further negotiation over several months, the parties eventually approved the settlement proposal reached at the mediation session.

What did the DON get out of this settlement?

- The DON's BRAC Project Management Office, which had recently reviewed the environmental services conducted by LMI and its clean-up contractors since 2001, estimated that the $32 million to be received from Steadfast (net of a 3% DOJ fee required by statute) should be sufficient to cover the cost of remaining clean-up work for DON contamination at the EETP.
- The issues were very complex. Submitting them to a jury trial, which would have been long and arduous, posed a high litigation risk. The settlement amount of $32 million was more than would likely have been recovered at trial, even with a favorable verdict on all breach of contract claims.

The net settlement proceeds were deposited directly into the existing trust account dedicated to funding clean-up of DON contamination remaining at the EETP.

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.

Nothing additional to report.

7. **Non-Third-Party-assisted Collaboration Processes:** Briefly describe other significant uses of environmental collaboration that your agency has undertaken in FY 2018 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.*

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.

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.

As one NLO attorney commented last F/Y, and is again reporting this F/Y, the reporting instructions are somewhat verbose, nuanced, and repetitive. Recommends redrafting in plain language.

Please attach any additional information as warranted.

Report due February 22, 2019.
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