

# Environmental Collaboration and Conflict Resolution (ECCR): Enhancing Agency Efficiency and Making Government Accountable to the People

A Report from the Federal Forum on Environmental Collaboration and Conflict Resolution

## EXECUTIVE SUMMARY

The Federal Government spends millions of dollars and thousands of hours dealing with environmental conflict each year. In 2005, the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ) issued a Memorandum on Environmental Conflict Resolution directing Federal agencies to address this “fundamental governance challenge” by increasing the effective use of environmental conflict resolution and building institutional capacity for collaborative problem solving. On August 15, 2017, Executive Order 13807<sup>1</sup> found that “more efficient and effective Federal infrastructure decisions can transform our economy, so the Federal Government, as a whole, must change the way it processes environmental reviews and authorization decisions.”

Through Environmental Collaboration and Conflict Resolution (ECCR), neutral, third-party facilitators work with agencies and stakeholders using collaboration, negotiation, structured dialogue, mediation, and other processes to prevent, manage, and resolve environmental conflicts. The Executive branch has successfully utilized ECCR in more than 3,800 documented cases since 2006. This report, based on more than a decade of experience and research, identifies quantifiable benefits of federal government ECCR use, including cost reduction, improved relationships, and better outcomes that avoided litigation, and makes recommendations on improving the effective use of ECCR, including within the context of federal infrastructure permitting.

Documented benefits of ECCR use include:

### ECCR saves time and money

ECCR can produce cost savings and more timely decisions for taxpayers and federal agencies, compared to litigation and other conventional processes. For example:

- The State of Florida, local governments, and private parties saved an estimated \$150,000 per enforcement dispute when they used mediation instead of litigation.
- In a study of 123 ECCR participants, 75% of waste management negotiations saved time, compared with the most likely conventional process for making decisions, and 81% of these cases saved money.
- As compared to litigation, EPA found that ECCR cases required 45% less time to reach a decision, 30% fewer staff members, and 79% fewer lead attorney hours than litigation.

### ECCR improves relationships between the government and stakeholders

Relationships improved through ECCR can lead to more broadly acceptable solutions and better-informed agency decisions. For example:

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<sup>1</sup> Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” of August 15, 2017, was published on August 24, 2017. 82 FR 40463. For further information regarding implementation of the Executive Order, see <https://www.whitehouse.gov/ceq/infrastructure>.

- More than 700 participants in collaborative land planning cases had 82% overall agreement that the process improved existing relationships and created new ones.
- A study of land use dispute cases suggests that ECCR can make progress even when it does not lead to a complete settlement of a matter. Most respondents (64%) involved in cases that did not reach settlement still thought they made significant progress and improved relationships.
- Most respondents in a study of federal and state ECCR cases reported that their working relationships improved, including their ability to work together on the issues involved in their case and their level of trust.

### ECCR improves outcomes

ECCR results in more creative and durable solutions to even long-term or entrenched disagreements by increasing understanding among stakeholders and reaching durable agreements. Agreements reached through ECCR in turn lead to more effective implementation of decisions, as well as economic and environmental benefits. For example:

- ECCR achieves high settlement rates, ranging from 66% to 93%, in a variety of situations.
- Participants in a group of land-use dispute mediations agreed that their settlement was creative (88%), and that it satisfied their interests (92%) as well as those of other parties (86%).
- Two large studies found that use of skilled mediators and other good ECCR practices was connected to valuable outcomes, including reaching agreements, durable agreements, resolving the issues, addressing all interests, and improving understanding.
- ECCR cases analyzed by DOI, EPA, and the State of Oregon showed comparative improvement in improved natural resource management practices, environmental results, and economic benefits.

### Opportunities to increase the effective application of ECCR

Given ECCR's potential to prevent, manage, and resolve environmental disputes in a cost-effective manner, the Federal Forum on ECCR recommends that government leaders take the following steps to improve and increase its use:

- Maintain support for ECCR programs and encourage better integration of ECCR into agency operations.
- Increase collaboration on federal actions and decisions that require environmental review.
- Assure that decision makers understand the value of ECCR.
- Employ ECCR to address interagency disputes, as appropriate.
- Apply ECCR principles to better engage tribal, state, and local governments.
- Use ECCR to improve rulemaking.
- Institutionalize ECCR funding.

## PURPOSE OF REPORT

As predicted in the 2005 OMB and CEQ Memorandum on Environmental Conflict Resolution, Federal agencies “continue to face the challenge of balancing competing public interests and federal agency responsibilities when striving to accomplish national environmental protection and management goals.”<sup>1</sup>

This report draws on information and case studies gathered from annual federal ECCR reports, research on the use of ECCR, and the experience of Federal ECCR Forum members to identify and quantify the benefits of federal government use of ECCR and make recommendations to further its use and maximize benefits within the federal government, including within the context of federal infrastructure permitting.

## BACKGROUND

On November 28, 2005, Joshua Bolten, Director of the Office of Management and Budget (OMB), and James Connaughton, Chairman of the Council on Environmental Quality (CEQ), issued a Joint Memorandum on Environmental Conflict Resolution (Memorandum). The Memorandum recognized the value of ECCR as a response to environmental litigation, lengthy resource planning processes, delays in implementing agency mission-related decisions, and conflict between stakeholders and federal agencies. To address these challenges and to support the careful stewardship of taxpayer dollars, the Memorandum directed federal agencies to increase the use of ECCR and their institutional capacity for collaborative problem solving.

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“ECCR is defined 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.”<sup>2</sup>

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The Memorandum directed the Udall Foundation’s U.S. Institute for Environmental Conflict Resolution (USIECR) to convene an interagency, senior-level forum to “provide advice and guidance and facilitate interagency exchange on ECCR.” In January 2006, the Federal ECCR Forum (the Forum) began meeting quarterly under the leadership of CEQ to exchange information about a variety of ECCR issues that impact federal agencies. They also coordinate annual reporting to OMB and CEQ on federal agency use of ECCR and the benefits derived from it.

Since that time, the Memorandum and the Federal ECCR Forum have continued to impact the way in which government uses ECCR. Compared to FY 2007, when federal agencies began reporting on the number of ECCR cases, the number of cases nearly doubled in FY 2015 (257 in FY07 vs. 512 in FY15)<sup>3</sup>. In 2012, OMB and CEQ updated the Memorandum to acknowledge gains achieved and re-emphasize the importance of ECCR.

## BENEFITS OF ECCR USE BY FEDERAL AGENCIES

When OMB and CEQ issued the 2005 memorandum, they recognized that the basic principles of ECCR engagement build on decades of practice and research and described a range of benefits that can be attributed to ECCR. Now, with ten years of experience and reporting, the Forum can confirm significant benefits from the use of ECCR in terms of cost savings, improved governance, and better outcomes. This experience shows how ECCR can help advance the policy of Executive Order 13807 requiring Federal agencies to be good stewards of public funds, conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner, and make timely decisions.

### ECCR saves time and money

ECCR produces cost savings and more timely decisions for taxpayers and federal agencies compared to litigation or unassisted settlement without neutral third parties. These savings are reflected in more efficient operations, including more expedient planning, project delivery, environmental review, permitting, licensing, and remediation. ECCR allows federal agencies and stakeholders to avoid conflicts, which would otherwise increase costs on all stakeholders as they escalate through long, drawn-out legal proceedings. By preventing or de-

escalating disputes, ECCR ensures that tax dollars are spent directly addressing the environmental and natural resource challenges at hand.

Scholarly research has identified evidence for cost and time savings from using ECCR. Buckle and Thomas-Buckle found that even when ECCR did not fully settle a dispute, participants reported contributions to the decision making process, resulting in lower cost and reduced delays.<sup>4</sup> Sipe and Stiftel estimated median cost savings of \$150,000 per case for mediated enforcement disputes in Florida compared to the prospect of going to court.<sup>5</sup> Waste management negotiations researched by Andrew showed that 75% of negotiation cases saved time compared with the most likely conventional decision-making process and 81% of negotiation cases saved money.<sup>6</sup>

More recently, due to the emphasis in the ECCR policy memoranda on systematically capturing the cost savings and benefits from ECCR, federal agencies have begun to report on their cost comparison evaluations. For example, EPA conducted a survey of all agency attorneys who led cases during FY 2011 to FY 2014 in which litigation was put on hold to use ECCR. The results of this survey were used to compare time spent on ECCR cases versus litigation or unassisted settlement. The findings from this study included the following:

- ECCR required 45% less time to reach a decision than litigation would have.
- ECCR required 30% fewer staff members than litigation would have.
- ECCR required 79% fewer lead attorney hours than litigation would have and 38% fewer lead attorney hours than unassisted settlement.

These results do not take into consideration any follow-on litigation, which would have resulted in even greater costs and delays in decision making.<sup>7</sup>

In another set of evaluations conducted since the 2005 ECCR policy memorandum, DOI and EPA conducted a review of the cost savings and benefits of ECCR cases, including a negotiated rulemaking about off-road vehicle (ORV) use on the Cape Cod National Seashore at DOI and a group of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA aka Superfund), wastewater permitting, and enforcement cases at EPA. DOI surveyed participants in the ORV negotiated rulemaking and asked them to compare the costs of the ECCR process to what would have occurred if DOI had promulgated the rule without stakeholder consensus. The 2007 DOI study found an estimated savings for the National Park Service of 2.9 person-years in rule development and an expected savings of one person-year annually to administer the rule.<sup>8</sup> For the EPA cases, the evaluation estimated an average of more than \$50,000 in savings of staff time per case compared to litigation.<sup>9</sup>

The evidence concerning cost and time savings and overall efficiency of ECCR validates OMB and CEQ's direction to increase federal agencies' use of ECCR to promote efficiency.

**Deal Regarding Clean-up of Contaminants Found near Airport and Former Military Base Saves on Clean-up Expenses and Avoids Cost of Litigation**

CERCLA clean-up cost recovery action involving multiple private and governmental entities at a former California Air National Guard Station was settled through use of ECCR. Settlement timing allowed parties to fund and enhance an ongoing regional water quality project that was more beneficial and less costly than alternatives. (Air Force, 2016).

## ECCR improves relationships between the government and stakeholders

ECCR relies on principles of balanced, voluntary representation, informed commitment, openness, group accountability and autonomy, and timely decision making. These core principles lead to improved, productive relationships between government agencies and the people they serve and increased capacity among participants to prevent or resolve environmental conflicts. Effective ECCR processes help parties reach high quality agreements that take everyone's interests into consideration, address the key issues, and improve working relationships even in complex cases with conflicting interests.

The connection between ECCR and improvements in relationships among its participants is supported by ample research.<sup>10</sup> In a study of EPA enforcement attorneys and potentially responsible parties (PRP) who had participated in ECCR, the government attorneys and PRPs both reported that they were satisfied with the impact of the process on the long term relationship between parties, with the PRPs being the most satisfied in this regard.<sup>11</sup> Similarly, a survey of more than 700 participants in collaborative land planning cases revealed an overall 82% agreement that the process improved existing relationships and created new ones.<sup>12</sup> Another study using interviews of 400 participants in 100 land use dispute cases suggests that ECCR can make progress even when it does not lead to a complete settlement of a matter. Nearly 40% of these cases did not result in settlement; however, most respondents involved in these cases (64%) nonetheless thought they made significant progress and improved relationships were one of the most commonly cited major benefits (23%).<sup>13</sup>

By emphasizing the systematic evaluation of ECCR processes, the ECCR policy memoranda prompted two more recent evaluation projects that assessed the connection between the key principles of ECCR engagement and the development of improved relationships. In a 2009 study the majority of participants in 52 federal and state ECCR cases reported an improvement in their working relationships, including their ability to work together on the issues involved in their case and their level of trust. Importantly, the same study also found significant positive associations between effective engagement of the parties in the ECCR process and the work of the neutral third party with the improvement in working relationships.<sup>14</sup> A later evaluation of 53 EPA ECCR cases in 2011 showed a significant correlation between the likelihood parties would work together in the future and six ECCR process variables: 1) identifying the key issues, 2) making quality information was available to the process, 3) seeking solutions to the parties' common needs, 4) ensuring that all parties have the authority to represent their stakeholder interest, 5) confirming that all participants have the resources they need to participate, and 6) the work of the neutral third party.<sup>15</sup> Both studies used sophisticated statistical analysis to affirm the findings of previous research and confirm that key ECCR principles of engagement can lead to improved relationships among ECCR participants, including government and private parties.

### **ECCR Processes Build Relationships and Solve Problems for the Great Lakes and Mississippi Interbasin**

USACE Great Lakes and Mississippi Interbasin Study studied trade-offs between the risk of Asian carp dispersal into the Great Lakes and continued operation of the Chicago Sanitary and Ship Canal. Five Great Lakes states sued in 2010 to close the canal. CEQ assumed leadership of the Asian Carps Regional Coordinating Committee, helping USACE solicit the best available agency invasive species information and experts from stakeholder federal, state (including parties to the suit), local government and non-governmental organizations to inform the study. CEQ facilitation resulted in a widely accepted, timely USACE feasibility report, and the concerted actions of Federal and state agencies have thus far prevented Asian carp dispersal into the Great Lakes. (USACE, 2014)

## ECCR improves economic and environmental outcomes

The Forum recognizes that the most important measure of ECCR's success is the extent to which it produces important outcomes for the government, ECCR participants, and the public. Our experience in the past decade confirms that ECCR results in more creative and durable solutions to even long-term or entrenched disagreements by increasing understanding among stakeholders and reaching durable agreements. Agreements reached through ECCR in turn lead to more effective implementation of decisions, as well as economic and environmental benefits.

Research on ECCR outcomes conducted before 2005 supported OMB and CEQ's decision to issue the original 2005 ECCR policy memorandum. Researchers identified high settlement rates from ECCR even before the 2005 Memorandum, ranging between about 66% and 93%.<sup>16</sup> This early research also considered the quality of agreements, implementation of agreements, and overall outcomes. The Consensus Building Institute (CBI) found strong majorities of participants in successfully mediated land-use disputes agreeing that their settlement was creative (88%) and that it satisfied their interests (92%) as well as those of other parties (86%).<sup>17</sup> Participants in a set of collaborative planning processes reported that the processes resulted in creative ideas for action (72% of respondents) and that the outcome served the public interest (69% of respondents).<sup>18</sup> With respect to implementation, researchers found that agreements tended to be durable in a set of EPA enforcement cases.<sup>19</sup> Most of the participants in the CBI study reached agreement on how they would implement or monitor their settlement (77%) and believed their settlement was being adequately implemented (75%).<sup>20</sup>

Early studies also focused on the overall outcome of ECCR. One study used the extent to which all parties were satisfied with the outcome of an ECCR case as a relatively stringent metric and found that all parties were satisfied in 61% of the waste management cases analyzed.<sup>21</sup> Little research before 2005, however, addressed the environmental outcomes of ECCR, although one small study found that 5 of 6 mediated land use cases produced environmentally sound outcomes.<sup>22</sup>

The adoption of the 2005 ECCR policy memorandum and its successor memorandum has resulted in improved outcomes for conflicts that have been resolved through ECCR practice. Despite difficulty in measuring ECCR outcomes, research subsequent to the memorandums has both identified benefits from the use of ECCR and also improved mechanisms for evaluation of the benefits associated with ECCR outcomes through additional development of measures and evaluation tools. Using data collected by multiple federal and state agencies through a common set of evaluation questionnaires, USIECR assessed the agreements that were reached, their durability, and how the ECCR process related to these variables. In this research, they found that agreements were reached in 82% of 52 cases, and the extent to which agreements were reached was significantly correlated with having the appropriate parties involved and effective engagement of participants, a key element in the ECCR process. Significant associations were also discovered between the durability of agreements reached through ECCR and having the appropriate parties are involved, using high quality and trusted information in the process, and effectively engaging participants. The practices of the neutral third parties also showed a positive association with agreement durability.<sup>23</sup>

### **ECCR Processes Build Consensus on the Everglades Restoration**

The Everglades Restoration Transition Plan regulates how federal water control structures are operated to meet USACE responsibilities for flood control, while minimizing adverse effects to threatened and endangered species. When discussions among USACE, USFWS, and other federal agencies came to an impasse over the endangered Cape Sable Seaside Sparrow, a professional facilitator enabled all agencies to come to consensus on how to protect the sparrow while meeting the USACE operational authorities. (USIECR, USFWS, USACE, 2015)

A subsequent study of 53 EPA ECCR cases found that the parties' and mediators' efforts to identify key issues and seek solutions to common needs are significant correlates of reaching durable agreements, ensuring that all interests are addressed in agreements, improving participants' understanding of the issues, and achieving agreements that resolve the issues. Other important process factors related to some of these ECCR outcomes included having quality information in the process, ensuring that the participants have access to information, engaging all participants, and making sure that all participants have sufficient authority to speak for their consistencies.<sup>24</sup>

Perhaps more importantly, the ECCR policy memorandum spurred the development of tools to assess the environmental, economic, and other effects of agreements reached through ECCR. In particular the Department of the Interior, U.S. EPA, and the State of Oregon pioneered a methodology to capture the effects of using ECCR compared to alternatives such as traditional rulemaking or litigation. These innovative ECCR evaluation efforts, described below, led directly a set of modern survey instruments to be used by federal ECCR programs going forward.

DOI surveyed participants in the Cape Cod off-road vehicle (ORV) negotiated rulemaking and asked them to compare the outcomes of the ECCR process to what would have occurred if DOI had promulgated the rule without stakeholder consensus. Findings included the parties' judgment that shorebird habitat was improved by about 25-33%, the ORV management process was improved, and ORV use was enhanced without impairing key environmental responsibilities for the negotiated rule compared to DOI promulgating a rule with its traditional approach.<sup>25</sup> Other important results for the negotiated rulemaking participants were attributed to the relationships they developed during the process. These included an expected lower risk of unfavorable outcomes in the future, better ability to forecast outcomes, and overall reduced uncertainty.<sup>26</sup> In a related study that investigated the economic value of agreements reached through ECCR in two Oregon water cases with DOI participation, researchers determined that the agreements would produce more than \$100 million in additional fish stocks.<sup>27</sup>

EPA applied this methodology to a group of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA aka Superfund), wastewater permitting, and enforcement ECCR cases. The findings focused specifically on the expected environmental benefits from the ECCR case final agreement compared to the likely alternative decisions over short- (10-year) and long-term (60-year) periods. Most short- and long-term metrics for the affected sites, environmental management and habitat, and contaminants were significantly positive for the ECCR cases compared to the alternative decisions. Only the 10-year habitat measure was negative for the

### **ECCR Helps Avoid Enforcement Action by EPA and Leads to Improved Sampling Techniques for Multiple Mining Sites**

EPA filed an administrative enforcement action against the Barrick Cortez gold mine in Nevada for reporting failures under the Emergency Planning & Community Right-To-Know Act. Barrick was not sure that EPA understood its extraction process and was concerned about sharing proprietary information. EPA's CPRC [Conflict Prevention and Resolution Center] convened the parties and provided a mediator capable of understanding both the technical and legal arguments in the case. The confidential mediation allowed parties to exchange previously undisclosed information, which hastened an agreement on a solution and eliminated the need for enforcement action. The resulting settlement included innovative testing and sampling techniques which Barrick now uses for reporting on all of their mining operations in the U.S. (EPA, 2013).

ECCR cases compared to the alternatives; this was likely due to habitat disruption caused by implementing the agreements in the short term.<sup>28</sup>

The EPA, DOI, and the U.S. Army Corps of Engineers have developed a new set of evaluation protocols to capture the comparative costs and benefits of ECCR and its effectiveness, based on the information from this pioneering benefits evaluation methodology. As programmatic resources allow, the three agencies will systematically collect and analyze data on ECCR cases to further the ECCR policy memorandum's mandate to estimate the cost savings and benefits realized through third-party assisted negotiation, mediation, or other processes. This new generation of ECCR evaluation instruments is also available to other agencies that may wish to utilize them.

### **ECCR Processes Result in Reusable Solutions for Transportation Projects**

The Ohio Department of Transportation, the USFWS, and the U.S. Federal Highway Administration (FHWA) utilized a neutral facilitator from the USIECR to develop consensus on how to protect two endangered bat species. The resulting agreement ensured that all agencies could carry out their missions and mandates without jeopardizing either species. Ohio and FHWA could proceed with their projects in a timely manner. This effort created a process that may be applied to similar endangered species disputes between FHWA, USFWS, and state departments of transportation in Ohio and elsewhere. (USIECR, FHWA, USFWS, ODOT, 2015)

## **MOVING FORWARD: RECOMMENDATIONS AND BEST PRACTICES FOR ECCR IN GOVERNMENT**

After more than a decade of experience implementing ECCR, the Forum recommends the following actions and sees them as important opportunities to improve and increase federal agency use of ECCR. To prevent and resolve environmental disputes in a timely and cost-effective manner, the federal government should continue to appropriately use and integrate ECCR principles and practices. These efforts will help to address environmental conflicts with external stakeholders and tribes, as well as within and among federal agencies. The basic principles of ECCR engagement included in both memoranda and agencies should continue to robustly implement them.

Implementing the recommendations described below will not only prevent, manage, and reduce environmental conflict, but will also enhance stakeholder engagement. This engagement will greatly support key administration priorities by giving states, tribes, communities, businesses, stakeholders, and other federal agencies a stronger, more effective voice in federal decision making.

Each agency varies in how it provides or accesses ECCR services and who serves as the lead for such services. In some agencies, the Dispute Resolution Specialist (DRS) designated under the Administrative Dispute Resolution Act -- a position with broad responsibility for alternative dispute resolution policy -- has the primary role for implementing ECCR activities and the recommended actions included in this report. Other agencies have identified leads other than the DRS to support and promote ECCR work. For purposes of the recommendations included below, "ECCR lead" refers to the agency official who has lead responsibility for implementing the OMB/CEQ ECCR Policy Memorandum and this report's recommendations.

These recommendations call for increased use of ECCR and offer ways to improve how ECCR is implemented by federal agencies.

## OPPORTUNITIES FOR INCREASED USE OF ECCR

The following are recommendations for greater use of best practices in ECCR by the federal government.

### Better Integrate ECCR into Agency Operations

The Forum challenges each agency to do more to integrate the ECCR practice into the ordinary course of business, regardless of its existing ECCR program or capacity or whether external conflict resolution professionals are used. Where they exist, ECCR offices and staff are uniquely qualified to carry out this integration. The Forum also suggests that agencies evaluate 1) which of the recommendations described below they are following and 2) which they should strive to adopt. Agencies could then develop a timeline for those they aim to adopt.

### Collaborate on Federal Actions that Require Review

Each agency should continue to incorporate ECCR principles and methods into their actions that involve environmental review, including during the implementation of NEPA and CERCLA, among other statutes. In accordance with EO 13807, Federal Permitting Improvement Steering Council (Permitting Council), agencies and CEQ should seek opportunities to apply ECCR to assist with the administration's infrastructure initiatives and projects and other priorities as they are set.<sup>29</sup> Providing information on ECCR to those leading new initiatives at the outset of the work can help improve the design, implementation, and overall effectiveness of agencies in meeting administration priorities.

### Consider Using ECCR for Appropriate Litigation

In order to realize the benefits of ECCR, each agency should systematically consider using ECCR for all appropriate litigation – both pre-filing and pending in federal and administrative courts. Agencies should identify or update specific criteria to evaluate cases that would be appropriate or inappropriate for ECCR. If needed, they should also establish and implement appropriate procedures for use of ECCR both before and during litigation.

### Resolve Interagency Disputes

Agencies should use ECCR to address and resolve interagency disputes. To do this, all agencies should incorporate ECCR into decision-making processes while developing - and prior to finalizing - actions of concern to other agencies, including actions related to rules, permits, licenses, and orders.

Each agency ECCR Lead should play an important and useful role in assessing interagency disputes by monitoring upcoming and ongoing high-priority and other agency actions, either directly or through the Forum. The ECCR Leads from the affected agencies then would coordinate their efforts to prevent or reduce potential conflict. Taking these actions can avoid elevation of most interagency environmental or resource disputes to agency heads, CEQ, OMB, Permitting Council, etc.

CEQ also could assist the agencies involved in high-priority interagency disputes by convening agency heads to engage in ECCR.

### Engage Federally Recognized Indian Tribes

Agencies should consider the use of ECCR principles and methods when consulting with federally recognized Indian tribes on environmental, natural, cultural and historic resource issues. Agencies should continue to use ECCR as a tool to cooperate with one another where their jurisdictions, special expertise, or related responsibilities overlap when an action may impact tribes. These use of ECCR helps ensure that the federal government's future actions are achievable, comprehensive, long-lasting, and reflect tribal priorities and interests.

Each agency should assess potential disputes involving tribes by monitoring upcoming and ongoing high-priority agency actions, either directly or through the Forum. The ECCR Leads from the affected agencies then would coordinate their efforts to prevent or reduce potential conflict. Taking these actions can help to deescalate environmental and resource disputes between agencies and tribes.

#### Use ECCR in Rulemaking

Negotiated rulemaking<sup>30</sup> is an ECCR process that can help agencies to establish new rules with direct participation by affected stakeholders and possibly reduce future litigation regarding new regulations. Agencies should systematically consider using negotiation and the negotiated rulemaking process for regulatory actions affecting the environment, including matters related to energy, transportation, and water and land management.

#### Institutionalize ECCR Funding

Agencies with dedicated ECCR funding can respond to ECCR requests in a timelier and more effective manner. Agencies should provide dedicated funding to support mediation, facilitation, training, and other conflict resolution services, whether provided by staff or external parties. There are many ways to do so, such as dedicating a percentage of major project costs or allocating a portion of program-level funding to support ECCR approaches and research.

To maximize the value of ECCR services, agencies should:

- initiate or continue to evaluate their programs;
- share information on effective use of ECCR;
- share strategies for funding ECCR; and
- continue to co-fund ECCR efforts when possible to share the upfront costs among agencies.

## CONCLUSION

ECCR is a highly effective tool to better engage the public and improve how the government functions. By adopting the above recommendations, the federal government will save money and time by avoiding and resolving disputes in an effective manner, will obtain superior outcomes, and will be more responsive to state, tribal, local, and stakeholder priorities and concerns.

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<sup>1</sup> Office of Management and Budget (OMB) and President's Council on Environmental Quality (CEQ), Memorandum on Environmental Conflict Resolution (November 28, 2005); OMB and CEQ, Memorandum on Environmental Collaboration and Conflict Resolution (September 7, 2012).

<sup>2</sup> Ibid.

<sup>3</sup> U.S. Institute for Environmental Conflict Resolution, "Environmental Collaboration and Conflict Resolution in the Federal Government: Synthesis of FY 2015 Reports" (November 2016), 3, <https://www.udall.gov/documents/ECRReports/2015/FY2015ECRRReportSynthesis-Final2.13.17.pdf>. (Note there is some fluctuation in the numbers reported over the years due to variation in the number of agencies reporting.)

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<sup>6</sup> Andrew, J. S. (2001). Making or breaking alternative dispute resolution? Factors influencing its success in waste management conflicts. *Environmental Impact Assessment Review*, 21, 23-57.

<sup>7</sup> Hall, W.E. (2016, June). "Assessing the value of environmental collaboration and conflict resolution: A census of litigation-related cases to estimate comparative process costs at the U.S. Environmental Protection Agency." Concurrent session presentation, the 29<sup>th</sup> Annual Conference of the International Association for Conflict Management, Columbia University, New York, NY.

<sup>8</sup> Rowe, A. and Hall, W. (2007, November). "Making better choices: Evaluating the results of environmental conflict resolution." DOI Dialogue on Collaborative Conservation and Cooperative Resolution, U.S. Department of the Interior, Washington, DC.

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<sup>15</sup> Hall, W., Carley, S., & Rowe, A. (2011, July). "Substantive, relational, and procedural case outcomes in assisted environmental negotiations: Exploring the relationship with process inputs, neutral third party roles, and policy context." Concurrent session presentation, the 24<sup>th</sup> Annual Conference of the International Association for Conflict Management, Istanbul, Turkey.

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<sup>18</sup> Frame, T. M., Gunton, T., & Day, J. C. (2004). The role of collaboration in environmental management: An evaluation of land and resource planning in British Columbia. *Journal of Environmental Planning and Management*, 47(1), 59-82.

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- <sup>29</sup> These initiatives include "High Priority Infrastructure Projects" and implementation of the Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects (January 24, 2017), and FAST Act "covered projects" (Pub. L. No. 115-94, 5 U.S.C. § 19).
- <sup>30</sup> Negotiated rulemaking is a process in which the parties who will be significantly affected by a Federal rule participate early in the rulemaking process in face-to-face negotiations with the Federal government in public to develop the rule and share information, knowledge, and expertise. See the Negotiated Rulemaking Act of 1996 (Pub. L. No. 101-648; 5 U.S.C. § 561 et. seq.).