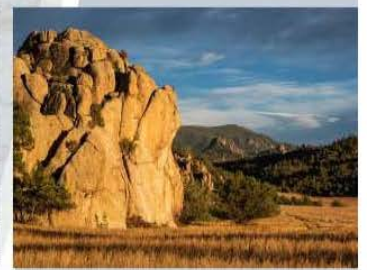


ENRD

Accomplishments Report Fiscal Year 2016



Grand Staircase-Escalante National Monument, Bureau of Land Management photo.

United States Department of Justice
Environment & Natural Resources Division

**ENRD
SUMMARY OF DIVISION ACCOMPLISHMENTS
FISCAL YEAR 2016**

**UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION**



Gulkana Wild and Scenic River Moose, Bureau of Land Management

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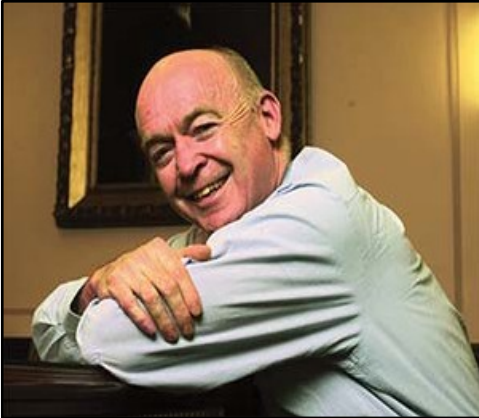


Dean Creek Elk Viewing Area, Bureau of Land Management



Morley Nelson Snake River, Bureau of Land Management

FOREWORD



As I bring to a close my final year as Assistant Attorney General of the Environment and Natural Resources Division, this Accomplishments Report allows me to reflect on the extraordinary work of the men and women of the Division. I have previously had the honor and privilege of spending over two decades at the Department of Justice, first as Chief of the Environmental Enforcement Section and then as a career Deputy Assistant Attorney General. During that time, I have been proud to serve alongside the many extraordinary public servants who have devoted their careers to the invaluable work of the Division: upholding our nation's laws, improving our environment, protecting our natural resources, and ensuring the health and safety of our citizens.

The Division's longstanding commitment to service, integrity, and adherence to the rule of law reflects its proud history. On November 9, 2016, the Division celebrated 107 years of work on behalf of the United States by gathering in the magnificent Great Hall of the Department of Justice over 200 ENRD alumni from across the United States. At that exceptional event, we gave our first Environmental Leadership Awards to two of our most outstanding alumni: Carol Dinkins, the first female Assistant Attorney General of the Division and first female Deputy Attorney General of the Department; and Richard Lazarus, the Howard and Katherine Aibel Professor of Law at Harvard University.

The Division's responsibilities are broad: enforcing the nation's civil and criminal pollution-control laws, defending environmental challenges to federal agency programs and activities, representing the United States in matters concerning the stewardship of the nation's natural resources and public lands, acquiring real property, bringing and defending cases under the wildlife protection statutes, and litigating cases concerning the resources and rights of Indian tribes and their members. We have also received new responsibilities which we have implemented during my tenure and which will be discussed in this report.

This year has been highlighted by three extraordinary events: (1) completing the historic settlement with BP arising out of the tragic Deepwater Horizon oil spill into the Gulf of Mexico, (2) bringing a Clean Air Act case against Volkswagen and finalizing an exceptional consent decree, which will impact over a half million diesel car owners, and (3) defending the President's Clean Power Plan, which served as the basis for the successful Paris Agreement, designed to reduce carbon dioxide across the planet.

Largely because of the Deepwater Horizon and Volkswagen consent decrees, the past twelve months have been among the most successful times in the Division's history. And, our success has gone a long way to fulfilling the goals I established for the Division.

In last year's Accomplishments Report, I set out my goals for the Division in 2016. The first of these was to enforce the nation's bedrock environmental laws that protect air, land, and water for all Americans. The Divi-

sion has made truly extraordinary progress toward this goal, as reflected in the successful civil and criminal enforcement actions described throughout this Report. A key accomplishment was taking an important step toward resolving the civil Clean Air Act violations alleged in the United States' complaint relating to Volkswagen's use of software algorithms and calibrations designed to defeat vehicle emissions tests (generally referred to as "defeat devices") on approximately 580,000 model year 2009-2016 2.0 and 3.0 liter diesel vehicles sold or leased in the United States. In June 2016, German automaker Volkswagen AG and related entities (Volkswagen) agreed to a partial settlement relating to the 2.0 liter vehicles, under which it will spend up to \$14.7 billion to offer consumers a buyback of the vehicles, and potentially also offer (if approved by regulators) an emissions modification to substantially reduce emissions; fund nitrogen oxides reduction projects; and invest in green technology. In September 2016, a Volkswagen engineer pleaded guilty to conspiracy to commit wire fraud, to violate the Clean Air Act, and to defraud the EPA for his role in the nearly 10-year conspiracy to defraud U.S. regulators and Volkswagen customers through use of defeat devices, and agreed to cooperate in the ongoing investigation. We continue our vigorous efforts to pursue a just resolution of all outstanding issues related to Volkswagen's use of defeat devices.

Another key enforcement success was the final entry in April 2016 of the consent decree in the Department's record-breaking settlement with BP in the Deepwater Horizon Oil Spill litigation arising from the 2010 blowout of the Macondo well and the resulting massive oil spill in the Gulf of Mexico. The United States and the five Gulf Coast states secured payments in excess of \$20 billion to resolve their claims against BP. This settlement is the largest in the history of federal law enforcement for a single defendant, and it includes the largest-ever Clean Water Act civil penalty and the largest-ever recovery of damages for injuries to natural resources. Now that the consent decree has been finalized, the Trustee Council—comprised of representatives from four federal agencies and all five Gulf States—can continue with the important work of restoring spill-injured natural resources.

In addition to the BP and Volkswagen litigation, the Division successfully litigated over 790 cases and handled a total of 6,972 cases, matters, and appeals in fiscal year 2016. We achieved over \$14 billion in civil and criminal fines, penalties, and costs recovered. The estimated value of federal injunctive relief—clean-up and pollution prevention actions funded by private parties—exceeded \$3 billion. And, in the Volkswagen settlement alone (which was approved by the court after the 2016 fiscal year), over \$14 billion more will go to protecting consumers, remediating the environment, and achieving full compliance with the Clean Air Act. ENRD also saved the taxpayers over \$12.3 billion by defeating monetary claims against the United States or reaching litigated or negotiated resolutions for substantially less than was sought in such suits. The Division achieved a favorable outcome in 95% of our cases, resulting in cleaner air, land, and water in the United States.

We also achieved great success toward my second goal for 2016: to vigorously represent the United States in federal trial and appellate courts, including by defending EPA's rulemaking authority and effectively advancing other agencies' missions and priorities. In 2016, ENRD attorneys devoted substantial efforts to defending key rules at the heart of this Administration's commitment to safeguard clean air and clean water. The Division is defending EPA's Clean Power Plan—the Agency's historic Clean Air Act rulemaking that takes action on climate change by reducing greenhouse gases from power plants. The rule has faced challenges from over 100 state and industry parties, with the cases consolidated in *West Virginia v. EPA*. The Division's vigorous defense of the rule culminated in a marathon six-hour oral argument before a 10-judge en banc panel of the D.C. Circuit in September 2016. After long moot court practice sessions, I came out of that hearing proud of our litigating team and impressed by the judges who were all well-prepared and committed to the rule of law.

The Division has had extraordinary success in defending EPA's other Clean Air Act rules, a source of constant litigation and some controversy. In 2016, we had 23 decisions, and won 19 of them outright, and had split de-

cisions in two, losing only two. Of the 16 D.C. Circuit Court of Appeals judges who ruled on these cases, every one of them cast numerous votes supporting these critical rulemakings.

My third goal for 2016 was to protect the public fisc and defend the interests of the United States. The Division protected the American taxpayer both through its careful and successful handling of agency land acquisitions and through vigorous and effective defense of cases alleging that government actions took property in violation of the Fifth Amendment. For example, in helping the National Park Service with acquisitions that will preserve important cultural and natural resources, the Division ensured that the government did not pay more than market value in providing just compensation to landowners. The Division also had key victories in the Federal Circuit in several Rails-to-Trails cases, some of which involved claims that the government illegally took property by allowing abandoned rail corridors to be preserved for future rail use and, in the interim, used as trails, and others involved claims for excessive amounts of attorney's fees. In addition, the Division helped federal agencies to carry out vital federal programs that serve a variety of important interests, including, for example, promoting the use of renewable energy to foster energy independence. Our efforts in this area included, for example, the successful defense of agency decisions regarding solar projects on public land as well as the prosecution of those who engage in renewable fuel fraud – criminal conduct which undermines the renewable fuel standard program that Congress created to curtail greenhouse gas emissions and expand the nation's renewable fuels sector.

The Division also made great strides toward my fourth goal for 2016: to advance environmental justice through all of the Division's work and promote and defend tribal sovereignty, treaty obligations, and the rights of Native Americans. ENRD has a cross-cutting position, the Counsel for Environmental Justice, charged with integrating environmental justice considerations throughout our work. ENRD's Counsel for Environmental Justice continued to work closely with attorneys throughout the Division both to improve awareness and understanding of environmental justice issues and to make sure we resolve cases in ways that provide real, concrete results for low-income and vulnerable communities that have suffered disproportionately from damage to the environment.

We have also had great achievements this past year in protecting tribal sovereignty and tribal rights. For example, we successfully defended the Interior Department's interpretation of a key phrase relevant to its authority to take land into trust under the Indian Reorganization Act. This decision, by the D.C. Circuit, was the first court of appeals to consider the issue since the Supreme Court's 2009 decision in *Carcieri v. Salazar*. In addition, the Ninth Circuit this year affirmed a district court decision finding that the State of Washington's construction of culverts that blocked access to fish habitat and reduced anadromous fish runs violated the treaty-based fishing rights of Indian tribes in the Pacific Northwest and upheld the injunction requiring the State to correct most of the barrier culverts. The Division also made substantial progress in advancing the Department's Indian Child Welfare Act initiative through its amicus practice as well as by partnering with relevant agencies to develop and use all available tools for compliance with the Act, engaging in outreach and other actions to promote compliance with the statute, and defending against lawsuits that would undermine this important law. The Division's commitment to civil affirmative litigation in support of tribal interests continued to see important results: protecting the treaty boundaries of the Omaha Reservation; defending the hunting and fishing rights of the Penobscot Nation; protecting against trespass on tribal lands of the Pueblo of Santa Clara and the Nez Perce Tribe; and securing federally reserved rights to water, including groundwater, for the Agua Caliente Band of Cahuilla Indians.

In addition, the Division also continued its initiative to resolve long-standing tribal trust cases, reaching further settlements with 17 tribes for almost \$493 million between January 1 and September 26, 2016 alone. The 2016 settlements add to the already-historic efforts in settling these lawsuits. Since January 20, 2009, the Division has settled the claims of 104 tribes for a total of \$3.35 billion. The settlements represent a significant milestone in improving the government-to-government relationship between the United States and Indian tribes.

My fifth goal was that the Division provide effective stewardship of the nation's public lands, natural resources and animals, including fighting for the survival of the world's most iconic species and protecting marine resources, and working across the government and the globe to end the illegal trade in wildlife. Here, too, we continued to achieve outstanding results. Along with senior leadership from the Departments of State and the Interior, I am a co-chair of the Presidential Task Force on Wildlife Trafficking, which unites 17 federal agencies and offices in a "whole of government" effort to combat the pernicious trade in wildlife that is decimating many species—including some of our most iconic, such as elephants, rhinos, great apes, tigers and sharks—and undermining global security. This year, the Division successfully prosecuted multiple wildlife traffickers; worked closely with our federal agency and international partners to develop and implement extensive training programs for prosecutors and judges that will help our foreign partners further develop their enforcement capacity; and participated in international meetings—including the Conference of the Parties on the Convention on International Trade in Endangered Species of Fauna and Flora—at which countries agreed upon key actions to counter wildlife trafficking. This year, we brought some of the most significant wildlife prosecutions in our history, particularly in the timber trafficking case against Lumber Liquidators. In addition, I led the United States delegation to the International Illegal Wildlife Trafficking conference held last November in Hanoi, Vietnam. The Division also promoted responsible stewardship of America's wildlife and natural resources by successfully defending important land- and resource-management decisions of federal agencies, including decisions that will protect forests, parks, and fisheries.

Furthermore, in 2016, the Division began to vigorously implement its newly acquired responsibility for criminal worker safety prosecutions and enforcement of animal welfare statutes. Under the new worker safety initiative, ENRD and the U.S. Attorneys' Offices are already working with several offices within the Department of Labor, including the Occupational Safety and Health Administration, to investigate and prosecute worker endangerment violations. ENRD also took several steps in implementing our new responsibilities enforcing animal welfare statutes. We have met with the responsible federal agencies, conducted training, and organized a highly successful conference that brought together federal, state and local leaders to map out a coordinated strategy for the future. The Division also brought criminal charges against nine defendants for their role in a multi-state dog fighting conspiracy; in coordination with these cases, we seized 79 dogs, and ENRD civil attorneys negotiated the surrender of 71 of these dogs—making them potentially available for adoption—and are seeking civil forfeiture of the remaining dogs. We are only at the beginning, but this is important work that we will continue to move forward.

The Executive Office of the Division has worked tirelessly in a broad range of ways to support the Division's attorneys in making such outstanding progress toward all these goals. The work of these individuals ensures that the Division is a diverse and thriving work environment, and has helped to ensure that it has consistently been one of the absolute best places to work in the federal government. I am particularly proud of the work of the EO educational arm, as we offered 71 unique courses, training over 1900 participants from the Justice Department and client agencies in the process.

In addition to all of the Division's extraordinary work, we also drew experts from across the United States to give us guidance. In October, we hosted in the Great Hall a symposium on Alternative Dispute Resolution, drawing the leading private and judicial mediators in the country. In November, we hosted a symposium on The Future of Environmental Law, drawing leading law professors from across the United States, speaking to an audience of Division personnel as well as a dozen agency general counsels and White House officials. The symposium was broken up into three parts: The future of administrative law, the future of natural resources law, and the future of environmental enforcement. We have transcribed this exceptional symposium and will be publishing the dialogue. We also established a speaker program that included Supreme Court Associate Justice Elena Kagan, Department of the Interior Secretary Sally Jewell, Solicitor General Don Verrilli, and EPA Administrator Gina McCarthy. And, on December 9, in the Great Hall, we celebrated the winners of the envi-

ronmental writing contest we sponsored with the District of Columbia Public School System and D.C.'s Department of Energy & Environment. This event was designed to both attract young people to environmental issues and showcase their thoughtful essays on environmental issues facing the District.

We have also advanced our work on managing e-discovery, both through our historic efforts in the Volkswagen and BP litigation, as well as our efforts to train our work force. This year, we upgraded to the latest version of our document review platform, allowing us to take advantage of increasingly sophisticated computer analytics and to design improved screenings for relevance and privilege, enabling us to meet the aggressive deadlines in many of our cases. In addition, we increased the training for our attorneys and professional staff in various aspects of e-discovery and continued to provide regular updates on advanced e-discovery issues through our bi-monthly newsletter.

Finally, we have significantly advanced our efforts to promote cooperative federalism by engaging in joint enforcement actions with States. Through such actions, we work more efficiently and effectively by leveraging resources and obtaining comprehensive outcomes for all Americans. For example, we not only share civil penalties with partnering states, but many of the communities surrounding polluting facilities benefit from environmental mitigation or supplemental environmental projects funded by defendants. And our cooperation with state counterparts extends to defensive litigation, where we may jointly defend challenges to needed infrastructure projects. We have also regularly shared expertise and experiences with our state counterparts through training on e-discovery, bankruptcy law, and other topics of mutual interest.

As I depart from the Division, we are in the best shape of our tenure. In December, the Division accepted an award by the Partnership for Federal Service, which ranked the Environment and Natural Resources Division as the #2 best place to work in the federal government as well as the best place to work in the Department of Justice. With more than 300 Federal agency subcomponents competing, our new rank places us well into the top 1% of all Federal workplaces. We have over 640 employees and have received 327 applications to fill 12 Honor Grad attorney positions, from a record number of law schools (123) across the country.

The Report that follows discusses all of the Division's important work, and provides further details on how we have made progress toward our goals over the past year. I commend all of my colleagues for their exceptional work.

I am so proud to have had the incredible opportunity to lead the men and women of the Environment and Natural Resources Division over the past years. I am confident that they will continue to make excellent progress on all aspects of the Division's mission, and I look forward to watching their successes in the years to come!

John C. Cruden
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
January 15, 2017

OVERVIEW OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The richness and complexity of the Division's work is inseparable from the larger story of the growth and maturation of American society. During the 19th Century, the federal government sought to encourage settlement by transferring the nation's public lands to private owners. Federal land policy changed abruptly at the turn of the century, when the government began to focus on retaining ownership of public lands, and managing the resources on those lands, for the benefit of the entire nation.

On November 16, 1909, Attorney General George Wickersham signed a two-page order creating "The Public Lands Division" of the Department of Justice to step into the breach and address the critical litigation that ensued. He assigned all cases concerning "enforcement of the Public Land Law," and relating to Indian affairs, to the new Division, and transferred a staff of nine—six attorneys and three stenographers—to carry out those responsibilities.

As the nation grew and developed, so did the responsibilities of the Division, and its name changed to the "Environment and Natural Resources Division" (ENRD) to better reflect those responsibilities. The Division celebrated its 107th anniversary on November 16, 2016. Today, we are mindful of the strong legacy that we have inherited and the opportunities and challenges that lie ahead of us. The Division has a main office in Washington, D.C., and field offices across the United States. It has a staff of over 600 people, and is organized into ten sections. It currently has over 6,972 active cases and matters and has represented virtually every federal agency in connection with cases arising in all fifty states and the United States territories.

One of the Division's primary responsibilities is to enforce federal civil and criminal environmental laws, such as the Clean Air Act (CAA), the Clean Water Act (CWA), the Oil Pollution Act (OPA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). The main federal agencies that the Division represents in these areas are the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). The Division's sections that carry out this work are the Environmental Enforcement Section, the Environmental Defense Section, and the Environmental Crimes Section. The Chiefs of these sections are Tom Mariani, Letitia Grishaw, and Deborah L. Harris, respectively.

A substantial portion of the Division's work includes litigation under a wide array of statutes related to the management of public lands and associated natural and cultural resources. All varieties of public lands are affected by ENRD's litigation docket, ranging from entire ecosystems, such as the nation's largest sub-tropical wetlands (the Everglades) and rain forest (the Tongass), to individual rangelands or wildlife refuges, to historic battlefields and monuments. Examples of ENRD's land and natural resources litigation include original actions before the U.S. Supreme Court to address interstate boundary and water allocation issues; suits challenging federal agency decisions that affect economic, recreational, and religious uses of the national parks, national forests, and other public lands; and actions to recover royalties and revenues from development of natural



**Grand Staircase Escalante National Monument, Utah,
Bureau of Land Management**



California Coastal National Monument, Bureau of Land Management

resources, including subsurface minerals. The Division primarily represents the land management agencies of the United States in these cases, including the U.S. Department of Agriculture's Forest Service and the many components of the U.S. Department of the Interior (Interior) such as the National Park Service (NPS), Bureau of Land Management (BLM), and U.S. Fish and Wildlife Service (FWS). The Natural Resources Section is primarily responsible for these cases. The Chief of the Natural Resources Section is Lisa L. Russell.

The Division's Wildlife and Marine Resources Section handles civil cases arising under the fish and wildlife conservation laws, including suits defending agency actions under the Endangered Species Act (ESA), which protects endangered and threatened animal and plant species; the Marine Mammal Protection Act, which protects marine mammals, such as whales, seals, and dolphins; and the Magnuson-Stevens Fishery Conservation and Management Act, which regulates fishery resources. The Chief of the Wildlife and Marine Resources Section is Seth Barsky. The Environmental Crimes Section brings criminal prosecutions under these laws and under the Lacey Act against people who are found smuggling wildlife and plants into or out of the United States or across state boundaries or otherwise violating federal wildlife laws. The main federal agencies that ENRD represents in this area are FWS and the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS).

Division cases frequently involve allegations that a federal program or action violates constitutional provisions or environmental statutes. Examples include Fifth Amendment takings claims, in which landowners seek compensation based on the allegation that a government action has precluded development of their property, and suits alleging that a federal agency has failed to comply with the National Environmental Policy Act (NEPA). Both takings and NEPA cases can affect vital federal programs, such as those governing the nation's defense capabilities (including military preparedness, weapons programs, nuclear materials management, and military research), renewable energy development, and food supply. In other cases, plaintiffs challenge regulations promulgated to implement the nation's pollution control statutes, such as the CAA and CWA, or activities at federal facilities that are claimed to violate such statutes. The Division's main clients in these areas include the Department of Defense (DOD), EPA, the U.S. Army Corps of Engineers (Corps), the U.S. Department of Transportation (DOT), and Interior's various components. The Natural Resources Section and the Environmental Defense Section handle these cases.

Another portion of the Division's caseload consists of eminent domain litigation. This important work, undertaken with Congressional direction or authority, involves the acquisition of land for the federal government, including for national parks, the construction of federal buildings, and national security-related purposes. The Land Acquisition Section is responsible for this litigation. The Chief of the Land Acquisition Section is Andrew Goldfrank.

The Division's Indian Resources Section litigates on behalf of federal agencies to protect the rights and resources of federally recognized Indian tribes and their members. This includes defending against challenges to statutes and agency actions that protect tribal interests, and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. The rights and resources at issue include water rights, the ability to acquire reservation land, and hunting and fishing rights, among others. The Chief of the Indian Resources Section is Craig Alexander. In addition, the Natural Resources Section defends claims asserted by Indian tribes and tribal members against the United States. The main federal agency that the Division represents in connection with this work is Interior's Bureau of Indian Affairs (BIA).

The Appellate Section handles the appeals of all cases litigated by Division attorneys in the trial courts, and works closely with the Department of Justice's Office of the Solicitor General on ENRD cases that reach the U.S. Supreme Court. The Chief of the Appellate Section is James Kilbourne.

The Law and Policy Section advises and assists the Assistant Attorney General on legal and policy questions, particularly those that affect multiple sections in the Division. It reviews and analyzes legislative proposals on environmental and natural resources issues of importance to the Division, handles the Division's response to congressional requests, provides comments on behalf of ENRD on federal agency rulemakings, and handles,

with the Appellate Section, *amicus curiae* participation in cases of importance to the United States. The Law and Policy Section leads the Division's efforts on international issues, often in collaboration with the Environmental Crimes Section, and handles various special projects on behalf of Division leadership. Attorneys in the Law and Policy Section also serve as the Division's ethics and professional responsibility officer and counselor, its alternative dispute resolution counselor, and coordinate the Division's Freedom of Information Act (FOIA) and correspondence work. The Chief of the Law and Policy Section is Karen Wardzinski.

The Executive Office is the operational management and administrative support section for ENRD. It provides financial management, human resources, information technology, procurement, facilities, security, litigation support, and other important services to the Division's workforce. The Executive Office takes advantage of cutting-edge technology to provide sophisticated automation facilities to ENRD employees. By utilizing new technologies and innovative business processes—and by in-sourcing services traditionally provided by contractors and equipping employees to better serve themselves—the Executive Office is able to achieve significant cost savings for the American public on an annual basis. The Executive Officer of the Division is Andrew Collier.

The Front Office is a cadre of extraordinary attorneys who ensure the Division's work is accomplished in a timely and professional manner each day. The Principal Deputy Assistant Attorney General is Sam Hirsch, who supervises the Appellate Section and Indian Resources Section. Lisa Jones supervises the Law and Policy Section and the Environmental Defense Section. Career Deputy Jean Williams supervises the Natural Resources Section, the Environmental Crimes Section, and the Wildlife and Marine Resources Section. Career Deputy Bruce Gelber supervises the Environmental Enforcement Section and the Land Acquisition Section. In addition, Cynthia Ferguson is Counsel for Environmental Justice, Andrea Berlowe is Counsel for State and Local Matters, Daron Carreiro is Counsel for Indian Affairs, and Sarah Himmelhoch is Counsel for E-Discovery. The Chief of Staff is Varu Chilakamarri.

PROTECTING OUR NATION'S AIR, LAND, AND WATER

The Division remains committed to enforcing the nation's environmental laws in order to address air pollution from the largest and most harmful sources; improving municipal wastewater and stormwater treatment and collection to keep raw sewage, contaminated stormwater, and other pollutants out of our nation's rivers, streams, and lakes; compelling polluters to clean up hazardous waste or repay the government for the costs it incurs conducting cleanups; and prosecuting criminal violations of environmental and other federal laws. The Division continues to enforce applicable laws and regulations to ensure that we protect human health and the environment.

Many of the Division's most significant Clean Air Act cases have been part of EPA's National Enforcement Initiatives to control harmful emissions from the largest sources of air pollution. Two related parts of the Clean Air Act — the New Source Review program and the Prevention of Significant Deterioration program — require some large industrial facilities to obtain permits and install and operate state-of-the-art air pollution controls before the facilities make modifications that increase air pollution emissions. Other parts of the Act establish New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants. The initiatives aimed at large sources cover facilities such as power plants, oil refineries, acid manufacturing plants, and glass manufacturing plants.

The pollutants emitted by these industries include sulfur dioxide, nitrogen oxides, and particulate matter. Sulfur dioxide contributes to acid rain. Nitrogen oxides contribute to ground-level ozone, commonly called smog, which is created by chemical reactions between nitrogen oxides and volatile organic compounds (VOCs) in the presence of sunlight. Ozone irritates the lungs, exacerbates asthma, and can increase susceptibility to respiratory illnesses, such as pneumonia, emphysema, and bronchitis. Sulfur dioxide and nitrogen oxides also can irritate the lungs and aggravate preexisting heart or lung conditions. Particulate matter contains microscopic particles that can travel deep into the lungs and cause difficulty breathing. In addition to being harmful in their own right, sulfur dioxide and nitrogen oxides in the atmosphere contribute to the formation of very fine particulate matter, known as PM_{2.5}. These very fine particulates can cause some of the most serious harm from air pollution, including premature mortality and increased incidence of heart attacks, chronic bronchitis, stroke, and respiratory ailments like asthma.

Many facilities also emit volatile organic compounds, which can result in numerous health effects, including eye, nose, and throat irritation; headaches; nausea; loss of coordination; and damage to the liver, kidney, and central nervous system. VOCs include a wide variety of hydrocarbons, some of which are hazardous air pollutants (also called air toxics) such as benzene, toluene, xylene, and ethyl benzene. Hazardous air pollutants are known or suspected to cause cancer and birth defects. Chronic exposure to benzene, which EPA classifies as a carcinogen, can cause numerous health impacts, including leukemia and adverse reproductive effects in women. As mentioned, VOCs are also a key component in the formation of ground-level ozone.



South Pass route over the Rocky Mountains, Bureau of Land Management



The Humbug Spires Wilderness Study Area, Bureau of Land Management

Defending the Clean Power Plan

Pursuant to the President's Climate Action Plan, EPA has developed regulations under the Clean Air Act to set carbon dioxide emission standards for new and existing coal and natural gas-fired power plants. When fully implemented, the rules will reduce carbon dioxide (CO₂) emissions from coal and natural gas-fired power plants by over 30% from 2005 levels. Those CO₂ emission reductions make up a primary part of the United States' commitment in the 2015 Paris Climate Change Agreement to reduce domestic greenhouse gas emissions. The Clean Power Plan was published in the Federal Register on October 23, 2015, and formally consists of two separate but related rules – one for existing power plants and one for new and modified power plants.

After the rules were published, 39 petitions for review of the existing source rule were filed in the D.C. Circuit on behalf of over 100 state and industry parties, and 16 petitions for review of the new and modified source rule were filed. ENRD vigorously defended the Clean Power Plan in FY 2016. Various groups of state, utility, and other industry parties filed nine motions to stay the effectiveness of the existing source rule pending judicial review of the merits, and ENRD filed a lengthy consolidated opposition to the motions. On January 21, 2016, a panel of the D.C. Circuit denied the motions to stay the rule, finding that petitioners had not satisfied the stringent requirements for a stay pending court review, but ordered that the case be expedited. A few days later, five groups of challengers filed separate applications with the Supreme Court for a stay of the existing source rule pending completion of judicial review. ENRD assisted the Solicitor General in opposing those applications, but on February 9, 2016, by a 5-4 vote, the Supreme Court issued orders granting the applications and staying the existing source rule pending completion of judicial review. ENRD then filed a lengthy merits brief defending the rule in consolidated cases styled *West Virginia v. EPA* (D.C. Cir.), and on September 27, 2016, presented a day-long oral argument before the D.C. Circuit sitting en banc.

Continuing Defense of EPA's Regional Haze Program

Although most of the Clean Air Act is directed toward reducing the amount of pollution in the air that affects human health, one very significant program created by Congress under the Act is devoted to reducing pollution-based haze that affects visibility in some of the country's most pristine and iconic national parks and wilderness areas. Emissions of sulfur dioxide and nitrogen oxides, often from great distances away, contribute to the particulate matter pollution that is the major cause of this problem. Some particulate matter, nitrogen oxides, and sulfur dioxide emissions occur naturally, but much is caused by man-made emissions from motor vehicles, electric utility and industrial fuel burning, and manufacturing operations. Over the last few years, EPA has devoted considerable resources to requiring states to adopt adequate plans to meet the Act's visibility requirements, and to developing federal plans where states fail to meet their obligation. Many of these EPA actions have been challenged in various judicial circuits nationwide (the Clean Air Act directs judicial review to the courts of appeals in the first instance), and to date the government has received largely favorable decisions from courts considering the merits of those challenges. This trend continued in fiscal year 2016, where ENRD received favorable regional haze decisions from the Ninth Circuit in a set of complex cases involving Arizona's plan (*Arizona v. EPA*), as well as a pair of favorable decisions from the Eighth Circuit involving plans for Nebraska (*Nebraska v. EPA*) and Minnesota (*National Parks Conservation Association v. EPA*).

Reducing Air Pollution from Power Plants: The Coal-Fired Power Plant Enforcement Initiative

The Division has continued to litigate civil claims under the Clean Air Act against operators of coal-fired electric power generating plants, which emit, among other things, sulfur dioxide, nitrogen oxides, and particulate matter. Through fiscal year 2016, these matters have settled on terms that will reduce emissions of sulfur dioxide and nitrogen oxides by approximately 2.5 million tons each year once the more than \$17.3 billion in required pollution controls are fully functioning. The violations at issue in these cases arose when companies engaged in major life-extension projects on aging facilities without installing required state-of-the-art pollution controls. The result was excess air pollution that degraded forests, damaged waterways, contaminated reservoirs, and adversely affected the health of our citizens, especially the young, the elderly, and asthma sufferers.

In fiscal year 2016, the Division concluded another settlement under the initiative, bringing the total to 31. In *United States, et al. v. Duke Energy Corporation* (M.D. N.C.), the Department of Justice and EPA, joined by co-plaintiffs Environmental Defense, the North Carolina Sierra Club, and Environment North Carolina, settled alleged Clean Air Act violations at five coal-fired power plants across North Carolina. The settlement resolved long-standing claims that Duke violated the federal Clean Air Act by modifying 13 coal-fired electricity-generating units without obtaining air permits or installing and operating the required air pollution control technologies. The 13 generating units were located at Duke's Allen, Buck, Cliffside, Dan River, and Riverbend plants.

During the negotiations, Duke shut down 11 of the 13 units; those shutdowns became a permanent and enforceable obligation under the consent decree. At the two remaining units, which are located at the Allen facility in Belmont, North Carolina, Duke must continuously operate pollution controls and meet interim emission limits before permanently retiring the two units no later than December 31, 2024.

To help mitigate the harm from the alleged violations, the settlement requires Duke to retire an additional unit at the Allen plant by 2024. EPA estimates that the shutdown of the three Allen units will reduce emissions from the Allen plant by approximately 2,300 tons per year compared to recent emission levels. When the three Allen units are shut down, total emissions from the 13 allegedly modified units — which were in excess of 51,000 tons per year in 2000 when the suit was filed — will be zero.



Duke's Allen Plant Steam Station, Google Maps

The settlement also requires Duke to spend at least \$4.4 million to fund several environmental mitigation projects. These projects include restoration of native wildlife and plants on National Park Service and Forest Service lands in North Carolina, a program to help North Carolina residents replace higher polluting wood stoves and fireplaces with cleaner burning alternatives, and a program to increase the use of clean energy and energy-efficiency measures in economically distressed communities. Other projects may include efforts towards increasing truck-stop electrification and electric vehicle charging stations in North Carolina. In addition, the settlement requires Duke to pay a civil penalty of \$975,000.

The United States initially sued Duke in 2000. In 2007, a landmark Supreme Court decision agreed with EPA's interpretation of Clean Air Act regulations governing modifications that increase the annual amount of pollution from a plant. Following years of pre-trial litigation, trial had been set to begin in October 2015; the consent decree was filed in September 2015.

Addressing Air Pollution from Oil Refineries and Chemical Plants

Refineries process crude oil into products like gasoline, diesel fuel, kerosene, jet fuel, asphalt, and liquefied petroleum gas. They emit pollutants from a number of different sources. Fluid catalytic cracking units, sulfuric

acid plants, heaters, boilers, and sulfur recovery units are substantial emitters of nitrogen oxides and sulfur dioxide. Flaring results in emissions of greenhouse gases, sulfur dioxide, and VOCs, including toxic air pollutants such as benzene. Leaking valves and pumps produce what are called “fugitive” emissions of VOCs.

Reducing Air Pollution from Refineries in Ohio, Kentucky, Michigan, Louisiana, and Illinois

In *United States v. Marathon Petroleum Company* (E.D. Mich.), the Department of Justice and EPA reached an agreement with Ohio-based Marathon Petroleum Company that will reduce air pollution from the company’s petroleum refineries in five states. When fully implemented, the agreement is expected to reduce harmful air pollutants like VOCs, sulfur dioxide, and nitrogen oxides by approximately 1,037 tons per year. The amended con-



Marathon Petroleum Refinery Canton Ohio, Google Maps

Reducing Air Pollution from Refineries in Alaska, California, Hawaii, North Dakota, Utah, and Washington

The \$425 million settlement in *United States, et al. v. Tesoro Refining & Marketing Company LLC, et al.*, (W.D. Tex.), addresses a range of alleged flaring and leak-detection-and-repair violations under the Clean Air Act at all six refineries and, at certain refineries, violations of the Act’s Prevention of Significant Deterioration program, Non-Attainment New Source Review program, New Source Performance Standards, and the National Emission Standards for Hazardous Air Pollutants. The settlement also addresses various violations of state clean air laws and permits.

The settlement will reduce air pollution at six refineries. Tesoro and Par Hawaii will spend about \$403 million to install and operate pollution control equipment. Tesoro will spend about \$12 million to fund environmental projects in local communities previously impacted by pollution. And Tesoro paid a \$10.45 million civil penalty. The consent decree resolved ongoing Clean Air Act violations at refineries in Kenai, Alaska; Martinez,

California; Kapolei, Hawaii; Mandan, North Dakota; Salt Lake City, Utah; and Anacortes, Washington. Of the \$10.45 million civil penalty, Tesoro paid \$8,050,000 to the United States, and \$2.4 million to the United States’ co-plaintiffs: the Northwest Clean Air Agency, the State of Alaska, and the State of Hawaii.

Once the companies install the pollution controls required by the settlement, annual emissions reductions at the six refineries will total an estimated 773 tons of sulfur dioxide, 407 tons of nitrogen oxides, 1,140 tons of VOCs, 27 tons of hazardous air pollutants, 20 tons of hydrogen sulfide, and the equivalent of 47,034 tons of carbon dioxide, a greenhouse gas. A large number of the emissions reductions will occur in areas with impaired air quality and thus help protect populations at risk for respiratory illnesses. This settlement will reduce greenhouse gas emissions from flaring at the subject refineries by over 60%.

The settlement incorporates the latest technological approaches to reducing flaring and making the flaring that does occur as efficient as possible. State-of-the-art Flare Gas Recovery Systems capture and recycle gases that would

otherwise be sent to combustion devices known as flares. Tesoro will install or expand Flare Gas Recovery Systems at all six refineries. Tesoro will also pay for third-party auditing of compliance with the enhanced leak-detection-and-repair requirements at all six facilities.

Under the consent decree, Tesoro will also spend about \$12.2 million to fund three pollution mitigation projects. First, Tesoro will use infrared gas-imaging cameras at four refineries to supplement the company's enhanced leak-detection-and-repair program. These cameras are able to locate fugitive VOC emissions that may not

be otherwise detected. Second, Tesoro will install ultra-low nitrogen oxides burners on a furnace at its Salt Lake City refinery. Tesoro estimates that the cost of this mitigation project is \$10.8 million and is expected to result in significant quantifiable reductions in nitrogen oxides emissions. Finally, Tesoro will contribute \$1 million to fund the replacement of old diesel school buses in Contra Costa County, California, with new compressed natural gas (CNG) school buses, decreasing emissions of nitrogen oxides, sulfur dioxide, PM, greenhouse gases, and other air pollutants.

sent decree builds on a 2012 consent decree in which Marathon agreed to reduce air pollution from flares by generating less waste gas and by installing equipment designed to make flares burn more efficiently. The 2012 settlement reduced emissions of VOCs and sulfur dioxide by over 5,200 tons per year.

Under the amended consent decree, Marathon will install seven Flare Gas Recovery Systems at an estimated cost of \$319 million at its refineries in Canton, Ohio; Catlettsburg, Kentucky; Detroit, Michigan; Garyville, Louisiana; and Robinson, Illinois. Marathon will also spend \$15.55 million on projects to reduce air pollution at three of the facilities. Marathon will shut down a flare at the fence line of its Detroit refinery at a cost of approximately \$6 million and reduce nitrogen oxides emissions at its Canton and Garyville refineries at a cost of approximately \$9.55 million. Marathon also paid a civil penalty of \$326,500 to the United States.

By installing advanced pollution controls at its refineries, Marathon will help reduce emissions that can disproportionately affect low-income and vulnerable populations, including children. In particular, the improvements in the Detroit refinery further the Department's and EPA's efforts to advance environmental justice in communities like southwest Detroit.

Addressing Air Pollution from Smelters

In the settlement in *United States v. ASARCO, LLC*. (D. Ariz.), the Department of Justice and EPA required ASARCO to spend \$150 million to install new equipment and pollution control technology to reduce emissions of toxic heavy metals at a large smelter located in Hayden, Arizona. The company will also fund local environmental projects valued at \$8 million, replace a diesel locomotive with a cleaner model for \$1 million, and pay a \$4.5 million civil penalty.



ASARCO Hayden Site Copper Smelter, Arizona Department of Environmental Quality

Built in 1912 and expanded over the years, the ASARCO Hayden site is a copper ore smelting facility located adjacent to the towns of Hayden and Winkelman, Arizona. The ASARCO plant produces 300 to 400 million pounds of copper and over half a million tons of sulfuric acid annually. Currently, the ASARCO smelter is the largest source of sulfur dioxide emissions in Arizona. ASARCO is owned by Grupo México, a Mexican consortium.

Copper smelting produces sulfur dioxide, particulate matter, inorganic arsenic, and lead. Long-term inhalation exposure to inorganic arsenic is associated with irritation of the skin and can affect the brain and nervous system. Exposure to lead can cause effects on the blood and the nervous, immune, renal, and cardiovascular systems.

The federal enforcement action targeted hazardous air pollutants, including lead, arsenic, and particulate matter. With the controls in place, the hazardous air pollutants should be reduced by at least 8.5 tons per year, and PM emissions are expected to be reduced by 3,500 tons per year. According to EPA estimates, the new equipment and controls will also slash the facility's sulfur dioxide emissions by 19,000 tons per year, a reduction of more than 90%.

Addressing Air Pollution at Glass-Manufacturing Facilities and Obtaining Company-Wide Relief

Company-wide case settlements benefit everyone. Communities located near the facilities covered by these settlements benefit from lower levels of pollution and, where appropriate, environmentally beneficial projects. The government benefits through the expedited resolution on an efficient scale of historic and ongoing violations. Industry benefits by gaining the certainty of knowing it is bringing its operations into compliance with the nation's laws, avoiding the cost and risk of additional litigation, and obtaining a negotiated schedule for technological upgrades that is efficient and consistent with company operations.

The production of flat glass produces pollution in the form of sulfur dioxide, nitrogen oxides, particulate matter, and sulfuric acid mist. Sulfuric acid mist irritates the skin, eyes, nose, throat, and lungs, and exposure to high concentrations can lead to more severe health effects.

In *United States, et al. v. Guardian Industries Corporation* (E.D. Mich.), the Department of Justice, EPA, Iowa, and New York resolved alleged violations of the Clean Air Act at Guardian's flat glass manufacturing facilities throughout the United States. Under the settlement, Guardian will invest more than \$70 million to control emissions of nitrogen oxide, sulfur dioxide, particulate matter, and sulfuric acid mist from all of its flat glass manufacturing facilities. Guardian will also fund an environmental mitigation project valued at \$150,000 to reduce particulate matter pollution in the San Joaquin Valley in California, and pay a civil penalty of \$312,000.

The settlement resolved allegations that Guardian violated the Clean Air Act and state air pollution control plans when it made major modifications to its flat glass furnaces that significantly increased harmful air emissions. This settlement is EPA's first settlement involving flat glass (as opposed to container glass or glass fiber). Flat glass, also known as float glass, is used in windows, glass doors, and automobile windshields.

EPA expects that the pollution controls required by the settlement will reduce harmful emissions by 7,300 tons per year, including approximately 6,400 tons of nitrogen oxides, 550 tons of sulfur dioxide, 200 tons of particulate matter, and 140 tons of sulfuric acid mist annually. The mitigation project in California will yield additional reductions of particulate matter.

Guardian's flat glass manufacturing facilities are located in Kingsburg, California; DeWitt, Iowa; Carleton, Michigan; Geneva, New York; Floreffe, Pennsylvania; Richburg, South Carolina; and Corsicana, Texas. The states of Iowa and New York participated in the settlement and will each receive 25% of the total penalty; the United States will receive 50%.

Addressing Air Pollution Through the National Acid-Manufacturing Plant Initiative

In *United States, State of Idaho, and San Joaquin Valley Air Pollution Control District v. J.R. Simplot Co.* (D. Idaho), the Department of Justice and EPA settled with the J.R. Simplot Company, resolving alleged Clean Air Act violations related to modifications made at Simplot's five sulfuric acid plants near three towns: Lathrop, California; Pocatello, Idaho; and Rock Springs, Wyoming. Under the settlement, Simplot will spend an estimated \$42 million on pollution controls that will significantly cut sulfur dioxide emissions at all five plants and fund a wood-stove replacement project in the area surrounding the Lathrop plant.

Once fully implemented, the settlement will reduce sulfur dioxide emissions from Simplot's five sulfuric acid plants by approximately 2,540 tons per year—a reduction of greater than 50%. Simplot will implement a plan to monitor sulfur dioxide emissions continuously at all five plants, and pay an \$899,000 civil penalty. Additionally, Simplot will spend \$200,000 on a wood-stove replacement mitigation project in the San Joaquin Valley to reduce emissions of fine particulate matter (PM_{2.5}), VOCs, carbon monoxide, and hazardous air pollutants.



Simplot Plant Rock Springs Wyoming, Google Maps

The emission rates secured in this settlement will result in the best-controlled, system-wide emissions rates secured in any sulfuric-acid-plant settlement to date. Simplot's Lathrop sulfuric acid plant is located in the San Joaquin Valley in California, which is currently classified as nonattainment for the National Ambient Air Quality Standards for PM_{2.5}, and has some of the most difficult challenges meeting those standards in the country. Because sulfur dioxide is a precursor to the formation of fine particulates, both the sulfur dioxide emission reductions from Simplot's plant and a wood-stove-replacement mitigation project will help reduce PM_{2.5} emissions in the San Joaquin Valley.

Upholding Stringent Emission Standards for Boilers and Incinerators

Boilers and incinerators are some of the most ubiquitous sources of emissions of mercury, particle pollution, sulfur dioxide, dioxin, lead, and nitrogen dioxide. These pollutants can cause a range of dangerous health effects—from developmental disabilities in children to cancer, heart disease and premature death. In 2012, EPA developed stringent emission standards based on the application of “maximum achievable control technology” to these sources. EPA estimated that, as promulgated, the standards will avoid up to 8,100 premature deaths, 5,100 heart attacks, and 52,000 asthma attacks. The standards were subject to a host of consolidated challenges in *United States Sugar Corp. v. EPA*, but in July 2016, the D.C. Circuit largely denied those challenges in a comprehensive 156-page opinion, thereby assuring implementation of these important regulations.

Addressing Air Pollution from Incinerators

General Electric owned its Waterford, New York, facility from 1947 through 2006 and continued to operate it through early 2007. GE manufactured various products at the facility, including sealants made of silicone.

The silicone manufacturing process generated hazardous waste. GE sought and received permits from the New York Department of Environmental Conservation to dispose of the hazardous waste onsite, subject to compliance with the Clean Air Act and RCRA. GE disposed of hazardous waste in a rotary kiln incinerator that automatically shut off the flow of hazardous waste to the incinerator if conditions deviated from parameters designed to ensure compliance with the CAA and RCRA. Unbeknownst to federal and state authorities, GE overrode the incinerator's automatic waste feed cut-off system, allowing GE to continue to burn hazardous waste in the incinerator in violation of its CAA and RCRA permits. On at least 1,859 occasions during the period from September 2006 to February 2007, GE employees overrode the automatic waste feed cut-off system, potentially exposing the public and the environment to harmful hazardous air pollutants, such as carbon monoxide, dioxins, and furans. GE submitted routine compliance reports to the United States and the state of New York falsely attesting to compliance with RCRA, the CAA, and permits issued pursuant to those statutes. In a settlement in *United States and the State of New York v. General Electric Company* (N.D.N.Y.), General Electric agreed to pay a \$2.25 million civil penalty to resolve a complaint alleging violations of federal and state environmental laws.

Addressing Air Pollution from Coke Production Facilities

Coke is used as a carbon source and as a fuel to heat and melt iron ore at steel making facilities. The Division entered into a settlement in *United States and State of New York v. Tonawanda Coke Corporation* (W.D.N.Y.), of claims alleging that Tonawanda Coke Corporation's facility in Tonawanda, New York, violated the Clean Air Act, the Clean Water Act, and the Emergency Planning and Community Right-to-Know Act (EPCRA).



Tonawanda Aerial View Smoke Plume, Environmental Enforcement Section

Tonawanda Coke Corporation's alleged violations of the Clean Air Act resulted in releases of coke oven gas, which contains benzene and other harmful chemicals. Tonawanda failed to install air pollution controls on its coke ovens, failed to properly monitor equipment for coke oven gas leaks, failed to conduct required annual inspections of emission controls, and failed to complete multiple required reports. Tonawanda's alleged Clean Water Act violations included discharging wastewater and other prohibited pollutants in its stormwater discharges to the Niagara River; discharging excessive amounts of cyanide, ammonia, and naphthalene in its process wastewater; and allowing process water holding tanks to decay, pipes to leak, and spill containment structures to become ineffective. In addition, Tonawanda was alleged to have violated EPCRA by failing to report that the company manufactured benzene and ammonia in quantities that exceeded the 25,000 pound-per-year reporting threshold. (Under EPCRA, companies that manufacture, process, import, or use chemicals above a certain amount must submit annually to state and local authorities chemical inventory information giving detailed information about the chemicals they have on site.)

Litigating the Volkswagen “Defeat Devices” Matter

On January 4, 2016, the Division, on behalf of the EPA, filed a civil complaint in the Eastern District of Michigan against Volkswagen AG, Audi AG, Volkswagen Group of America Inc., Volkswagen Group of America Chattanooga Operations LLC, Porsche AG and Porsche Cars North America Inc. (collectively referred to as Volkswagen). The complaint alleges that nearly 600,000 diesel engine vehicles had illegal defeat devices installed that impair their emission control systems and cause emissions to exceed EPA’s standards, resulting in harmful air pollution. The complaint further alleges that Volkswagen violated the Clean Air Act by selling, introducing into commerce, or importing into the United States motor vehicles that are designed differently from what Volkswagen had stated in applications for certification to EPA and the California Air Resources Board (CARB).

In related actions, the German automaker Volkswagen AG settled for \$14.7 billion allegations that it had cheated emissions tests and deceived customers for nearly 10 years. A portion of that settlement, almost \$5 billion, will go toward mitigating the pollution caused by these cars and investing in green technology. States also filed and were compensated for their consumer claims. In September of 2016, the Division indicted one Volkswagen employee and obtained a plea agreement. The employee admitted that he helped his co-conspirators continue to lie to the EPA, CARB and Volkswagen customers even after the regulatory agencies started raising questions about the vehicles’ on-road performance following an independent study commissioned by the International Council on Clean Transportation, which showed that the diesel vehicles’ emissions on the road were up to 40 times higher than shown on the dynamometer. The plea agreement provides that the employee will cooperate with the government in the Department’s ongoing investigation.

Under the settlement, Tonawanda paid \$2.75 million in civil penalties, will spend approximately \$7.9 million to reduce air pollution and enhance air and water quality, and will spend an additional \$1.3 million on environmental projects.

Under the consent decree, Tonawanda must improve its processes, operations, and monitoring for coke oven gas leaks, assess key equipment, repair or replace equipment, install new pollution controls and take many additional measures under a prescribed schedule. One important requirement of the settlement is that Tonawanda install coke-oven-battery pollution controls to limit coke oven gas emissions. Once fully operational, these controls, known as “pushing controls,” are expected to reduce particulate matter emissions by up to 162 tons per year. In addition, Tonawanda Coke will conduct additional auditing of its operations and implement necessary and appropriate changes. This work, estimated to cost approximately \$7.9 million, will secure significant reductions of emissions of benzene, ammonia, and particulate matter from the plant, improving air quality and protecting public health in Tonawanda.

The settlement also requires Tonawanda to pay a \$1.75 million civil penalty to the United States and a \$1 million civil penalty to the state of New York, co-plaintiff with the United States. In addition, Tonawanda Coke will pay \$1 million to fund projects that will benefit the environment and the residents of Tonawanda. Finally, \$357,000 will be provided to acquire and preserve wetlands, which protect and enhance water quality, reduce flooding, and provide habitat for fish and wildlife.

Addressing Risks at Chemical Blending and Distribution Facilities; Reducing the Risk of Environmental Violations that Endanger Work Safety

In *United States v. Barton Solvents Inc.* (S.D. Iowa), the Department of Justice and EPA settled with Barton Solvents Inc., resolving multiple environmental violations at five of the company’s chemical blending and distribution facilities in Iowa, Kansas, and Wisconsin. The settlement requires Barton to pay a civil penalty of \$1.1 million and undertake measures to ensure that its blending and packaging processes adhere to safety and environmental requirements.

In 2007, violations of the Clean Air Act General Duty Clause resulted in explosions and major fires at two Barton facilities. (The General Duty Clause, rather than prescribe a specific emissions limit on a particular pollutant, imposes a general duty to identify risks and to maintain a safe facility.) The explosions and fires damaged Barton's facilities and nearby businesses and caused the evacuation of the facilities and surrounding communities. EPA inspections at these and other Barton facilities found violations of the hazardous waste storage requirements of RCRA and the Spill Prevention, Control, and Countermeasure (SPCC) requirements of the Clean Water Act. These types of violations put at risk facilities, workers, and the surrounding communities.

Under the settlement, Barton will also hire independent auditors to perform comprehensive environmental compliance audits and correct any additional violations uncovered at all of its facilities, including a facility in West Bend, Wisconsin, where there were no known violations.

Addressing the Quality of Fuel Produced by America's Refineries

As gasoline evaporates, volatile organic compounds are released, including a wide variety of hydrocarbons, some of which, such as benzene, toluene, xylene, and ethyl benzene, are hazardous air pollutants. To limit these emissions, the Clean Air Act requires refiners to ensure that conventional gasoline meets volatility standards, called "Reid Vapor Pressure" standards.

In *United States v. HollyFrontier Refining & Marketing LLC, et al.* (D.D.C.), the Department of Justice and EPA reached a settlement with subsidiaries of the HollyFrontier Corporation that resolved alleged Clean Air Act violations regarding volatility standards and testing requirements at three HollyFrontier facilities.

HollyFrontier disclosed to EPA that three of its refineries — the Navajo Refinery in Artesia, New Mexico; the Woods Cross Refinery in



El Dorado Refinery in El Dorado, Kansas, Google Maps

Woods Cross, Utah; and the El Dorado Refinery in El Dorado, Kansas — produced approximately 42 million gallons of gasoline that exceeded the applicable Reid Vapor Pressure standards. HollyFrontier estimated that the violations resulted in approximately 10 excess tons of VOC emissions.

Under the settlement, HollyFrontier will implement a mitigation project at its refinery in Salt Lake City, Utah, to offset past emissions: HollyFrontier will install new equipment on two tanks to reduce VOC emissions by about 96 tons over the lifetime of the consent decree. HollyFrontier also paid a \$1.2 million civil penalty to the United States.

Reducing Air Pollution from Motor Vehicles

Over half of the pollutants in America's air come from "mobile sources" of air pollution. These mobile sources include cars, trucks, buses, motorcycles, recreational vehicles, scooters, off-road construction equipment, marine engines, generators, and small engines. Mobile source pollutants include volatile organic compounds, nitrogen oxides, particulate matter, carbon monoxide, greenhouse gases, and various toxic air pollutants, including benzene.

The Clean Air Act requires that every vehicle and engine sold in the United States be covered by a valid EPA-issued certificate of conformity, which manufacturers obtain by certifying that vehicles meet applicable federal emissions standards for various pollutants. The act also prohibits any person from removing, rendering inop-

erative, or tampering with a motor vehicle's certified emissions control system. Enforcement efforts regarding motor vehicles are part of an ongoing effort by the Division and EPA to ensure that manufacturers and importers of vehicles and engines comply with the requirements of the Clean Air Act, and that retailers exercise due diligence in ensuring that their products comply fully with the Act's regulations.

In *United States v. Tractor Supply Company, Inc. and Tractor Supply Company of Texas, L.P.* (D.D.C.), the Department of Justice and EPA resolved allegations that the companies imported and sold more than 28,000 all-terrain vehicles, off-highway motorcycles, and engines that did not comply with federal Clean Air Act certification and emission-information labeling requirements. Under the settlement, Tractor Supply Company will implement a compliance plan to prevent future violations and mitigation projects to reduce air pollution. Tractor Supply will also pay a \$775,000 civil penalty. The Justice Department alleged that from 2006 to 2009, Tractor Supply imported from China and sold in the U.S. over 28,000 vehicles and engines that varied from the certificates of conformity that had been submitted to EPA. Among other things, the vehicles had adjustable carburetors that were not described in the applications for certification, were produced by manufacturers other than those listed in the applications, or were significantly more powerful than described. The Department of Justice and EPA also alleged that the emission-control-information labels on certain vehicles did not comply with federal regulations, and that Tractor Supply provided an incomplete and inaccurate response to EPA's information request.

The settlement required Tractor Supply to implement a rigorous corporate compliance plan covering both imported and domestically manufactured products. The plan requires regular vehicle and engine inspections, emissions and catalyst testing, staff training, and reporting for five years. Tractor Supply will also mitigate potential adverse environmental effects of equipment already sold to consumers, estimated by EPA to be up to 23.5 tons of excess hydrocarbon and nitrogen oxide emissions and 12.2 tons of excess carbon monoxide emissions.

Defending the Clean Water Rule and the Clean Water Regulatory Program

ENRD obtained a significant win in ongoing litigation over the EPA and Department of the Army's Clean Water Rule, which defines "waters of the United States" for purposes of federal regulatory jurisdiction under the statute. More than one hundred parties have filed challenges to the rule in both the courts of appeals and numerous district courts across the country, citing an ambiguity in the Clean Water Act's jurisdictional provision. In *Murray Energy Corp. v. EPA*



Snake River, WashingtonState.gov

(6th Cir.), the Sixth Circuit Court of Appeals, presiding over 22 consolidated petitions for review of the rule, resolved this dispute in favor of the United States, adopting our view that jurisdiction to review the rule properly lies in the courts of appeals. The Sixth Circuit's subsequent denial of rehearing of the jurisdictional ruling was a significant victory in our overall strategy to consolidate the litigation. As a result, the consolidated petitions will now proceed to the merits in the Sixth Circuit and the district court challenges to the Clean Water Rule

have been dismissed or stayed pending a ruling from the Sixth Circuit on the merits. The Division also obtained a favorable Eleventh Circuit ruling in *State of Georgia v. McCarthy* (11th Cir.) that further supports the consolidated review by the Sixth Circuit. In that litigation, the State of Georgia and others appealed from the denial of their request for a preliminary injunction to block the Clean Water Rule, asking the Eleventh Circuit to hold that appellate courts did not have exclusive jurisdiction to review the rule. After the Sixth Circuit issued its ruling, the Eleventh Circuit stayed both the appeal and proceedings in the district court pending a decision by the Sixth Circuit. The Eleventh Circuit held that “[i]t would be a colossal waste of judicial resources for both this Court and the Sixth Circuit to undertake to decide the same issues about the same rule presented by the same parties.”

ENRD also obtained a favorable decision on November 2015 in defense of the Corps’ wetlands regulatory program in *Walther v. U.S. Army Corps of Engineers* (D. Alaska), where the owner of a wetlands mitigation bank alleged that the Corps had improperly authorized a competing mitigation bank to sell credits. In dismissing the claims, the district court found that the plaintiff lacked standing because even if the court were to grant the requested relief and bar the competing mitigation bank from selling credits, it was unlikely that parties would purchase credits from plaintiff’s mitigation bank given the other mitigation options open to them.

The Division also had success defending the Corps’ interpretation of its obligations under the Clean Water Act in *Idaho Rivers United v. U.S. Army Corps of Engineers* (W.D. Wash.). In that case, plaintiffs challenged the Corps’ maintenance dredging plans for the Lower Snake River in Washington, alleging violations of the Clean Water Act and NEPA. After ENRD defeated plaintiffs’ motion for a preliminary injunction, the Corps completed the dredging. In February 2016, the court granted judgment in the Corps’ favor, finding that the challenge was moot, but that even if it was not, the Corps had properly determined that it did not need to complete the “public interest review” required by Corps regulations for permitted projects because the regulations do not apply to Army civil works maintenance activities authorized by Congress.

Clean Water Act Section 404 Permitting Authority

On July 8, 2016, in *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers* (4th Cir.), the Fourth Circuit upheld the Corps’ issuance of a permit under Section 404 of the CWA to an operator of surface coal mine in West Virginia, allowing the operator to place fill in waters of the United States. Ohio Valley Environmental Coalition (OVEC) challenged the Corps’ limitation of its review under NEPA to the environmental impacts to regulated waters. OVEC argued that the Corps should have looked at the impacts of the operation of the mine as a whole, specifically health impacts to surrounding communities from surface coal mining. The Fourth Circuit has previously addressed the issue of the scope of the Corps’ NEPA review in a Section 404 permit context in *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, where it held that the Corps correctly interpreted its regulations in considering only impacts to regulated waters. In *Aracoma*, the Court stated that, under the Surface Mining Control and Reclamation Act, the primary responsibility for regulation of surface mining in West Virginia rested with the West Virginia Department of Environmental Protection. OVEC argued that *Aracoma* was distinguishable, but the Fourth Circuit was unpersuaded. OVEC claimed that the Section 404 permit did authorize coal mining because coal would be extracted from waters under the Corps’ jurisdiction in a technique called “mine-through.” The Court held that the Corps’ Section 404 permit did not allow the extraction of the coal, just the placement of fill in those waters, and that responsibility for permitting extraction of coal remained with West Virginia. The Court also rejected OVEC’s argument that because West Virginia did not consider health effects from operation of the coal mine, the Corps had the responsibility to do so in the Section 404 permitting process. The Court ruled that West Virginia’s alleged failure to consider these impacts did not widen the Corps’ responsibility for issuance of a Section 404 permit.

On July 19, 2016, the D.C. Circuit, in a divided decision in *Mingo Logan Coal Co. v. EPA* (D.C. Cir.), upheld the EPA’s 2011 decision to “veto” most of a CWA permit that the U.S. Army Corps of Engineers had issued to a coal company in 2007. Section 404(c) of the Act authorizes EPA to “withdraw[]” disposal sites that the Corps specifies for dredged and fill material “whenever” EPA concludes that their specification will have an “unacceptable

adverse effect” on specific natural resources, including “wildlife.” EPA’s veto decision precluded the company from discharging coal-mine overburden into seven miles of West Virginia streams due to an unacceptable adverse effect on wildlife, both within the footprint of the fill material and downstream of that footprint. The court of appeals had previously upheld EPA’s authority to act under Section 404(c) after a permit issues, and in this latest decision, the court upheld the agency’s decision against various Administrative Procedure Act challenges. First, the majority held that the coal company had forfeited its argument that EPA had to (and failed to) weigh the company’s reliance interests in light of EPA’s acquiescence in the Corps’ issuance of the permit four years earlier. Second, the court held that, even if EPA had to provide a more reasoned explanation for its decision given its post-permit timing, the agency did so in the form of substantial new information that arose after permit issuance. Third, the court unanimously held that EPA permissibly considered downstream impacts of the fill material in light of Section 404(c)’s capacious language and despite the State of West Virginia’s issuance of a Section 402 National Pollutant Discharge Elimination System (NPDES) permit to the company for overlapping downstream discharges. The dissent concluded that EPA erred in not considering the costs of vetoing the permit.

Ensuring the Integrity of Municipal Wastewater Treatment Systems

Through enforcement of the Clean Water Act, the Division addresses one of the most pressing infrastructure issues in the nation’s cities—discharges of untreated sewage from aging collection systems. Raw sewage contains organic matter, toxics, metals, and pathogens that threaten public health, deter recreational use of beaches and waterways, and contaminate fish. Untreated or poorly treated sewage can also contain total suspended solids, nitrogen, phosphorus, and “biological oxygen demand” (organic matter that, as it is broken down by organisms, reduces the amount of oxygen in the water). High levels of total suspended solids increase water temperatures, decrease oxygen levels, and inhibit photosynthesis by blocking sunlight. Too much nitrogen and phosphorus in the water causes algae to grow faster than ecosystems can handle. Large growths of algae, known as algal blooms, contribute to the creation of hypoxia or “dead zones” where oxygen levels are so low that most aquatic life cannot survive.

Exposure to raw sewage can cause ailments that range in severity from mild gastroenteritis, causing stomach cramps and diarrhea, to life-threatening ailments such as cholera, dysentery, infectious hepatitis and severe gastroenteritis. Exposure to untreated sewage, therefore, presents a serious health risk to those who may come into contact with it. Children, the elderly, pregnant women, and people with weakened immune systems face greater risks from exposure to sewage.

Our work helps to protect some of our most vulnerable communities, including low-income and minority communities, which often live in older urban areas with the worst infrastructure problems. We also work to preserve national treasures like the Chesapeake Bay and the Great Lakes.

The cornerstone of the Clean Water Act is the National Pollutant Discharge Elimination System (NPDES) permit program. The discharge of pollutants from point sources to waters of the United States is prohibited unless the discharger has obtained and complies with an NPDES permit issued by EPA or by a state with an EPA-approved permit program.

There are two major types of sewer systems: combined and separate. Combined sewers were designed to collect both sewage and stormwater runoff in a single “combined” system. In wet weather, when large amounts of stormwater enter the system, combined sewer systems often overflow in what are called combined sewer overflows (CSOs). (State and local authorities generally have not allowed the construction of new combined sewers since the first half of the 20th century.)

Separate sanitary sewers are designed to collect primarily sewage, not stormwater. Sanitary sewers, however, are often not watertight because of cracks, faulty seals, and/or improper connections. As a result, they can receive large amounts of infiltration and inflow (I/I) during wet weather. The infiltration and inflow can cause sanitary sewer overflows (SSOs).

The Division has made it a priority to bring cases nationwide to improve municipal wastewater and stormwater treatment and collection. From January 2009 through September 2016, courts entered 91 such settlements, requiring, in total, an estimated \$29.7 billion in long-term control measures and other relief to bring municipalities into compliance with the Clean Water Act.

In fiscal year 2016, courts approved eight settlements or partial settlements negotiated by the Division. Collectively, the settlements required more than an estimated \$1.8 billion in improvements, \$1.5 million in civil penalties, and \$234,000 in supplemental environmental projects.

Puerto Rico

Under a settlement in *United States v. Puerto Rico Aqueduct and Sewer Authority and the Commonwealth of Puerto Rico* (D.P.R.), the Department of Justice, EPA, and the Puerto Rico Aqueduct and Sewer Authority (PRASA) agreed PRASA would make major upgrades, improve inspections and cleaning of existing facilities within the Puerto Nuevo system, and continue improvements to its systems across the island. The Puerto Nuevo sewer system serves the municipalities of San Juan, Trujillo Alto, and portions of Bayamón, Guaynabo, and Carolina.

PRASA's violations include releases of untreated sewage and other pollutants into waterways in the San Juan area, including the San Juan Bay, Condado Lagoon, Martin Peña Canal, and the Atlantic Ocean.



PRASA Bay, Puerto Rico, Department of Justice

These releases have been in violation of PRASA's NPDES permits and the Clean Water Act. PRASA also violated its NPDES permit by failing to report discharges from the Puerto Nuevo collection system and by failing to meet effluent limitations and operation-and-maintenance obligations at numerous facilities.

Under the agreement, PRASA will spend approximately \$1.5 billion to make necessary improvements. The settlement expands upon and supersedes settlement agreements reached with PRASA in 2004, 2006, and 2010. The improvements required by the 2016 agreement supplement projects already being implemented under the previous settlements and PRASA's Capital Improvement Program. Under the 2016 agreement, PRASA will prioritize island-wide capital improvement projects, taking into consideration the effect of the project on the population served. In recognition of the financial conditions in Puerto Rico, the U.S. government waived the payment of civil penalties associated with violations alleged in the complaint.

Delaware County, Pennsylvania

In *United States and the Commonwealth of Pennsylvania Department of Environmental Protection v. Delaware County Water Quality Control Authority (DELCORA)* (E.D. Pa.), the Department of Justice and EPA settled with DELCORA, resolving alleged Clean Water Act violations involving combined sewer overflows to the Delaware River and its tributaries. DELCORA agreed to develop and implement a plan to control and significantly reduce overflows from its sewer system, which will improve the water quality of the Delaware River, Chester Creek, and Ridley Creek near Philadelphia.

Based on information submitted by DELCORA, EPA estimates that the Authority could spend as much as \$200 million to implement an overflow control plan that complies with the terms of the Clean Water Act. Once the specific pollution control measures are selected and approved, the settlement requires DELCORA to implement the plan as quickly as possible, with a 20-year deadline. DELCORA must also pay a \$1.375 million penalty for prior violations, which will be split between the United States and the Commonwealth of Pennsylvania,

a co-plaintiff in the case. The settlement addresses longstanding problems with DELCORA's combined sewer system, which, when inundated with stormwater, discharges raw sewage and industrial waste. According to DELCORA, the volume of sewage that overflows from the system is approximately 739 million gallons annually.

DELCORA's wastewater facilities serve approximately 500,000 people in the greater Philadelphia area, including many low-income communities. When fully implemented, the settlement will help reduce the direct exposure of low-income and minority populations in the service area to raw sewage. DELCORA must seek input from the public on the long-term control plan, including from communities near Chester Creek, that have historically been overburdened by pollution. The consent decree also requires DELCORA to notify the public of sewer overflows using a visual notification system, including warning lights and flags at outfalls where sewers empty into local waterways.

Using the Clean Water Act to Protect the Nation's Water and Wetlands

The Division also obtained notable results enforcing and defending other Clean Water Act programs that protect the nation's navigable waters and wetlands.

Addressing Pollution Related to Stormwater

Stormwater often carries pollution and sediment from construction sites into local waterways damaging water quality. Under the Clean Water Act, developers and contractors responsible for operations at construction sites one acre or larger are required to implement stormwater pollution prevention plans to keep soil and contaminants from running into nearby waterways. These plans can include measures such as sediment barriers and means of reducing the flow of stormwater onto the construction site. Stormwater typically carries soil and contaminants off of construction sites at a rate 10 to 20 times greater than the rate at which they are carried off of agricultural lands, and 1,000 to 2,000 times greater than the rate from forested lands.

The consent decree in *United States v. Rhode Island Department of Transportation* (D.R.I.), addresses several years of noncompliance by the Rhode Island Department of Transportation (RIDOT) with the Clean Water Act and the permit that governs day-to-day operations of RIDOT's stormwater drainage systems. RIDOT's roadways are serviced by a drainage system made up of storm drains, pipes, catch basins, manholes, and outfalls. The RIDOT drainage system includes approximately 25,000 catch basins and 3,800 outfalls, services over 3,300 lane-miles of roadway, and carries stormwater runoff to approximately 235 impaired water body segments in Rhode Island, including waters that ultimately discharge into Narragansett and Mount Hope Bays.

The consent decree requires RIDOT to immediately begin comprehensive efforts to repair, restore, and improve its stormwater systems. RIDOT will develop stormwater control plans for groups of impaired water bodies. RIDOT must undertake a comprehensive sampling program to identify illicit connections to RIDOT's storm sewers, connections that can send sewage or other non-stormwater pollutants into the stormwater system. RIDOT will submit an inventory of the catch basins and other components the system and then implement a comprehensive inspection, cleaning, and repair program followed by continuing periodic inspection and maintenance. Finally, RIDOT must inventory its roads and parking lots and then implement a street sweeping and tracking system to ensure that its network is swept regularly.

RIDOT also paid a civil penalty of \$315,000 and will undertake two Supplemental Environmental Projects (SEPs). The SEPs will preserve, through conservation easements and permanent protection from development, two parcels of land in Johnston and Lincoln, Rhode Island. These lands abut current state park or environmental preserves and lie within the watersheds of impaired waterways subject to the consent decree.

Addressing Water Pollution from Coal Mines in West Virginia, Virginia, Pennsylvania, Kentucky, and Maryland

The settlement in *United States, et al. v. Arch Coal*, (S.D.W.Va.), resolved allegations that Arch Coal and its subsidiaries under the International Coal Group Inc. (ICG) umbrella violated discharge limits for aluminum, manganese, iron, and total suspended solids in their state-issued NPDES permits on more than 500 occasions over six years. Altogether, there were over 8,900 days of alleged violations. EPA discovered the violations by inspecting ICG facilities and projects, reviewing information provided by the companies, and coordinating with the affected state governments. The West Virginia Department of Environmental Protection, the Commonwealth of Virginia, and the Pennsylvania Department of Environmental Protection were co-plaintiffs with the United States.

Arch, one of the nation's largest coal companies, and the ICG subsidiaries agreed to conduct comprehensive upgrades to their operations to ensure compliance with the Clean Water Act. The settlement resolved Clean Water Act violations related to illegal discharges of pollutants at the companies' coal mines in West Virginia, Virginia, Pennsylvania, Kentucky, and Maryland. The companies agreed to pay a \$2 million civil penalty.

Arch and the ICG entities filed for bankruptcy protection in early 2016. Although the reorganized companies might not ultimately pay the full civil penalty, the reorganization plan (which went into effect on October 5, 2016) confirms that requirements of the consent decree compelling the companies to carry out upgrades and other work remain in effect.

Addressing Water Pollution from a Mine Complex in Western Pennsylvania

The U.S. government's complaint in *United States and the Pennsylvania Department of Environmental Protection v. Consol Energy Incorporated, et al.* (W.D. Pa.), alleges chronic exceedances of osmotic pressure (OP) and other limits in Consol's Clean Water Act permits governing discharges from the Bailey Mine Complex in Greene and Washington Counties, Pennsylvania. The discharges primarily entered tributaries of the Ohio River. Pennsylvania limits the osmotic pressure of discharges to protect aquatic life from excess amounts of total dissolved solids (TDS). Excessive TDS entering into a water body can increase the salinity of the water, harm aquatic life, and impact drinking water quality.

Under the terms of the consent decree, Consol Energy Inc., CNX Coal Resources, and Consol Pennsylvania Coal Co. LLC have agreed to measures that will prevent discharges of contaminated mine waters from the mine complex to nearby streams. EPA estimates that implementation of the consent decree will eliminate more than 2.5 million pounds of pollutants in the form of TDS. The company also agreed to conduct regular long-term monitoring to ensure sufficient storage capacity to prevent future discharges, develop contingency plans to be implemented should future discharges become likely, and implement an environmental management system to ensure compliance with the Clean Water Act and other environmental laws. In addition, Consol agreed to pay a \$3 million civil penalty.

Addressing Water Pollution from a Cement Plant in California

Selenium is a naturally occurring element in limestone and other rock formations. When discharged at high concentrations to waterways, however, selenium is toxic to fish and other aquatic life and to birds and other animals that consume selenium-contaminated aquatic organisms.

In *United States, et al. v. Lehigh Southwest Cement Company and Hanson Permanente Cement*, (N.D. Cal.), the United States and the state of California alleged that from at least 2009 until 2014, the Lehigh cement plant near Cupertino, California, routinely discharged excessive selenium into Permanente Creek, a tributary of San Francisco Bay. The plant's discharges also routinely exceeded standards for total suspended solids, total dissolved solids, turbidity, and pH, and sometimes exceeded standards for mercury, hexavalent chromium, nickel, and thallium. Permanente Creek is listed as "impaired" for selenium under the Clean Water Act and provides important habitat for red-legged frogs, a threatened species under the Endangered Species Act. The plant is

owned by Hanson Permanente Cement Inc. and operated by Lehigh Southwest Cement Co.

The settlement of the matter requires Lehigh to construct an advanced wastewater treatment system and make other facility improvements to significantly reduce its discharges of selenium and other metals. Lehigh already installed an interim treatment system; the permanent system will be completed by 2017. Lehigh will make other facility improvements to remove sediment from its stormwater runoff. The company will spend more than \$5 million in total to come into compliance with the Clean Water Act. Lehigh also paid \$2.55 million in civil penalties to settle the case, half to the United States and half to the state of California.



Lehigh Hanson Cement Plant, Google Maps

Otherwise Protecting the Nation's Waters and Wetlands

In *United States & West Virginia v. James C. Justice Companies, Inc.* (N.D.W.Va.), ENRD, in cooperation with the State of West Virginia, achieved a favorable settlement to resolve CWA violations in Monroe County, West Virginia, that resulted when a landowner hired a contractor to place 20 concrete dams in a series of streams with the intent of improving recreational trout fishing. Under the court-approved settlement, the defendants are required to remove the dams, restore the streams, provide compensatory mitigation, and pay a civil penalty of \$345,000.

The Division obtained summary judgment on CWA liability in *Duarte Nursery v. U.S. Army Corps of Engineers* (E.D. Cal.). The Corps had issued a cease and desist order in response to the nursery's ripping activities in vernal pools, vernal swales, and streams, including Coyote Creek, a tributary of the Sacramento River. The nursery challenged the issuance of the order as a violation of Fifth Amendment procedural due process protections. After the court denied our motion to dismiss the challenge as premature, ENRD filed a Clean Water Act civil enforcement counterclaim. The nursery then amended its complaint to add a retaliatory prosecution claim to enjoin our pursuit of the counterclaim. On June 10, 2016, the court granted our motions for summary judgment and denied the nursery's cross-motions, finding that Duarte Nursery and its president, John Duarte, are liable under the Act, that a cease-and-desist order is not a deprivation under the Fifth Amendment, and that the United States has not waived sovereign immunity for decisions to bring suit. The issue of what remedy (civil penalty and injunctive relief) should be granted on our enforcement counterclaim was left for trial at a later date.

ENSURING CLEAN UP OF OIL AND HAZARDOUS WASTE

Recovering Penalties and Damages from Oil Spills

Clean Water Act Section 311 makes it unlawful to discharge oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in quantities that may be harmful to the environment or public health. In addition, the Coast Guard has promulgated spill-prevention regulations for vessels and other facilities. Penalties paid under Section 311 go into the federal Oil Spill Liability Trust Fund, which is used to pay for federal response activities and to compensate for damages.



ATP Innovator Being Towed, Department of Justice

The Gulf of Mexico

In March 2012, a floating oil-and-gas production platform known as the ATP Innovator was operating in the area of the Mississippi Canyon in the Gulf of Mexico, approximately 45 nautical miles offshore of southeastern Louisiana. Interior's Bureau of Safety and Environmental Enforcement (BSEE) inspected the platform, discovering that ATP had been discharging both oil and an unauthorized chemical dispersant to mask the oil. In February 2013, the Division filed *United States v. ATP*

Oil and Gas Corporation, et al. (E.D. La.), a joint enforcement action by BSEE and EPA, alleging claims under the Clean Water Act and the Outer Continental Shelf Lands Act (OCSLA).

The settlement with ATP involved three proceedings: the U.S. action filed in the Eastern District of Louisiana, an administrative action by BSEE, and ATP's bankruptcy proceeding in the Southern District of Texas. First, the consent decree approved by the District Court for the Eastern District of Louisiana resolved the claims of the United States against ATP in that action by imposing a CWA civil penalty of \$38 million. Second, BSEE cited ATP in an administrative proceeding for several violations of OCSLA related to the oil discharges and other improper operations on the platform. Finally, in the bankruptcy proceeding — *In re: ATP Oil and Gas Corporation* (Bankr. S.D. Tex.) — the United States obtained an allowed unsecured claim for the \$38 million (the amount of the penalty imposed by the settlement in the Eastern District of Louisiana), and BSEE obtained an allowed claim of \$3.85 million for the violations BSEE had been pursuing administratively.

American Samoa

In *United States v. Tri-Marine Management Company LLC, et al.* (D. Haw.), the Department of Justice and the Coast Guard alleged that the Tri-Marine companies were liable for the October 2014 oil spill from their commercial tuna-fishing vessel, the *Capt. Vincent Gann*, into Pago Pago Harbor in American Samoa, and related



**Chemical drums at a newly discovered potential NPL site,
Environmental Protection Agency**



**Soil excavation and clean up at a Superfund site,
Environmental Protection Agency**



Captain Vincent Gann Dry Docked, Department of Justice

violations of the Coast Guard's spill prevention regulations.

It is illegal to store fuel in the bulbous bow of a vessel. Yet on October 16, 2014, when the *Capt. Vincent Gann* returned to Pago Pago Harbor after a long fishing voyage and struck two moored fishing vessels, at least 35 barrels of marine fuel oil flowed out of the bulbous bow. The fuel oil had originally been stored in two of the vessel's fish holds, but was later transferred from the fish holds to the bulbous bow to make room for tuna in the holds.

The complaint alleged the vessel stored the oil illegally in the bow to extend the duration of the fishing voyage and allow the ship to store a larger catch of fish. The consent decree required Tri-Marine to pay \$1.05 million in civil penalties and to perform inspections and corrective measures across its entire fleet of ten vessels based in American Samoa.

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Resolving Civil Claims in the Deepwater Horizon Explosion and Oil Spill

After five years of fast-paced litigation, including a three-phase trial of the United States' civil penalty claim and intense work on the claim for natural resource damages, the Division led many federal agencies and the five Gulf States in negotiating a proposed settlement resolves the governments' civil claims against BP arising from the April 20, 2010, blowout of the Macondo well and the massive oil spill in the Gulf of Mexico.

In April 2016, the United States District Court for the Eastern District of Louisiana entered this consent decree resolving civil claims of the United States and the five Gulf Coast states against BP. Under the consent decree, BP will pay the U.S. and the five Gulf States more than \$20 billion, including: a \$5.5 billion civil penalty; more than \$8.1 billion in natural resource damages; \$600 million in further reimbursement of clean-up costs and some royalty payments; and up to \$6 billion in economic damage payments for the Gulf States or their local units of government. This resolution is the largest settlement with a single entity in Department of Justice history. It includes the largest civil penalty ever awarded under the Clean Water Act, the largest-ever natural resources damages settlement and massive economic damages payments to our state partners.

The United States received numerous comments on both the proposed federal consent decree and the 1,700-page draft damage assessment and restoration plan published by the Deepwater Horizon Trustees Council, a council comprised of representatives of the five Gulf States and four federal agencies. The plan includes a comprehensive assessment of natural resource injuries resulting from the oil spill and a detailed framework for how the trustees will use the natural resource damage recoveries from BP to restore the Gulf environment.

Penalties recovered in connection with the litigation will be distributed under the framework established in the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act). The RESTORE Act will direct about 80% of civil penalties to environmental and economic projects that will benefit the Gulf of Mexico region in the five Gulf States.

Previously, BP entered into a plea agreement with the Department that resolved certain criminal claims against the company for this same disaster. Under that agreement, BP is liable for fines and other sums in excess of \$4 billion.

Conserving the Superfund by Compelling Parties to Clean Up Hazardous Waste and Recovering Superfund Monies

The Division brings actions under CERCLA to require responsible parties to clean up hazardous waste and to recover the costs of cleanups conducted by EPA. In fiscal year 2016, ENRD concluded a number of settlements requiring responsible parties to reimburse the United States for EPA's clean-up costs, to undertake the clean-up work themselves, or both. The Superfund program operates on the principle that polluters should pay for the cleanups rather than pass the costs on to taxpayers. EPA searches for parties legally responsible for the contamination at sites and seeks to hold those parties accountable for the costs of investigations and cleanups.

The American Cyanamid Superfund Site, New Jersey

The American Cyanamid Superfund Site, in Bridgewater Township, New Jersey, has a history of industrial pollution dating back to 1915. For nearly a century, chemicals were manufactured at the property. A number of impoundments used for the storage and disposal of waste eventually contaminated the soil and groundwater. The site was placed on the federal Superfund list in 1983. The soil, groundwater, and waste disposal areas are contaminated with volatile and semi-volatile organic compounds and heavy metals. The groundwater underlying the site is highly contaminated with benzene and other contaminants. Many of the site contaminants are known or suspected to cause cancer in people and animals, and benzene can cause cancer in people.

In *United States v. Wyeth Holdings LLC*. (D.N.J.), the Department of Justice and EPA settled with Wyeth Holdings LLC, a subsidiary of the Pfizer Corporation. Wyeth will perform nearly \$194 million worth of clean-up work and pay \$1 million for EPA's past costs of overseeing clean-up work at the site. The clean-up work includes addressing contaminated soil, groundwater, and six waste disposal areas at the site. The agreement provides for the closure of two waste disposal areas, the contents of which were previously excavated and sent off-site. Also, Wyeth will continue to operate a system for collecting and treating contaminated groundwater under the site to prevent the water from seeping into the Raritan River, Cuckels Brook, or Middle Brook. A study to evaluate alternatives for cleaning up two additional waste disposal areas is ongoing.



Wyeth Holdings Aerial View, Department of Justice

The Copper Basin Mining District Superfund Site, Tennessee

From the mid-1800s until 1989, the Copper Basin Mining District Superfund Site in Eastern Tennessee was the location of extensive copper, iron, and sulfur mining operations, mineral processing, and sulfuric acid production. Throughout that time, sulfuric acid, lead, mercury, polychlorinated biphenyls (PCBs), and other wastes generated by those operations were disposed of in and around Davis Mill Creek and North Potato Creek, both

of which discharge to the Ocoee River. Over the last 25 years, in cooperation with the Tennessee Dept. of Environment and Conservation, EPA has overseen extensive work at the site, including the construction of two of the three water treatment plants (WTPs). Over 67.3 billion gallons of water have been treated. To date, 535,231 kilograms of hazardous waste, oil, equipment, and soil contaminated with lead and PCBs have been removed from the site and properly disposed.

In *United States and the State of Tennessee. v. OXY USA, Incorporated* (E.D. Tenn.), OXY, a subsidiary of Occidental Petroleum Co., settled with the Department of Justice and EPA by agreeing to clean up two watersheds that flow into the Ocoee River and monitor sediments in the river. The settlement requires the company to spend an estimated \$40 million to maintain and operate a water treatment system and reimburse EPA for approximately \$10.8 million toward costs incurred in its past clean-up actions at the site.



Vintage Photo of OXY Site, Department of Justice

In addition, the Tennessee Valley Authority (TVA) agreed to implement measures at its dams along a 26-mile stretch of the Ocoee River in order to prevent contaminants from becoming mobilized and contaminating the river. EPA will oversee the work. Also under the consent decree, the United States, on behalf of the Department of Defense and the Department of Commerce, agreed to pay OXY approximately \$12.6 million to settle claims for OXY's past and future clean-up costs, based primarily on the United States' ownership and operation of a portion of the site between 1941 and 1946. Taking into account the new settlement and the work previously performed, over \$217 million is being devoted to cleaning up the contamination at this site in Polk County, Tennessee.

Protecting the Public Fisc from Excessive or Unwarranted Claims for Reimbursement of Clean Up Costs

The Division has had significant successes defending against claims seeking reimbursement of costs that cannot be recovered under CERCLA. In *United States v. Sterling Centrecorp, Inc.* (E.D. Cal.), an enforcement action on behalf of EPA to recover response costs at the former Lava Cap Mine near Grass Valley, California, defendant filed a counterclaim against the United States alleging that government was an "operator" of the mine, and thus liable under CERCLA, based solely on an order of the War Production Board that temporarily restricted gold mining during World War II. On September 20, 2016, the court granted summary judgment in our favor, concluding that the Board's mere issuance and enforcement of the order was insufficient to give rise to "operator" liability under CERCLA.

In *ARCO v. United States* (D.N.M.), the plaintiff, Atlantic Richfield Company (ARCO), sought to recover over \$40 million paid to the Laguna Pueblo in 1986 to conduct reclamation work at the Jackpile-Paguate Uranium Mine Site in New Mexico, arguing that this payment constituted a response cost recoverable under Sections 107 and 113 of CERCLA. On February 9, 2016, the court granted ENRD's motion to dismiss the complaint, agreeing with the United States that ARCO's claim for money spent in 1986 was time-barred, and that ARCO's more recent expenditures hiring consultants, surveying the site, and identifying responsible parties were unrecoverable litigation costs. The court also rejected ARCO's attempt to proceed with a Section 113 claim before the United

States had sought cost recovery from ARCO, declining to allow ARCO to “force the United States’ hand” concerning the timing of litigation.

The Division also settles claims under CERCLA seeking to impose liability for clean up on federal agencies where a fair apportionment of costs can be reached. In fiscal year 2016, these included several multimillion-dollar settlements:

- On March 4, 2016, the court entered a consent decree in *State of Alaska v. United States* (D. Alaska), resolving claims against the Air Force and its contractors for PCB and trichloroethylene (TCE) cleanup costs arising from a Cold War-era communications site in Aniak, Alaska. Under the decree, the United States will pay \$8.3 million to resolve its past and future liability with respect to PCB clean-up costs, and will contribute \$495,000 to perform a remedial investigation and feasibility study to address the TCE contamination.
- ENRD successfully resolved an administrative action by EPA that required the Navy to remediate waste disposed of in the Gorst Creek Ravine Landfill in Port Orchard, Washington. Pursuant to a settlement agreement and consent order executed on January 19, 2016, between EPA, the Navy, and the current owner of the property, the Navy will pay more than \$24 million to resolve its liability and facilitate clean up of the site.
- In *The Boeing Company v. Air Force* (D. Kan.), the Boeing Company threatened claims against the Air Force to recover response costs under CERCLA in connection with clean up of contamination at the former Air Force Plant 13 in Wichita, Kansas. After a formal mediation process led to agreement on a settlement amount, on March 7, 2016, the court entered a consent decree under which the United States will pay \$32,250,000 to fully resolve Boeing’s claims.
- In *The Boeing Company v. Air Force* (C.D. Cal.), Boeing brought claims under CERCLA for response costs arising from hazardous substance contamination – primarily TCE and hexavalent chromium – at Boeing’s former aircraft manufacturing plant (former Air Force Plant 15) in Long Beach, California. After formal mediation, the parties reached an agreement to settle Boeing’s claims for past and future response costs. On April 20, 2016, the court entered a consent decree under which the United States will pay Boeing \$40,750,000 to fully resolve its claims. Boeing had initially demanded more than \$200 million in alleged past and estimated future response costs.
- On December 21, 2015, the court entered a consent decree resolving *Chartis Specialty Insurance Co. v. United States* (N.D. Cal.). Under the consent decree, the United States will pay \$7,750,000 to an insurer for past and future cleanup costs at a former defense contractor’s explosive ordnance manufacturing plant in Hollister, California. The settlement resolves claims under CERCLA arising from the remediation of contaminants found in the soil and underlying groundwater at and migrating from the site. In a second case involving the same site, *Whittaker Corp. v. United States* (N.D. Cal.), the former owner and operator the ordnance plant, brought claims under CERCLA for response costs arising from ongoing environmental remediation of soil and groundwater. On June 3, 2016, the court entered a consent decree under which the United States will pay Whittaker \$1,732,000 for its past cleanup costs, and agrees to reimburse 20% of Whittaker’s future cleanup costs (presently estimated at approximately \$20 million).
- In 2012, Verizon settled a claim by the Hicksville Water District seeking to recover the cost of constructing a water treatment plant to address groundwater contamination migrating from a former uranium manufacturing facility in Hicksville, New York, with Verizon paying the Water District \$5.65 million. Verizon in turn sought contribution from the United States arising out of federal involvement at the site. On July 5, 2016, the parties executed a settlement that would resolve Verizon’s potential claim against the United States for a payment of approximately \$2.825 million.

Securing Natural Resources Damages

In addition to authorizing lawsuits to compel clean up and recoup clean-up costs, CERCLA allows separate claims for money damages when natural resources have been injured by releases of hazardous substances. These actions can only be brought by the United States, states, and Native American tribes, because claims for natural resource damages (NRD) seek compensation for public losses from injuries to natural resource. To ensure that the public benefits from any compensation that the government obtains, CERCLA specifies that recoveries on NRD claims must be used to restore, replace, or acquire the equivalent of the resources that were injured by the hazardous substances.

The Thea Foss and Wheeler-Osgood Waterways in Tacoma's Commencement Bay

In *United States, et al. v. Advance Ross Sub Company, et al.* (W.D. Wash.), more than 56 settling parties agreed to resolve their liability for natural resource damages caused by hazardous substances released into the Thea Foss and Wheeler-Osgood Waterways in Tacoma's Commencement Bay. For many decades, the Thea Foss and Wheeler-Osgood Waterways received discharges of industrial waste from a variety of industrial sources and sewers. The contaminants discharged include cadmium, lead, zinc, polychlorinated biphenyls, and polycyclic aromatic hydrocarbons (PAHs). In addition, bis(2ethylhexyl) phthalate was discovered to be widespread throughout the Thea Foss waterway at levels associated with biological effects. The settling parties are companies, individuals, and state or local governmental entities that are past or current owners or operators of facilities that released hazardous substances to the waterways (or successors to past owners or operators). The complaint asserts claims for natural resource damages in Commencement Bay under CERCLA, the Clean Water Act, the Oil Pollution Act, and Washington's Model Toxics Control Act.

The settlement resulted from the collaborative efforts of the settling parties and the natural resource trustees: NOAA, Interior, the Washington State Department of Ecology, the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe. The State of Washington and the two tribes were co-plaintiffs with the United States.

In the consent decree, the settling parties agreed to fund the restoration of key salmon habitat on the White River, which flows through King and Pierce Counties in Washington State and is one of the Puget Sound's most important watersheds for imperiled salmon and steelhead. The habitat restoration project will reopen 121 acres of historic floodplain for salmon. Specifically, the settling parties will fund the Countyline Levee Setback Project, which will restore and provide off-channel rearing habitat for salmon and steelhead on the Lower White River in the vicinity of Pacific, Auburn, and Sumner, Washington. The project will also help reduce the risk of flood damage for more than 200 nearby homes and businesses by allowing floodwaters more room to flow without damage.

The settling parties will monitor and manage the project under a 10-year plan that ensures at least 32.5 of the 121 acres are inundated by the river and thus accessible to fish. The parties also will pay more than \$1 million towards the natural resource trustees' assessment, oversight, and long-term stewardship costs.

This is the twentieth natural resources settlement related to pollution in Commencement Bay, long the industrial heart of Tacoma. Through these settlements, more than 350 acres of salmon habitat will have been restored to offset the injuries to salmon and other fish from pollution in Commencement Bay.

Talmadge Creek and the Kalamazoo River near Marshall, Michigan

Enbridge Energy Limited Partnership's pipeline called "Lakehead Line 6B" ruptured near Marshall, Michigan, on July 25, 2010. Enbridge then discharged additional oil from Line 6B during two attempts to restart the ruptured pipeline on July 26, 2010. The oil spill was one of the largest inland oil spills in U.S. history. Oil discharged from Line 6B entered Talmadge Creek and ultimately extended approximately 38 miles down the Kalamazoo River. The oil impacted over 1,560 acres of stream and river habitat as well as floodplain and upland areas, injuring birds, mammals, reptiles, and other wildlife. The river was immediately closed to the public and sections remained closed for several years, reducing recreational and tribal uses of the river.

The 2015 consent decree in *United States v. Enbridge Energy, L.P., et al.* (W.D. Mich.), resolves claims of federal, state, and tribal trustees for natural resource damages caused by the 2010 rupture of Enbridge's Line 6B. The natural resource trustees in this case are the Michigan Department of Environmental Quality, the Michigan Department of Natural Resources, the Michigan Department of the Attorney General, the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, the Nottawaseppi Huron Band of the Potawatomi Tribe, and the Match-E-Be-Nash-She-Wish Band of the Potawatomi Indians (Gun Lake Tribe). The State of Michigan and the two tribes were co-plaintiffs of the United States.



Enbridge Energy Kalamazoo River Lakehead Line 6b oil spill site, Google Maps

Under the settlement, several Enbridge affiliates will be responsible for completing numerous natural resource restoration projects along the Kalamazoo River and will pay an additional sum of nearly \$4 million to fund additional restoration projects, reimburse natural resource damage assessment costs of federal and tribal trustees, and support ongoing restoration planning activities of the natural resource trustees.

The trustees reached the NRD settlement in conjunction with a separate settlement that resolved related state law claims of the state of Michigan. The United States' 2015 NRD settlement incorporates elements of the state settlement requiring Enbridge, among other things, to perform work to restore, or compensate for, injured natural resources along the Kalamazoo River, at an estimated cost of at least \$58 million. The two settlements combined secured an estimated \$62 million or more to restore natural resource damages.

The NRD settlement provides for habitat improvement projects to address injuries to aquatic organisms, fish, reptiles, mammals, and birds, as well as for enhancements to public access and use of the Kalamazoo River for recreational, educational, and cultural purposes. The trustees have proposed to carry out several projects with funding from the NRD settlement. The Damage Assessment and Restoration Plan and Environmental Assessment for the spill was issued in final on October 20, 2015. The NRD settlement addresses Enbridge's liability for natural resource damages under the Oil Pollution Act (OPA) and Michigan's Natural Resources and Environmental Protection Act.

In July 2016, the Department of Justice and EPA announced a different settlement with Enbridge that addresses EPA's claims for spill prevention and civil penalties. Under that second settlement, Enbridge would spend at least \$110 million on measures to prevent oil spills and pay \$62 million in penalties. The public comment period on the proposed consent decree closed on October 21, 2016.

Addressing Hazardous Waste Generated by the Production of Phosphoric Acid and Fertilizer

While certain wastes generated from phosphoric acid processing operations are not regulated as hazardous wastes when properly managed under RCRA, these wastes become subject to hazardous waste regulations when a facility commingles them with other hazardous wastes not qualifying for the exemption. Through its National Enforcement Initiative on Reducing Pollution from Mineral Processing Operations, EPA is requiring



New Wales Facility, Florida, Department of Justice

phosphate fertilizer production facilities nationwide to cease commingling hazardous waste with exempt waste, reduce the storage volume of stored hazardous wastewaters, ensure that waste stacks and ponds have environmentally protective barriers, and verify the structural stability of waste stacks and ponds. As part of that initiative, EPA and State personnel inspected the facilities of Mosaic Fertilizer, LLC (Mosaic) and discovered that Mosaic was mixing certain types of highly corrosive hazardous wastes from its fertilizer operations

with the phosphogypsum and mineral processing wastewater in its stacks and ponds, which is a violation of federal and state hazardous waste laws.

In *United States and the Florida Department of Environmental Protection v. Mosaic Fertilizer, LLC* (M.D. Fla.) and *United States and the Louisiana Department of Environmental Protection v. Mosaic Fertilizer, LLC* (E.D. La.), the Department of Justice and EPA reached a settlement with Mosaic that will reduce the generation of hazardous and other wastes by over 23 million tons per year at four Mosaic facilities in Florida and two in Louisiana. The settlement will further ensure the proper treatment, storage, and disposal of an estimated 60 billion pounds of hazardous waste already on site at these facilities, and the proper management of contaminated wastewater so that it does not pose a threat to groundwater resources. The settlement resolves a series of alleged violations by Mosaic of RCRA, which regulates how hazardous waste must be stored, handled, and disposed. Louisiana and Florida joined the United States as co-plaintiffs in the cases.

Mosaic Fertilizer is one of the largest producers of fertilizer and phosphate products in the world. At Mosaic's facilities, mined phosphate ore is reacted with sulfuric acid to produce phosphoric acid, which produces large quantities of a solid material called phosphogypsum and highly acidic wastewater. These wastes are stored in large stacks, tanks, ditches, and ponds; the stacks can reach 500 feet high and cover more than 600 acres, making them some of the largest man-made waste piles in the United States. The stacks also contain several billion gallons of highly acidic wastewater, which can threaten human health and cause severe environmental damage if it reaches groundwater or local waterways.

Under the settlement, Mosaic will spend approximately \$170 million over the next several years to implement an innovative reconfiguration of their current operations and waste management and recycling systems. The development of these industry-leading technologies will optimize resource efficiency and decrease the amount of raw materials required to produce fertilizer. This case spurred Mosaic to develop advanced engineering controls and practices to recover and reduce some types of acid wastes, which will reduce the amount and toxicity of the waste materials stored at Mosaic's facilities, and the severity of potential spills, all while cutting Mosaic's costs for treating material at closure. The settlement also provided comprehensive design and operating requirements for Mosaic's phosphogypsum stack systems and stringent groundwater monitoring requirements.

Mosaic also will operate under a comprehensive set of controls that regulate how the company constructs, operates, and closes phosphogypsum stack systems. These controls include installing liners under new or expanded stacks, ponds, and ditches; managing and minimizing acidic wastewater on-site; monitoring groundwa-

ter; inspecting stacks for signs of potential problems; closing stacks, ponds, or ditches when they reach the end of usability; and providing financial means to fund the closure and longterm care of all of its phosphogypsum stack systems.

The financial assurance to be provided by Mosaic Fertilizer includes a \$630 million trust fund, which will be invested until it reaches full funding of \$1.8 billion, the amount needed to close the operating facilities in compliance with RCRA. The settlement also requires Mosaic Fertilizer to provide a \$50 million letter of credit until the trust fund reaches full funding. These funds will cover the costs of closing four Mosaic facilities: the Bartow, New Wales, and Riverview plants in Florida and the Uncle Sam plant in Louisiana. The funds also will be used for the treatment of hazardous wastewater remaining at those facilities as well as the long-term care of those facilities and two additional facilities that are already being closed. The Mosaic Company, Mosaic Fertilizer's parent company, will provide a corporate guarantee for this work until the trust reaches full funding.

Mosaic also will fund a \$1.2 million environmental project in Florida to mitigate and prevent certain potential environmental impacts associated with an orphaned industrial property located in Mulberry, Florida. In Louisiana, Mosaic will spend \$1 million to fund studies regarding statewide water quality issues. In civil penalties, Mosaic will pay \$5 million to the United States, \$1.55 million to co-plaintiff the State of Louisiana, and \$1.45 million to co-plaintiff the State of Florida.

Enforcing Clean Up Obligations in Bankruptcy Cases

The Division takes actions in bankruptcy cases to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. During fiscal year 2016, the Division obtained eleven settlement agreements in bankruptcy proceedings. Debtors or parties in interest were obligated to pay or perform work valued at over \$67 million. In addition, debtors paid over \$7 million during fiscal year 2016 under bankruptcy agreements concluded by the Division in prior fiscal years. Altogether, debtors or parties in interest in bankruptcy cases reimbursed the federal government for over \$12.5 million in previously expended costs, and were obligated to pay or perform work valued at over \$61.5 million to clean up hazardous waste sites.

MAKING PROGRESS TOWARD ENVIRONMENTAL JUSTICE

Clean water, air, and land are basic necessities—not luxuries—that every American should enjoy wherever they live, work, play, and learn, regardless of their income status or race. However, the burdens of pollution often still fall disproportionately on low-income and minority communities who do not have a meaningful opportunity to voice their concerns. Environmental justice means that all Americans are afforded fair treatment and full protection under the nation’s laws, including environmental, civil rights, and health and safety laws. Furthermore, every American should have the opportunity to participate meaningfully in the decision-making processes that affect their environment. The goals and principles of environmental justice are part of ENRD’s mission and are appropriately integrated into our work. In 2016, ENRD worked in a number of ways to advance the goals of environmental justice and continued to achieve tangible results that benefited communities.

The Department of Justice, along with 16 other federal agencies and White House offices that signed a Memorandum of Understanding on Environmental Justice (MOU) in August 2011, works to lead the federal government’s efforts to help all communities in America achieve environmental justice. Building upon Executive Order 12898—the federal government’s first statement of an environmental justice policy—the MOU reflects the federal government’s renewed commitment to environmental justice. The MOU promotes interagency collaboration and public access to information about agency work on environmental justice, and specifically requires each agency to publish an environmental justice strategy, provide an opportunity for public input on those strategies, and produce annual implementation progress reports. This past year, the Division achieved significant results for the American people as it continued to implement its Environmental Justice Strategy, Executive Order 12898, and the MOU.

Collaborative Work with Other Federal Agencies and Department Components in Fiscal Year 2016

Interagency Working Group on Environmental Justice (EJ IWG)

EPA and the White House Council on Environmental Quality (CEQ) co-lead the efforts of the Environmental Justice Interagency Working Group (EJ IWG), which was established by Executive Order 12898. The EJ IWG demonstrates the importance of federal agencies working collaboratively to enhance multi-agency support of holistic community-based solutions to address environmental concerns. The EJ IWG facilitates the active involvement of all federal agencies in implementing Executive Order 12898 by minimizing and mitigating disproportionate negative impacts on overburdened communities and fostering environmental, public health, and economic benefits for all Americans. The EJ IWG provides a forum for federal agencies collectively to advance environmental justice principles. The agencies work together to assist communities in building capacity to promote and implement innovative and comprehensive solutions to address environmental justice concerns.

Through its work with the EJ IWG, the Department has assumed a leadership role in ensuring a coordinated federal response to environmental justice issues. Representatives from ENRD and the Civil Rights Division (CRT) regularly participate in EJ IWG senior staff-level meetings and identify ways the Department can support and further the EJ IWG’s work. On August 29, 2016, EPA Administrator Gina McCarthy hosted a Cabinet-level meeting of the EJ IWG. The Department’s Acting Associate Attorney General William Baer and senior leadership



Air Pollution, Wikipedia



Danger sign, Tennessee.gov

from ENRD and CRT attended this productive meeting.

Implementing the Interagency Memorandum on Environmental Justice

The Department played an important leadership role in the conception and development of the MOU and continues to play an important role in its implementation. The MOU identifies four focus areas for the EJ IWG as agencies implement their environmental justice strategies: (1) implementation of NEPA; (2) implementation of Title VI of the Civil Rights Act of 1964, as amended (Title VI); (3) addressing impacts from climate change; and (4) addressing im-



Environmental Justice Seal, Environmental Protection Agency

acts from commercial transportation and supporting infrastructure (often referred to as “goods movement”). The Charter to the MOU was updated in 2015 and now includes a governance structure and a requirement for agency senior leadership to meet twice a year to discuss agency collaboration efforts and commitments that will help further efforts to achieve environmental justice.

The EJ IWG governance structure identifies permanent EJ IWG committees on the following four topics: Public Participation; Regional Interagency Working Groups (RIWG); Strategy and Implementation Progress Reports; and Title VI of the Civil Rights Act of 1964.

Every three years the EJ IWG also determines if there are additional focus areas for federal agencies to consider and address. During fiscal years 2016–2018, the EJ IWG will maintain the following additional committees to address these five focus areas: Native Americans/Indigenous Peoples; Rural Communities; Impacts from Climate Change; Impacts from Commercial Transportation (Goods Movement); and NEPA.

In 2016, ENRD co-chaired the EJ IWG committees on Public Participation, Strategy and Implementation Progress Reports, and Native Americans/Indigenous Peoples. The Division also actively participated in other committees such as the RIWG Committee and the NEPA Committee. The RIWG Committee developed a very successful “*Access & Awareness Webinar Series*,” a monthly event that gives the public access to the EJ IWG and increases community awareness of federal agency environmental justice strategies and holistic community-based solutions to address environmental justice issues.

EJ IWG NEPA Committee

ENRD’s Natural Resources Section (NRS), continues to be a vital member of the NEPA Committee of the EJ IWG, which is dedicated to cross-agency education and coordination to foster the incorporation of environmental justice principles into decision-making through the NEPA process. NEPA requires federal agencies, before they act, to assess the environmental consequences of their proposed actions for the dual goals of informed agency decision-making and informed public participation. Additionally, NEPA gives communities the opportunity to access public information on and participate in the agency decision-making process for federal actions. The Presidential Memorandum accompanying Executive Order 12898 underscores the importance of procedures under NEPA to “focus federal attention on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice.”

In 2016, NRS’ work with the NEPA Committee has principally been through two Subcommittees: the Education and Community of Practice (COP) Subcommittees. In March 2016, the EJ IWG released the NEPA Committee’s

report on “Promising Practices for EJ Methodologies in NEPA Reviews.” The report provides a framework for meaningful engagement, developing and selecting alternatives, and identifying minority and low-income populations. NRS helped ensure that the report was disseminated within DOJ and also assisted the NEPA Committee in various presentations to federal agencies to promote further awareness and use of the Promising Practices report. The NEPA Committee’s Education Subcommittee is also working to finalize a National Training Product as a companion to the Promising Practices report.

Increasing Communication and Awareness across Federal Agencies

The Division continues to collaborate directly with other federal agencies to increase dialogue on and awareness of environmental justice issues. For example, ENRD’s Counsel for Environmental Justice and CRT’s representative to the EJ IWG meet jointly with representatives from the U.S. Department of Agriculture’s Office of General Counsel and other parts of the agency to discuss environmental justice. In addition, the “Law Leaders on Environmental Justice,” a cross-agency group of career attorneys that ENRD and EPA’s Office of General Counsel established five years ago to discuss legal issues regarding environmental justice, continues to be an important forum, with ongoing dialogue and education on topics such as EPA’s environmental justice mapping and screening tool known as EJSCREEN.

Participating in Community and Other Outreach

Community engagement is an important part of the EJ IWG’s responsibilities under EO 12898. As a co-chair of the EJ IWG Public Participation Committee along with EPA, ENRD continues to work with the EJ IWG to facilitate community engagement. The committee strives to provide communities with opportunities to access the EJ IWG to raise awareness, seek multi-agency support of community-based solutions to address environmental justice issues, and share success stories. For example, in 2016 a number of EJ IWG meetings included presentations by community activists and EJ advocates.

The Department continues to use a variety of other forums to hear from communities about their concerns. For example, an ENRD representative attended the March 2016 EPA National Environmental Justice Advisory Council public meeting held in Gulfport, Mississippi. These meetings afford communities the opportunity to comment on environmental justice issues of concern to them.

ENRD and other components of the Department continue to engage in community outreach to ensure that the Department understands and is responding to community concerns. The Department approaches outreach in a variety of ways, including community meetings, visits by senior Department officials, participation in EJ IWG community meetings and calls, participation in environmental justice conferences, and outreach in conjunction with cases.

Training and Increasing Awareness

ENRD continued to focus on increasing awareness and understanding of environmental justice issues among its attorneys and staff. For example, in September 2016, ENRD included environmental justice in its training for new attorneys entering the Division. During 2016, ENRD also worked to foster greater understanding of environmental justice principles within the Department of Justice. The Division has been working with the Executive Office for United States Attorneys to provide the Department’s 93 Offices of the U.S. Attorneys with useful and easily accessible information regarding environmental justice.

Integrating Environmental Justice Principles into ENRD Litigation and Outcomes

The breadth of the Division’s work benefits local communities across the country and reflects the Department’s continued commitment to environmental justice. Through the fair and even-handed enforcement of the nation’s environmental and natural resources laws, ENRD’s Environmental Enforcement and Environmental Crimes Sections and the U.S. Attorneys’ Offices seek to protect all communities from environmental harms. And we work to resolve our cases in the interest of affected communities by finding appropriate ways to en-

sure they have a voice in remedies that affect the places in which they live, work, play, and worship.

Incorporating Environmental Justice in Enforcement Cases

Our efforts to achieve environmental justice in our enforcement cases are reflected throughout this Report. For example, our settlement of Clean Air Act claims against Marathon—described in this Report’s section on addressing air pollution from oil refineries and chemical plants—furtheres our efforts to advance environmental justice in communities like southwest Detroit by requiring improvements in a Detroit refinery that will reduce emissions that disproportionately affect low-income and vulnerable populations, including children. The DELCORA Clean Water Act settlement—described in this Report’s section on municipal wastewater treatment systems—will help reduce the direct exposure of low-income and minority populations to raw sewage, and the settlement includes important provisions regarding public input from and notification of neighboring communities that have suffered disproportionately from pollution.

The following are a few additional examples of how ENRD, in coordination with the U.S. Attorneys’ Offices and our agency partners, furthered environmental justice in 2016:

- In *United States v. J.S.B. Industries, Inc. et al.* (D. Mass.), communities in Chelsea and Lawrence, Massachusetts will receive needed emergency response equipment as a result of the settlement DOJ and EPA reached concerning violations in the handling and release of anhydrous ammonia and the use of sulfuric acid at two wholesale bakeries in Chelsea and Lawrence. The settlement was approved by the court on August 17, 2016.

The violations alleged include failure to comply with the requirements of the Clean Air Act under which facilities that use hazardous chemicals must, among other things, take action to prevent accidental releases and take steps to minimize the consequences of any accidental releases that occur. Additional violations include a failure to comply with chemical reporting requirements of the Emergency Planning and Community Right-to-Know Act and chemical release notification requirements of the Comprehensive Environmental Response, Compensation, and Liability Act.

The Chelsea and Lawrence facilities are in densely populated, urban neighborhoods, in close proximity to residences and other businesses. At JSB’s Chelsea facility, approximately 2,000 pounds of anhydrous ammonia was accidentally released from a refrigeration system in April 2009. Anhydrous ammonia is an extremely hazardous chemical that is corrosive to skin, eyes, and lungs, can be immediately dangerous to life and health, and, under certain conditions, is flammable and explosive. The release triggered a shelter-in-place order by local authorities and exposed two firefighters to anhydrous ammonia, one of whom was hospitalized for medical treatment.

Under the settlement, the defendants will pay a civil penalty of \$156,000. The defendants must also perform a supplemental environmental project (SEP) valued at \$119,000. The SEP requires the defendants to provide emergency response equipment to fire departments serving Chelsea and Lawrence, both of which are low-income and minority communities with environmental justice concerns. The equipment will help these communities better protect their residents and workers by improving their emergency preparedness and abilities to effectively respond to the release of hazardous chemicals. In addition to performing the SEP, before DOJ lodged the settlement with the court, the defendants switched their refrigeration system from anhydrous ammonia to less hazardous liquid nitrogen, at a cost of over \$300,000.

- School children and low-income populations will breathe cleaner air as a result of the settlement reached in *United States v. Detroit Diesel Corp.* (D.D.C.). The settlement, lodged with the court on October 6, 2016, resolves alleged violations of the Clean Air Act by Detroit Diesel in selling heavy-duty diesel engines that were not certified by EPA and did not meet applicable emission standards. Under the settlement, Detroit Diesel will spend \$14.5 million on projects to reduce nitrogen oxide and other pol-

lutants, including replacing high-polluting diesel school buses and locomotive engines with models that meet current emissions standards. Detroit Diesel will also pay a \$14 million civil penalty.

The United States' complaint, filed along with the settlement, alleges that Detroit Diesel violated the Clean Air Act by introducing into commerce 7,786 heavy-duty diesel engines for use in trucks and buses in model year 2010 without a valid EPA-issued certificate of conformity demonstrating conformance with Clean Air Act standards to control nitrogen oxide emissions. The complaint also alleges that the engines did not conform to emission standards applicable to model year 2010 engines.

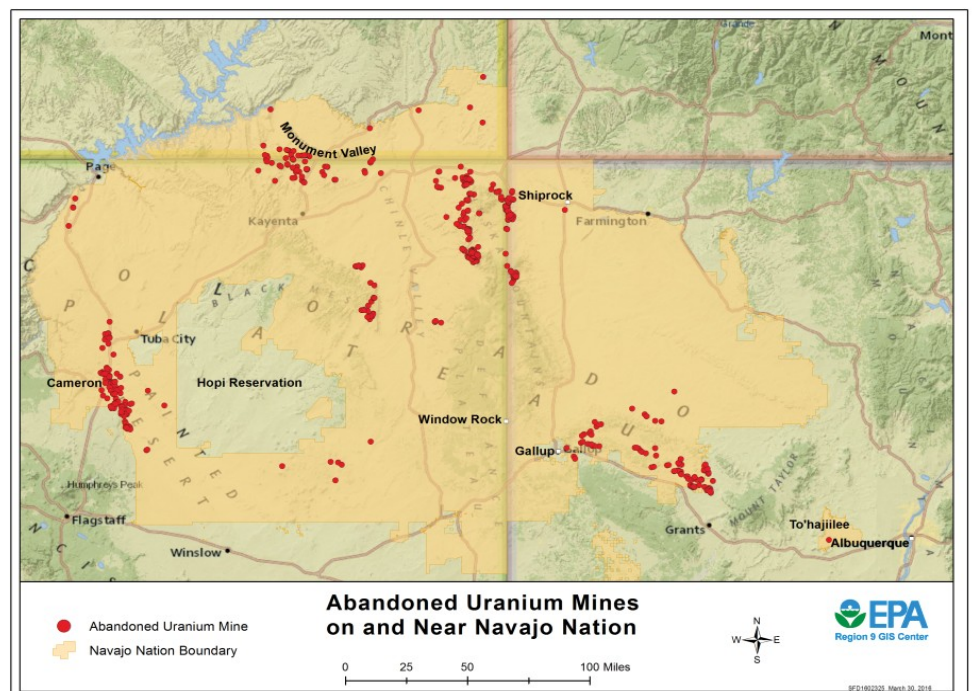
To mitigate the harm posed by the alleged violations, the school bus and locomotive replacement projects required by the settlement will reduce ambient air levels of nitrogen oxide and other pollutants. EPA will approve where the projects are to be performed, based on various criteria, including whether the area already does not meet Clean Air Act standards and whether the area includes low-income communities. In addition, the school bus program will improve air quality inside school buses by reducing exposure to diesel exhaust. Diesel exhaust poses a lung cancer hazard for humans and can cause non-cancer respiratory effects such as asthma.

Detroit Diesel is also required to post data and information about the clean diesel projects on a public website.

Incorporating Environmental Justice in the Defense of Agency Action

An important aspect of ENRD's work involves defending the environmental or natural resources actions of federal agencies. The Division has worked to incorporate the principles of environmental justice into our handling of these cases, which comprise more than half of the Division's work. ENRD works closely with agencies to identify defensive cases that present environmental justice concerns, even where the complaint may not clearly assert that the agency failed to address environmental justice issues adequately. More broadly, in the context of litigation, the Division actively evaluates the depth of the agency's analysis and handling of environmental justice issues as well as the completeness of the decision-making effort in addressing environmental justice concerns. Indeed, rather than merely defending agency analysis of environmental justice issues and decision-making, ENRD implements Executive Order 12898 by proactively looking for ways to address concerns of environmental justice communities outside of the traditional litigation context.

One important recent example involves a settlement the Department announced in July 2016 with the Navajo Nation, under which the United States will provide funding necessary to continue clean-up work at abandoned uranium mines on the Navajo Nation. Specifically, the United States will fund environmental response trusts to clean up 16 priority abandoned uranium mines located across the Navajo Nation. The agreement also provides for evaluations of 30 more abandoned uranium mines, and for studies of two abandoned uranium mines to determine if groundwater or



Abandoned Uranium Mines on and Near Navajo Nation, Environmental Protection Agency

surface waters have been affected by those mines. The legacy of uranium mining on Navajo lands is one of the most severe environmental justice problems in Indian Country. Land near Navajo homes, roads, grazing lands and cultural areas has been contaminated by abandoned mines.

The work to be conducted is subject to the joint oversight and approval of the Navajo Nation Environmental Protection Agency and the United States Environmental Protection Agency (EPA). The United States previously provided \$13.2 million for evaluations at the 16 priority mines in a “Phase 1” settlement executed in 2015. This “Phase 2” settlement agreement is the next step to ensure cleanup of abandoned mines posing the most significant risks to people’s health. It also starts the evaluations of additional mines for cleanup in the future.

The Navajo Nation encompasses more than 27,000 square miles within Utah, New Mexico and Arizona in the Four Corners area. The unique geology of the region makes the Navajo Nation rich in uranium, a radioactive ore in high demand after the development of atomic power and weapons at the close of World War II. Approximately four million tons of uranium ore were extracted during mining operations within the Navajo Nation from 1944 to 1986. The federal government, through the Atomic Energy Commission (AEC), was the sole purchaser of uranium until 1966, when commercial sales of uranium began. The AEC continued to purchase uranium ore until 1970. The last uranium mine on the Navajo Nation shut down in 1986.

Many Navajo people worked in and near the mines, often living and raising families in close proximity to the mines and mills. Since 2008, federal agencies including EPA, the Department of Energy, Interior and its Bureau of Indian Affairs, the Nuclear Regulatory Commission and the Indian Health Service have collaborated to address uranium contamination on the Navajo Nation. The federal government has invested more than \$100 million to address abandoned uranium mines on Navajo lands.

EPA has also compiled a list of 46 “priority mines” for cleanup and performed stabilization or cleanup work at 9 mines. EPA work cleaning up mines has generated 94 jobs for Navajo workers.

This settlement agreement resolves the claims of the Navajo Nation pertaining to costs of engineering evaluations and cost analyses, and cleanups, at the 16 priority mines for which no viable responsible private party has been identified, as well as the costs of evaluations at another 30 such mines, two water studies, and modest costs for pre-assessment of natural resources damages. The area is also seeing results from an earlier settlement. In April 2014, the Justice Department and EPA announced in a separate matter that approximately \$985 million of a multi-billion dollar settlement of litigation against subsidiaries of Anadarko Petroleum Corp. will be paid to EPA to fund the clean-up of approximately 50 abandoned uranium mines in and around the Navajo Nation, where radioactive waste remains from Kerr-McGee mining operations. EPA commenced field work with the proceeds from that settlement in 2016.

PARTNERING WITH STATES

During 2016, the Division actively promoted cooperative federalism through work with our state partners to enforce our nation's pollution laws and prosecute wildlife traffickers. By teaming up with state partners in both enforcement and defensive cases, we enhance our ability to meet mutual goals and missions, reduce costs, and obtain more comprehensive results. We also met throughout the year with numerous state officials to exchange views and collaborated regularly with state officials on a wide variety of training opportunities.

A key example of our fruitful work with state leadership is the record-breaking settlement with BP in the *Deepwater Horizon* Oil Spill litigation. In April 2016, the United States District Court for the Eastern District of Louisiana entered the final consent decree in the litigation, thereby resolving civil claims of the United States and the five Gulf Coast states against BP. The claims arose from the 2010 blowout of the Macondo well and the resulting massive oil spill in the Gulf of Mexico. Under the consent decree, BP will pay the U.S. and the five Gulf States more than \$20 billion, including: 1) a \$5.5 billion civil penalty; 2) more than \$8.1 billion in natural resource damages; 3) \$600 million in further reimbursement of clean-up costs and some royalty payments; and 4) up to \$6 billion in economic damage payments for the Gulf States or their local units of government. This resolution is the largest settlement with a single entity in Department of Justice history; it includes the largest civil penalty ever awarded under the Clean Water Act, the largest ever natural resources damages settlement and massive economic damages payments to our state partners.

ENRD had many other significant state-federal enforcement actions this year, which highlight cooperative federalism in action. Not only do we share civil penalties with partnering states in these joint cases, but many of the communities surrounding the facilities responsible for violations benefit from environmental mitigation or supplemental environmental projects funded by the defendants.

In other federal-state coordinated enforcement efforts involving oil spills in and around the Gulf of Mexico, ORB Exploration LLC (ORB) agreed to pay civil penalties and state response costs and to implement corrective measures to resolve alleged violations of federal and state environmental laws stemming from three crude oil spills that occurred in 2013 and 2015 from two of ORB's Louisiana facilities in the Atchafalaya River Basin, as well as violations of Spill Prevention, Control and Countermeasure regulations at its Frog Lake oil storage barge. Under a proposed consent decree lodged on Earth Day 2016 in federal court, ORB will pay \$615,000 in federal civil penalties for the spills and other environmental violations, pay \$100,000 to the Louisiana Department of Environmental Quality for civil penalties and response costs, and take measures to improve spill response preparedness and prevent future oil spills.

ENRD also partnered with Utah to negotiate an agreement with Salt Lake County to resolve alleged Clean Water Act violations associated with the county's stormwater management program. The agreement requires the county to take specific measures to reduce illegal stormwater and non-stormwater discharges to Jordan River Valley surface waters by thoroughly implementing the requirements of its municipal separate storm sewer system permit. The county also must pay a civil penalty of \$280,000 to be split evenly between the



BP Deepwater Horizon Oil Spill, Wikipedia



Operation Roadhouse Paddlefish, Missouri Department of Conservation

United States and Utah.

In late April, ENRD and the California Department of Toxic Substances Control (DTSC) announced that a group of 66 companies had agreed to clean up contaminated groundwater at the Omega Chemical Corporation Superfund Site in Whittier, California, which is across the street from a residential neighborhood and within one mile of several schools. The site was a refrigerant and solvent recycling, reformulation and treatment facility that operated from about 1976 to 1991 and involved a number of parties. The settlement requires the companies to spend an estimated \$70 million to install wells and operate a groundwater treatment system that will clean up the underground water. The defendants will also reimburse EPA and DTSC for their costs incurred in past cleanup actions at the site. An additional 171 parties that have either sent waste to the site or operated in the area and contributed to the contamination also agreed to fund a portion of the work. The drought in California has underscored the importance of protecting groundwater resources by cleaning up the affected aquifer, and this settlement will make excellent progress toward that goal, as well as put additional systems in place to monitor and evaluate the level of contamination, which will guide future work at the site.

In May, we partnered with the State of Minnesota to settle various claims arising from the Southern Minnesota Beet Sugar Cooperative's violations of its wastewater discharge permit at its processing facility in Renville, Minnesota. The consent decree requires for the defendant to pay a civil penalty of \$1 million, to be split equally with the State, for its violations of the Clean Water Act. It also calls for the defendant to spend at least \$5 million to address wastewater treatment plant performance and wastewater storage issues, and to pay nearly \$50,000 in restitution to the State for the associated fish kill.

The Division also continued our cooperative relationship with states in criminal prosecutions this year. For example, we partnered with state agencies to handle criminal cases that arose from "Operation Roadhouse," a covert investigation into trafficking in paddlefish led by U.S. Fish and Wildlife Service and the Missouri Department of Conservation. We prosecuted eight individuals for wildlife trafficking in violation of the Lacey Act, with five defendants convicted on felony charges. In addition, as part of this joint effort, the state issued citations to over a hundred individuals for violations of state law.

To improve our ability to work closely with states on enforcement efforts, prosecutors from ENRD's Environmental Crimes Section provided criminal enforcement training to various state partners, including information on the Division's new Worker Safety Program. Our cooperation with states does not end with environmental enforcement; we also partnered with states in defensive cases this year.

For example, ENRD partnered with the State of North Carolina to defend the jointly prepared environmental analysis of a proposed tollway near Charlotte from a challenge under the National Environmental Policy Act (NEPA). On June 9, 2016, the U.S. Court of Appeals for the Fourth Circuit affirmed the federal district court's ruling that the agencies' supplemental environmental analysis met NEPA's requirements. Counsel for the federal and state agencies prepared a joint brief in the appeal and shared time at oral argument.

The Land Acquisition Section of the Division also collaborated with U.S. Fish and Wildlife Service to orchestrate a land exchange with the South Florida Water Management District. The property acquired by the United States protects the largest remaining cypress swamp in Palm Beach County, Florida and will be included in the Arthur R. Marshall Loxahatchee National Wildlife Refuge. The property conveyed to the South Florida Water Management District will facilitate a stormwater management project that will reduce phosphorus levels in water flowing into the Everglades ecosystem, greatly benefiting both the United States and local government.

Finally, ENRD continued to develop and enhance relationships with our state counterparts by participating in several forums designed to share experiences and expertise. Last spring, Assistant Attorney General John C. Cruden had the honor of being the first ENRD Assistant Attorney General invited to speak to the annual

meeting of the Environmental Council of the States, the national association of state and territorial environmental agency leaders. He joined colleagues from EPA, New Mexico and academia to discuss innovative ways to measure the success of environmental enforcement. Other ENRD representatives gathered in May with state investigators and environmental enforcement attorneys from around the country at the annual meeting of the Regional Environmental Enforcement Associations. ENRD attorneys also partnered with the National Association of Attorneys General to present webinars on topics of mutual interest, such as e-discovery, and share expertise regarding federal bankruptcy law in the context of environmental cases. Division attorneys also participated in a meeting intended to foster cooperation between FWS and state wildlife managers, and taught wildlife criminal investigators representing seventeen states at a course presented by the Wildlife Investigators' Covert Academy.

PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S WILDLIFE AND NATURAL RESOURCES

Defending the Bureau of Land Management's and the Forest Service's Land Management Discretion

The Forest Service and the Bureau of Land Management (BLM) manage lands under broad mandates to provide for multiple uses. Their statutory authorities require the agencies to balance a variety of interests and environmental concerns in order to determine the proper mix of uses for public lands. Because the different kinds of authorized uses on federal lands often conflict, management decisions are frequently the target of litigation.

In *National Parks Conservation Association v. Forest Service* (D.D.C.), the Division successfully defended the Forest Service's decision authorizing a 24.6-acre gravel pit on the Dakota Prairie Grassland in North Dakota. The Division persuaded the court that the Forest Service's environmental assessment explored a reasonable range of alternatives, including an exchange of mineral rights, and took the "hard look" at the project's impacts required by National Environmental Policy Act (NEPA). The decision has allowed the Forest Service to satisfy its multiple-use mission while ensuring that the mining company complies with all legal requirements.

In *Center for Biological Diversity v. Forest Service* (C.D. Cal.), environmental groups challenged the Forest Service's actions in administering water diversion and transmission facilities operated by Nestlé Waters North America for its Arrowhead Springs bottled water product on the San Bernardino National Forest. The court ruled in favor of the Forest Service on all claims, holding that a 1978 special use permit for Nestlé's activities continued in effect because Nestlé had requested a new permit prior to the 1978 permit's 1988 expiration date. And, because the 1978 permit remained in effect until the agency acts on the request for a new permit, the challenges to the Forest Service's actions in annually billing Nestlé for use of National Forest System lands did not constitute challenges to "final agency action" as required for judicial review under the Administrative Procedure Act (APA). The holding recognizes implicitly that as a result of the agency's finite resources, it cannot as a practical matter complete new or supplemental NEPA analyses before a permit for existing use expires whenever a permittee applies to renew it. Nor, the court found, does the APA require that result.

The Division continued to build on its recent successes in defending BLM's commercial timber program in western Oregon. Last year, the United States Court of Appeals for the District of Columbia Circuit reversed, on standing grounds, summary judgment in favor of timber industry plaintiffs in *Swanson Group Manufacturing v. Jewell* (*Swanson I*), and the district court thereafter rejected the same groups' attempt to recast their allegations in *Swanson Group Manufacturing v. BLM* (*Swanson II*). This year, when the same timber industry groups brought a third challenge to BLM's western Oregon timber program in *Swanson Group Manufacturing v. Jewell* (*Swanson III*), the Division moved aggressively to shut down those claims.

When the *Swanson III* timber industry plaintiffs moved for a preliminary injunction requiring BLM to sell a specific volume of timber in this fiscal year, the Division mounted a vigorous defense to the motion and simultaneously moved to dismiss based on issue preclusion, lack of standing, and other grounds. The court dismissed fourteen of the fifteen timber industry plaintiffs for failure to establish standing, and, as to the remaining



Continental Divide Wilderness Area, Bureau of Land Management



Wilderness in Colorado, Bureau of Land Management

timber industry plaintiff, denied its motion for a preliminary injunction for failure to establish a likelihood of success on the merits of its allegations of standing.

Appellate Defense of Forest Service Land Management

On December 3, 2015, in *Cascadia Wildlands v. Thrailkill* (9th Cir.), the Ninth Circuit affirmed the district court's ordering denying plaintiffs' request for a preliminary injunction. The lawsuit was brought by environmental groups who sought to enjoin the Douglas Fire Complex Recovery Project, located in the southern Oregon Klamath Mountains. They challenged the validity of FWS's biological opinion, which had concluded that the Recovery Project was not likely to jeopardize the Northern Spotted Owl or adversely modify its critical habitat. The court of appeals concluded that the district court had not erred when it determined the plaintiffs had not



Northern Spotted Owl, National Park Service

demonstrated a likelihood of success on their merits claims. Specifically, the panel concluded the Service had relied upon the best scientific and commercial data available in assessing (1) the predatory effects of barred owls on spotted owls, (2) the effect of wildfire on the spotted owl's habitat use, and (3) the impact of the project on the spotted owl's recovery.

On February 26, 2016, the Ninth Circuit affirmed the district court's grant of summary judgment to

the Forest Service in *Friends of Tahoe Forest Access v. United States Department of Agriculture* (9th Cir.). This action, brought by a coalition of motorized recreational groups, challenged the Forest Service's approval of a Motorized Travel Management Project on the Tahoe National Forest under NEPA. The plaintiffs asserted on appeal that the Forest Service did not properly consider and disclose the environmental impacts of motorized travel, failed to consider a reasonable range of alternatives, and impermissibly limited the analysis of cumulative environmental impacts. The panel rejected all of the plaintiffs' claims. The panel explained that the Forest Service had engaged "in a robust public process" to develop a reasonable range of alternatives and that the plaintiffs had failed to show how consideration of more alternatives would have fostered "more informed decision making." The panel also found that the Forest Service reasonably limited its analysis of cumulative impacts to the Tahoe National Forest boundaries. Even though there could be some impacts outside the Forest, it was reasonable for analysis to be limited to the Forest's boundaries because the Forest was the scope of the project area, considering a larger spatial area would result in a loss of "site specificity" "among all the assumptions," and impacts across a larger geographic area were speculative.

On August 22, 2016, the California Supreme Court unanimously upheld that state's legislative ban on the use of suction dredges for mining throughout the state in *People v. Rinehart* (Ca. Sup. Ct.). After Brandon Rinehart was caught mining illegally on National Forest System lands, he argued that the state law was preempted by the federal Mining Law of 1872. The California Court of Appeal agreed, holding that because the use of a suction dredge was the only "commercially practicable" method of extracting gold from his claim, the state law posed an "obstacle" to Congress's intent to encourage the free and open exploration of mineral deposits on federal lands. The California Supreme Court reversed. The Court agreed with the position set forth in an

amicus curiae brief filed by the Division, finding that the text of the Mining Law of 1872 concerns itself with property rights and assignment of title, and therefore only preempts state law “with respect to laws governing title. In other areas, state and local law are granted free reign.” The Court therefore concluded that it was not the intent of Congress to permit mining on the public lands absent any environmental regulation by the State.

Protecting United States’ Property Interests

The Division obtained a favorable decision in *Silver States Land LLC v. Beaudreau* (D.D.C.), where a land development company sought an injunction forcing the Secretary of the Interior to issue a patent to a 480-acre parcel of public lands in Nevada. BLM had initially offered the parcel for sale under a modified competitive bid process based on representations that the land would be used to develop a professional sports arena and other facilities consistent with a development agreement between the development company and the City of Henderson, Nevada. After submitting the highest bid and depositing the full purchase amount into escrow, however, the company terminated the development agreement. Interior then withdrew the sale and the Division successfully defended that decision in district court. The court found that the Secretary of the Interior is authorized to stop consummation of unlawful sales of public lands, based on long-standing principles relating to the general statutory mandate for Interior and the Secretary to manage public lands. It held that this broad plenary authority remains intact absent a contrary statutory provision, and that nothing in the Federal Lands Policy and Management Act (FLPMA) compels the issuance of land patents or limits the Secretary’s authority to terminate public land sales. On December 16, 2016, the D.C. Circuit unanimously affirmed the district court’s grant of summary judgment.

Preventing Illegal Grazing on Public Lands

In a long-standing dispute between federal land managers and a Nevada ranching family, the Division had significant successes both on appeal and on remand after appeal. The United States sued ranchers (the Hages) in trespass seeking injunctive relief and damages for persistent unauthorized grazing use of federal lands in violation of federal grazing regulations. The district court, among other things, substantially denied recovery in trespass on the ground that ranchers, who were owners of stockwater rights on federal grazing lands, have a defense to any trespass action where grazing occurs within one-half mile of a water source in which they hold rights. The district court also concluded such water-right owners hold an implied half-mile access easement that allows grazing associated with moving cattle to such water sources. These associated grazing rights applied regardless of whether they hold grazing permits for the land on which the grazing occurs. The district court also granted relief on a counterclaim that the United States violated Hage’s substantive due process rights by failing to renew permits in the 1990s. It directed the Hages to apply for grazing permits, and ordered BLM and the Forest Service to grant the permits, along with other injunctive relief. The district court additionally held BLM and Forest Service employees in contempt for taking administrative enforcement actions directed at cattle grazing in the area where the defendants’ cattle were found, thereby interfering with the court’s jurisdiction over this trespass action. The United States appealed all of those rulings, and the employees that had been held in contempt separately appealed the contempt ruling.

On January 15, 2016, in *United States v. Estate of E. Wayne Hage* (9th Cir.), the Ninth Circuit unanimously reversed the district court on all issues. It held that the rancher’s stockwater rights are irrelevant to the requirement to obtain federal grazing permits, and merely provide the holder of the rights with a priority for the grant of grazing permits. It vacated the rulings on the Hages’ counterclaims regarding substantive due process on the ground that litigation of those claims was barred by the statute of limitations. It also held that the district court “grossly abused” the contempt power by holding federal employees in contempt for taking lawful actions within the scope of their employment. Finally, the court approved the United States’ request that the case be reassigned on remand. The court held that the judge’s conduct reflected “both pre-judgment of the merits and bias against the federal agencies” and that this same judge had demonstrated similarly improper conduct in a number of prior cases. It vacated the judgment and remanded for determination of trespass damages by a different federal judge.

Following the Ninth Circuit's remand, a newly-assigned district court judge announced rulings from the bench, finding that Wayne N. Hage was responsible for placing cattle on federal lands and liable for \$555,040.50 for trespass on lands administered by the BLM and \$11,791.34 for trespass on National Forest System lands. The court found that an injunction requiring Mr. Hage to remove his cattle and cattle in his control from the federal lands was justified. The court stayed entry of judgment while the defendants sought certiorari, but the Supreme Court denied their petition for certiorari on October 17, 2016.

Successful Defense of Stewardship of National Park Lands

The Division secured a favorable decision in *National Parks Conservation Association v. Department of the Interior* and *Public Employees for Environmental Responsibility v. Salazar* (M.D. Fla.), a case involving a challenge to NPS's February 2011 Record of Decision and 2010 General Management Plan, Wilderness Study, Off Road Vehicle Management Plan, and Environmental Impact Statement for the "Addition Lands" of Big Cypress National Preserve, as well as the U.S. Fish and Wildlife Service's (FWS) related 2010 Biological Opinion. The groups challenging the agencies' decisions asserted claims under NEPA, ESA, the Wilderness Act, the Organic Act, the Enabling Act, Executive Orders 11,644 and 11,989, and the Federal Advisory Committee Act (FACA). Following a favorable decision in 2014, the Eleventh Circuit affirmed the district court's ruling, stating that "Appellants' arguments can be reduced to a disagreement regarding the NPS's and FWS's ultimate conclusions. It is unsurprising that reasonable minds can differ regarding the interpretation of the copious amount of data upon which the NPS and FWS relied when making their decisions . . . it is beyond the power of Appellants and this Court to second guess these agencies' reasoned decision-making."

Successful Implementation of the Endangered Species Act

Congress enacted the Endangered Species Act (ESA) "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." Congress authorized the Departments of the Interior and Commerce, acting through the FWS and National Marine Fisheries Service (NMFS) respectively, to achieve this objective by listing imperiled species, designating critical habitat for such species, and then applying the protections of the ESA. Such decisions are often challenged.

In 2016, ENRD attorneys achieved favorable results in several cases, thereby allowing full and effective implementation of the Act and its protections. For example, in *Carpenters Industrial Council v. Jewell* (D.D.C.), Division attorneys obtained the court's dismissal of a challenge to FWS's designation of critical habitat for the threatened Northern spotted owl. Accordingly, the important conservation tool of critical habitat designation remains in effect.

Appellate Defense of ESA Implementation

On February 29, 2016, the Ninth Circuit unanimously reversed the district court's order vacating FWS's final rule designating critical habitat for the polar bear under the ESA in *Alaska Oil & Gas Association v. Jewell* (9th Cir.). The district court had faulted FWS for failing to identify specifically where and how polar bears use the portions of critical habitat designated as Units 2 and 3. The court further faulted FWS for failing, under ESA § 4(i), to provide the State of Alaska with an adequate "written justification" for not adopting a final rule consistent with the State's submitted comments. On appeal, the panel agreed with FWS that the district court held it to a standard of specificity that the ESA does not require. The panel reviewed FWS's designations of Units 2 and 3, and found their inclusion supported by the administrative record. The court also found that FWS had provided adequate "written justification" to Alaska under § 4(i). The panel rejected the district court's ruling that FWS had to include *all* of its responses to the State in its letter to the State and could not cross-reference to the Final Rule. The Court explained that nothing in the text of § 4(i) imposed a "one document" rule, and instead the only requirement is that the justification be in writing. Nothing prevented FWS from referencing other publicly-available documents in support of its justifications. The court also ruled that FWS reasonably mailed the letter to the Governor, instead of the State Wildlife Management Agency, given that the State's let-

ters appeared to be speaking for the State rather than any of the agencies listed.

On March 1, 2016, the D.C. Circuit upheld FWS's decision not to list the dunes sagebrush lizard as endangered under the ESA in *Defenders of Wildlife v. Jewell* (D.C. Cir.). The court rejected the plaintiffs' claim that the Service's decision was arbitrary and capricious in relying on a voluntary conservation plan by the Texas Comptroller for avoiding and limiting the loss of the lizard's habitat, which overlies a highly productive area for oil-and-gas development. Finding the Service's conclusions about the Texas plan supported by substantial evidence, the court rejected as unpersuasive plaintiffs' arguments that the plan was insufficiently certain to be implemented or to be effective under the Service's own policy.

On June 30, 2016, the Fifth Circuit upheld FWS's designation of approximately 1,500 acres of privately-owned timber land as critical habitat for the endangered dusky gopher frog. In *Markle Interests, PLC v. U.S. Fish and Wildlife Service* (5th Cir.),

FWS had found that this parcel, which is not currently occupied by the frog, was "essential" to the conservation of this species because it: (1) formerly supported a population of frogs; (2) contains a unique and rare grouping of ephemeral ponds within a woodland that, while not currently good upland habitat, could be converted thereto; and (3) is far enough away from the confined area currently occupied by the frog that it could serve as a refuge in case of disaster. The



Dusky Gopher Frog, Fish & Wildlife Service

panel majority deferred to

the Service's interpretation of "essential" habitat as including areas that would require some modification before they could serve the needs of the species, where, as here, the Service had shown that the best available science indicated that the parcel was uniquely valuable and necessary to support recovery of the species. The dissent complained that the Service had stretched the meaning of "essential" beyond the bounds of the statute where, in the dissent's view, there was no reasonable probability that the parcel would in fact ever be useful to the frog, given that the upland areas would require modification and the landowners were not willing to cooperate with any effort to reintroduce the frog. The majority also rejected plaintiff's contention that it was arbitrary and capricious not to exclude their property from the designation on grounds of economic impact, holding—consistent with two recent Ninth Circuit decisions—that determinations not to exclude from critical habitat on grounds of economic impact are entirely discretionary and thus unreviewable under 5 U.S.C. § 701(a)(2). It next rejected the landowners' argument that designation of unoccupied private land as critical habitat in these circumstances is beyond the reach of the Commerce Clause. The Court found that while the designation of this land may not have a direct relationship to commerce, it nevertheless survives constitutional muster because it is an essential part of an economic scheme to preserve the value (including economic value) of endangered and threatened species, and without the ability to designate in these circumstances the regulatory scheme could be undercut by piecemeal extinction. Finally, the Court found that the National Environmental Policy Act did not apply to critical habitat designations, because the designations do not result in any physical changes to the environment.

On August 15, 2016, the Ninth Circuit upheld BLM's Recreational Area Management Plan for the Algodones Dunes, a popular off-highway vehicle destination in Southern California, in *Center for Biological Diversity v. BLM* (9th Cir.). Plaintiffs claimed that the biological opinion for the Plan violated the ESA because it did not include an incidental take statement for the Peirson's milk vetch, a threatened plant species. The Ninth Circuit rejected that argument, holding that because the ESA's definition of "take" only applies to fish and wildlife, not to plants, and the ESA's prohibition against take does not include plants, there was no need for an incidental take statement. The panel also rejected the plaintiffs' Clean Air Act emissions-level arguments, holding that BLM's factual assumptions about off-highway vehicle use at the Dunes were supported by substantial evidence in the record and that its choice of scientific methodology was reasonable.

Supporting Land Management Decisions Designed to Restore Forest Health and to Protect Federal Lands from Catastrophic Fire

In response to threats from drought, wildfire, and climate change, the Forest Service identifies and conducts vegetation management projects designed to help restore forest health and resilience. These decisions are often subject to judicial challenge by those opposed to any activities in National Forests or by industry entities who believe that greater economic access should be allowed. Such cases often involve a range of issues, including ESA issues, because the Forest Service must balance the needs of ESA-listed species as part of its directive to manage the National Forest system for multiple purposes. The Division continues to be a strong partner with the agency, defending these projects as they are challenged in court – often on an emergency basis.

- In *Alliance for the Wild Rockies v. Savage* (D. Mont.), the Division successfully defended the East Reservoir Project on the Kootenai National Forest. This ten-year project authorizes timber harvest and other vegetation management treatments to restore a landscape in northwest Montana and to make it more resilient to disturbance, including wildfire, insect damage, and climate change. The Forest Service developed the project with extensive input from the Kootenai Forest Stakeholders Coalition, a diverse group of local organizations and governmental entities interested in responsible forest management.
- In *Native Ecosystems Council v. Marten* (D. Mont.), the Division prevailed in a challenge to the East Deerlodge Project, on the Beaverhead-Deerlodge National Forest in Montana, allowing critical forest restoration work to go forward.
- In *Alliance for the Wild Rockies v. U.S. Forest Service* (D. Idaho), the Division succeeded in the defense of the Lost Creek-Boulder Creek Landscape Restoration Project, allowing approximately 17,700 acres of timber harvest and forest health activities on the Payette National Forest to proceed.
- In *Native Ecosystems Council v. U.S. Forest Service* (D. Mont.), the Division successfully defended the Rendezvous Project, a forest health project on the Gallatin National Forest in Montana.
- In *Conservation Congress v. U.S. Forest Service* (E.D. Cal.), the Division successfully defended, in both preliminary injunction and summary judgment proceedings, the Shasta-Trinity National Forest's Porcupine Project, a large project designed to thin over-crowded and diseased tree stands to improve habitat for the northern spotted owl.
- In *Conservation Congress v. U.S. Forest Service* (E.D. Cal.), the Division successfully defended the Harris Vegetation Management Project on the Shasta-Trinity National Forest. The Harris Project authorized timber thinning and other vegetation management treatments to reduce fire risk and improve habitat for the California spotted owl.

The Division has also worked successfully with the Forest Service to defend the agency's efforts to salvage timber killed by wildfire. The agency's ability to recover commercial value from burned trees, to restore disturbed landscapes and to prevent fire-damaged wood from contributing to future fire risk requires these projects to proceed quickly. Thus, our salvage sale litigation generally involves short turn-around emergency motions practice.

- For example, the Westside Fire Recovery Project was developed by the Forest Service in response to the massive 2014 wildfires in the Klamath National Forest. In *Karuk Tribe v. Stelle* (N.D. Cal.), the Division prevailed on a motion for a temporary restraining order and preliminary injunction, allowing this important salvage work to proceed.
- In *Alliance for the Wild Rockies v. Bulletts* (D. Utah), the Division successfully defended the Iron Springs Vegetation Improvement and Salvage Project on the Dixie National Forest in Utah.

Defending National Marine Fisheries Service's Management of Ocean Fisheries

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) and other related statutes charge the National Marine Fisheries Service (NMFS) with the difficult task of managing ocean commercial fishing to provide for conservation and sustainable fishing while, at the same time, optimizing fishing yield. In FY 2016, ENRD again successfully defended various fishery management actions necessary to meet these objectives.

In *Goethel v. Pritzker* (D.N.H.), ENRD attorneys successfully turned back a sweeping constitutional and statutory challenge to NMFS's program for enforcing the rules governing the Atlantic groundfish fishery off the coast of New England. In *Etheridge Seafood Co. v. Pritzker* (E.D.N.C.), Division attorneys defeated a similar challenge to NMFS's program establishing an individual bluefin quota system to reduce bycatch of Atlantic bluefin tuna by pelagic longline vessels. This year, ENRD attorneys also obtained favorable decisions upholding regulations implementing the Gulf Coast Reef Fish Fishery Management Plan in *Coastal Conservation Association v. Pritzker* (E.D. La.), specifications and management measures for the Atlantic herring fishery in *Flaherty v. Locke* (D.D.C.), and NMFS's quota-shifting rule that annually sets harvest limits for bigeye tuna in the U.S. territories of Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands in *Conservation Council for Hawaii v. NMFS* (D. Haw). Through these cases, Division attorneys assured that the MSA's objectives of providing for sustainable fisheries without causing undue economic hardship are realized.

Fair enforcement of fishery regulations is also critical to NMFS's fishery program. Consistent with that objective, in *Bolton v. Pritzker* (W.D. Wash.), ENRD attorneys successfully defended NMFS's penalty assessment of \$223,905 for the illegal harvest of 1.2 million pounds of Pacific cod in the Western Gulf of Alaska. Similarly, in *Pacific Ranger, LLC v. Pritzker* (D.D.C.), ENRD attorneys successfully defended NMFS's penalty assessment of \$127,000 for setting purse seine fishing gear on whales during five tuna-fishing expeditions in violation of the Marine Mammal Protection Act and Western and Central Pacific Fisheries Convention Implementation Act. Enforcement of these requirements is essential to ensuring that fisheries are being harvested in a responsible and sustainable manner while, at the same time, maintaining a level playing field for all participants.



**Lost Creek Boulder Creek Landscape Restoration Project
Payette National Forest, Department of Agriculture**

Successful Implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The United States is a signatory to CITES, a multilateral treaty that aims to protect vulnerable wildlife by regulating trade in species that are threatened with extinction as well as species that are not necessarily threatened with extinction at present but may become so unless trade in such species is subject to strict regulation. CITES ensures that trade in these species is regulated and sustainable by way of standardized import and export permits and other mechanisms.



Pacific Cod, Wildlife & Marine Resources Section

Of note this past year was *Safari Club International v. Jewell* (D.D.C.), involving a challenge by hunting organizations under the ESA and CITES to the FWS's decision to suspend the importation of sport-hunted elephant trophies from Zimbabwe. Due to changed circumstances for the worse in Zimbabwe, FWS announced a prohibition on further importation of elephant trophies from there until further review could be undertaken. Hunt-



African elephants, Fish & Wildlife Service

ing interests challenged the moratorium. After briefing by ENRD attorneys, the Court affirmed FWS's decision, thereby allowing the prohibition to remain in effect and provide needed protections to the elephants.

Co-Chairing the Presidential Task Force on Wildlife Trafficking

Illegal trafficking in wildlife, plants and timber, and marine creatures has reached epidemic proportions. It is both a critical conservation concern — threatening the survival of many species

throughout the world — and a growing threat to regional stability and global security that requires increased attention. The United States' efforts to tackle this crisis are coordinated through the Presidential Task Force to Combat Wildlife Trafficking, established by President Obama through Executive Order on July 1, 2013. The Division represents the Department of Justice on this Task Force, which is co-chaired by the Attorney General and the Secretaries of State and the Interior or their designees. The Task Force also includes senior-level representatives from 14 additional federal departments and agencies, including the Departments of Commerce, Defense, Treasury, Agriculture, and Homeland Security, as well as the United States Agency for International Development (USAID) and the Office of the Director of National Intelligence.

The Task Force developed the first-ever *National Strategy for Combating Wildlife Trafficking*, which was issued by the President on February 12, 2014. The *Strategy* reflects a “whole-of-government” approach that will both strengthen anti-trafficking efforts already underway in ENRD and other federal agencies and elevate illegal wildlife trafficking as a priority for additional agencies whose missions include law enforcement, trade regulation, national security, international relations, and global development. The *Strategy* identified three strategic priorities that the Task Force deemed critical to combating wildlife trafficking: strengthening domestic and global enforcement, reducing demand for illegally traded wildlife, and building international cooperation and public-private partnerships. In February 2015, the Task Force issued an implementation plan for the *Strategy*, which recognized that achieving the *Strategy’s* goals would require a significant and sustained commitment over the long term and identified both short- and long-term next steps toward each of the objectives set out in the *Strategy*. The Division continues to work in concert with the other Task Force agencies to carry out its responsibilities under the *Strategy* and Implementation Plan.

Coinciding with the celebration of World Wildlife Day in March 2016, the Task Force agencies held public events at the State Department and Great Hall of the Department Justice to issue the first-ever Annual Progress Assessment. The Division took the lead role in drafting this report, which documents the Task Force agencies’ progress in implementing the National Strategy and describes the actions of multiple federal agencies, working worldwide, to counter wildlife trafficking in accord with each of the *Strategy’s* three objectives.

The Division’s primary role in stopping wildlife trafficking is direct enforcement of wildlife trafficking laws. We work closely with investigative agencies throughout the government to prosecute high-level traffickers in an



effort to take the profit out of wildlife trafficking. ENRD also works closely with other Task Force agencies to increase capacity to combat wildlife trafficking, both at home and abroad. For example, in fiscal year 2016, with funding from the Department of State and assistance from USAID, ENRD continued to implement a series of regional capacity building workshops on wildlife trafficking for judges and prosecutors in Africa. ENRD conducted two workshops, one for six southern

Zambia Training Workshop Participants, Law and Policy Section African countries (Angola, Botswana, Malawi, Mozambique, Namibia, and Zambia) in Windhoek, Namibia, and a second for five west/central African nations (Gabon, Ghana, Nigeria, Republic of Congo and Togo) in Accra, Ghana.

In all, nearly 70 judges and prosecutors were trained by ENRD prosecutors and lawyers as well as subject matter experts from federal enforcement partners (NOAA, FWS and FBI), the U.N. Office on Drugs and Crime, and anti-trafficking NGOs. The workshops included sessions on evidentiary and prosecutorial issues unique to wildlife trafficking cases, money laundering, asset tracing, corruption issues, and the related natural resource crimes of illegal logging and illegal fisheries.

The high priority given by the Division to combating wildlife trafficking is also reflected in our efforts, often taken in conjunction with other Task Force agencies, to build international commitment and cooperation in this area, including:

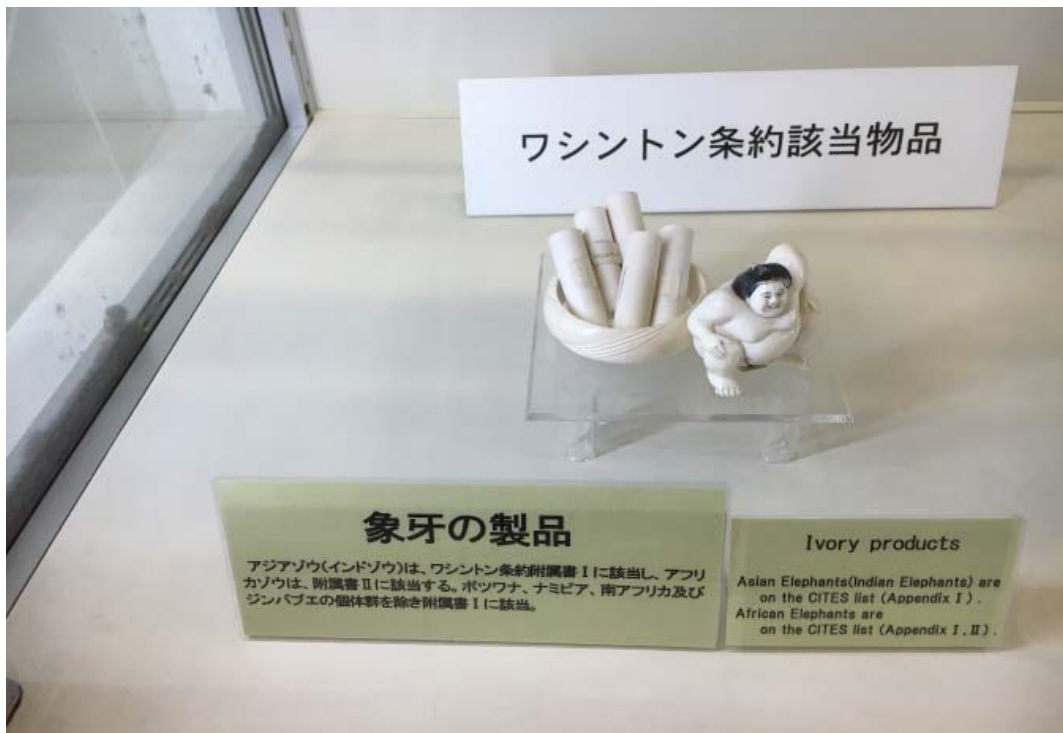
- Assistant Attorney General John C. Cruden led the U.S. inter-agency delegation to the Hanoi Conference on Illegal Wildlife Trade in November 2016. The Conference provided an important opportunity for the more than 50 nations gathered together to discuss implementation of the commitments made at the prior Conferences on Illegal Wildlife Trade held in Kasane in 2015 and in London in 2014.



Assistant Attorney General John Cruden with Prince William, Duke of Cambridge in Vietnam, Department of Justice

- Assistant Attorney General Cruden joined the other Task Force co-chairs and gave multiple presentations on counter-wildlife trafficking and the vital role of public environmental prosecutors at the World Conservation Congress of the International Union for the Conservation of Nature held in Honolulu, Hawaii in September 2016.
- Assistant Attorney General Cruden also joined the State Department and other agencies from the President’s Wildlife Trafficking Task Force in discussing strategies for combating wildlife trafficking in connection with the U.S.-China Strategic & Economic Dialogue held in Beijing, China, in June 2016.

- Division attorneys continued their longstanding participation in the U.S. delegation to the Conference of the Parties for the Convention on International Trade in Endangered Species (CITES). The seventeenth such Conference of the Parties—CoP17—was held in September-October 2016 in Johannesburg, South Africa. Division attorneys joined FWS and other federal agencies in advancing the positions of the U.S. on numerous proposals seeking stronger



CITES Display in the Hong Kong Airport, Department of Justice

protections for endangered and threatened species around the globe. They also attended the global meeting of regional Wildlife Enforcement Networks and the meeting of Interpol's Wildlife Crime Working Group, both of which were held in conjunction with CoP17. This year's meeting was considered by many one of the most successful international efforts to improve the goals of CITES. All the proposals the United States submitted were adopted, including proposals addressing law enforcement and other efforts to combat wildlife trafficking.



Accra training in June 2016, Department of Justice

ENFORCING THE NATION'S CRIMINAL POLLUTION AND WILDLIFE LAWS

The Environmental Crimes Section (ECS), in partnership with U.S. Attorneys' Offices and a host of federal investigative agencies, is responsible for prosecuting criminal violations that arise under a wide variety of environmental statutes. As described below, ECS's work this year included several successful multi-district, as well as transnational, prosecutions. ECS's work can be broken into two broad categories: enforcement of the laws designed to protect the environment, public, and workers from unlawful pollution; and enforcement of laws designed to protect wild animals and plants from unlawful poaching, harvesting, profiteering, and other harms. In addition, ECS's prosecutions in each of these categories may include general criminal violations such as conspiracy, false statements, obstruction of justice, smuggling, and wire fraud.

Incorporating New Practice Areas

Creating a Safer Workplace for all Americans

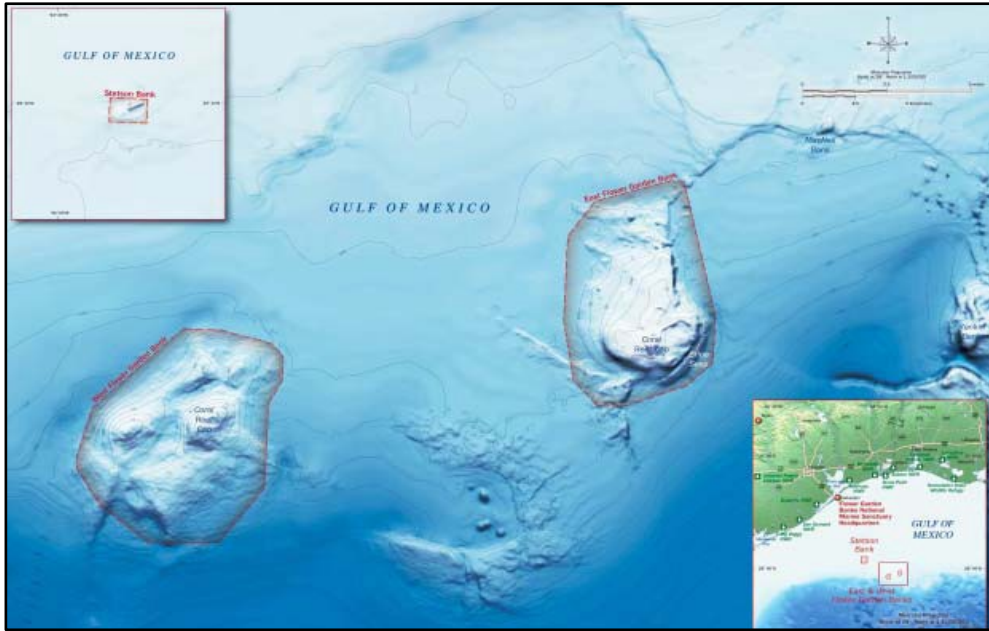
On December 17, 2015, the Department of Justice entered into a Memorandum of Understanding with the Department of Labor establishing a process and framework for coordination with respect to enforcing federal workplace safety statutes. On that same day, Deputy Attorney General Sally Yates issued a Memorandum for all U.S. Attorneys setting forth amendments to the U.S. Attorneys' Manual that transfer the responsibility for criminal worker safety prosecutions, shared with U.S. Attorneys' Offices, to ECS; specifically criminal prosecutions under the Occupational Safety and Health Act, the Mine Safety Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the Atomic Energy Act. The result has been an appreciable increase in the number of worker safety investigations and prosecutions across the nation.

For example, in August 2016, Wood Group PSN entered into a global plea agreement to resolve criminal activity in both the Western and Eastern Districts of Louisiana, and were fined a total penalty of \$9.5 million in *United States v. Wood Group*

PSN (E.D. La., W.D. La.). In the Eastern District of Louisiana, Wood Group pleaded guilty to a Clean Water Act violation for the illegal discharge of oil into the Gulf of Mexico. The charge arose out of the 2012 explosion on an oil production platform that killed three workers, injured several more, and discharged 500 barrels of oil into the water. For this offense, Wood Group was sentenced to pay a \$1.8 million fine, and make a



Wood Group 2012 Oil Rig Explosion, Environmental Crimes Section



Flower Garden Banks, National Marine Sanctuary, NOAA



Rhino horns, Department of Justice

community service payment of \$200,000 to the National Marine Sanctuary Foundation to benefit the Flower Gardens National Marine Sanctuary.

In the Western District of Louisiana, Wood Group PSN pleaded guilty to one false statement charge for creating approximately 87 false documents that were required to be maintained under the Outer Continental Shelf Lands Act. The company claimed in these documents to have inspected and serviced oil platforms when, in fact, it had not. For this offense, the company was sentenced to pay a \$7 million fine and make a \$500,000 community service payment, which will be paid as follows: \$300,000 to a FWS project that will entail the construction of oyster reef structures and the creation of an abatement area to protect the shoreline, marsh and fisheries habitat. The reduction of erosion will also protect a nearby highway that is used as a major hurricane evacuation route for the area. In addition, \$100,000 will be allocated to the Barataria-Terrebonne National Estuary Program for habitat restoration, \$50,000 will go to the Nature Conservancy for local projects, and \$50,000 will go to the Southern Environmental Enforcement Network.

Protecting the Welfare of Animals

In late 2014, the Department designated ENRD as the Main Justice component responsible for coordinating enforcement efforts under the six major federal animal welfare statutes, including the Animal Welfare Act, Animal Fighting Prohibition Act, Horse Protection Act, Humane Slaughter Act, Twenty-Eight Hour Law, and the Animal Crush Video Prohibition Act. Some of these offenses—such as dog fighting—are often committed by highly organized interstate criminal enterprises that attract an array of other illegal activities which threaten public safety. And even in large-scale commercial settings, such as animal exhibitors, slaughterhouses and horse shows, the enforcement of animal welfare laws is critical to ensuring not only the integrity of our legal system, but an even playing field for those commercial actors who are complying with humane standards.

Since animal welfare enforcement was added to ENRD's portfolio, we have undertaken a comprehensive effort to build this new program area. We have conducted training and outreach to Department attorneys and client agencies. We have established a working relationship with the USDA, regularly discussing enforcement authorities, strategies, and cases.



Chained Dog in a Barrel, Environmental Crimes Section

This year, in a coordinated effort across numerous federal districts to combat organized dog fighting, we filed criminal complaints in the District of New Jersey against nine defendants in a multi-state dog fighting conspiracy. On the civil side, the Animal Welfare Act also authorizes the civil forfeiture to the United States of any animals involved in animal fighting ventures. When agents served warrants and raided multiple residences in New Jersey, Indiana, and New Mexico as part of the criminal investigation of suspected dog fighting operations, 79 dogs were seized. Complementing the criminal prosecutions, attorneys from the Wildlife and Marine Resources Section successfully negotiated the surrender of 71 of the 79 dogs rescued from these suspected dog

fighting operations, making them potentially available for immediate adoption. ENRD attorneys in conjunction with the United States Attorney's Office for the District of New Jersey filed an *in rem* action seeking civil forfeiture of the remaining dogs.

We were also pleased to engage more broadly with our federal and state partners in this new practice area. In May, Deputy Assistant Attorney General Jean Williams represented the Department before the U.S. Sentencing Commission to support increasing the recommended penalties for animal fighting violations. The Commission voted to adopt this recommendation and, among other changes, it increased the recommended penalties for the blood sport from a base offense level of 10 (a range of 6-12 months) to a base offense level of 16 (a range of 21 to 27 months). The Division also worked with the Office of Justice Programs to co-host a roundtable discussion on federal, state, and local cooperation in animal welfare enforcement, drawing over 100 leaders from the federal and state law enforcement communities as well as national law enforcement and animal protection organizations. The roundtable began an important dialogue on information-sharing, cross-referrals, and joint task forces.

Protecting the Environment

Prosecuting renewable fuel fraud

ECS, in partnership with U.S. Attorneys' Offices and criminal investigators from EPA, the Secret Service, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Transportation, and the Federal Bureau of Investigation, continued its efforts to combat fraud in the renewable fuels arena. Through the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007, Congress obligated fuel producers and importers to produce specific annual volumes of renewable fuel. Accordingly, EPA created Renewable Fuel Standards (RFS), and established Renewable Identification Numbers (RINs) to track these volumes of fuel. EPA also developed an EPA-moderated transaction system (EMTS) to facilitate RIN trading. By buying and retiring RINs, petroleum producers and importers can meet their renewable fuel obligations. They usually purchase the RINs from other, specialized, renewable fuel businesses, often through brokers, typically, buying batches of several thousand RINs at a time, for thousands of dollars per batch.

Biodiesel is one of the most important renewable fuels covered by the RFS. Congress established tax credits for people who blend biodiesel with petroleum diesel. The credit is designed to incentivize biodiesel production; blending (which can involve less than 1% petroleum diesel) is the event that triggers payment of the subsidy.

Criminals have discovered it can be quite lucrative generate RINs without producing the volume of renewable fuel that a RIN represents, and to obtain IRS's blender's tax credit for biodiesel that had already been blended and used to obtain the credit. ECS and its partners successfully prosecuted several individuals and corporations involved in such fraud in 2016.

For example, in the renewable fuel fraud case titled *United States v. Chris Ducey, et al. (E-biofuels)* (S.D. Ind.), E-biofuels (a company owned and operated by Brian Carmichael and the Ducey brothers, Chris, Chad, and Craig) manufactured biodiesel in a Middletown, Indiana plant. In late 2009, Joseph Furando, Katirina Tracy, Caravan Trading Company, and CIMA Green began supplying E-biofuels with biodiesel that had already been used to claim tax credits and RINs, thus allowing Furando to purchase the biodiesel at prices more than \$2 per gallon less than biodiesel that was still eligible for the credits. The biodiesel was then illegally re-certified and sold at a much higher market price.

The defendants realized substantial per-gallon profits through this scheme, sometimes in excess of \$12,000 per truckload. Over the course of approximately two years, they fraudulently sold more than 35 million gallons of fuel for a total cost of over \$145.5 million. The defendants realized more than \$55 million in gross profits, at the expense of their customers and U.S. taxpayers.

- Furando, Caravan Trading and CIMA Green pleaded guilty to all charges: conspiracy, wire fraud, false

statements, obstruction, engaging in prohibited financial transactions, and money laundering. Furando was sentenced to 20 years' incarceration.

- The Duceys pleaded guilty to conspiracy, false claims against the IRS, wire fraud, and lying to the EPA and the IRS. In addition, Craig Ducey pleaded guilty to a related \$58.9 million securities fraud, which victimized more than 625 investors and shareholders of Imperial Petroleum, a publicly-traded company and the parent company of E-biofuels. E-biofuels pleaded guilty to similar charges. Chris Ducey was sentenced to six years' incarceration. Chad and Craig Ducey have not yet been sentenced.
- Carmichael and Tracy pleaded guilty to conspiracy charges. Carmichael was sentenced to five years' imprisonment; Tracy has not yet been sentenced.
- All defendants, including the corporations, have been held jointly and severally liable for more than \$56 million in restitution.
- Jeffrey Wilson was the final defendant to be prosecuted in this multi-state fraud scheme. Once Imperial Petroleum bought E-biofuels in May 2010, Wilson, the company CEO and president, was soon made aware that the facility was not making biodiesel. Despite this knowledge, he filed an annual report with the SEC in November 2010, stating that E-biofuels was manufacturing fuel, and he continued to present this false information to the public, investors, auditors and investigators. On July 20, 2016, after an eight-day trial, a jury convicted Wilson of securities fraud, filing false reports with the SEC, falsely certifying reports to the SEC, lying to the company's outside auditor, and lying to federal investigators.

During sentencing, the district court found that because Furando obstructed justice, it declined to adjust his sentence for acceptance of responsibility. Furando appealed, but in *United States v. Joseph Furando* (7th Cir.), on July 25, 2016, the Seventh Circuit affirmed the district court's decision explaining that a defendant who obstructs justice is presumed not to have accepted responsibility. The presumption can only be rebutted in "extraordinary circumstances," and Furando did not show that his alleged acceptance of responsibility was exceptional. On the contrary, Furando continued committing violent physical assaults while on pretrial release and, while detained, plotted to kill federal witnesses and sell drugs.

Another renewable fuel fraud conviction was obtained in *United States v. Philip Joseph Rivkin* (S.D. Tex.). Since 2008, Philip Rivkin operated and controlled several companies in the fuel and biodiesel industries, including Green Diesel LLC, Fuel Streamers Inc., and Petro Constructors LLC, all based in Houston. As part of his scheme to defraud, Rivkin claimed to have produced millions of gallons of biodiesel at Green Diesel's Houston facility and then generated and sold RINs based upon this claim. In reality, no biodiesel was ever produced at the Green Diesel facility. The scheme enabled Rivkin to generate and sell in excess of 59 million fraudulent RINs resulting in at least \$51 million in sales. In 2015, Rivkin pleaded guilty to a mail fraud count and a Clean Air Act false statement violation.

On March 7, 2016, Rivkin was sentenced to 121 months' incarceration, followed by three years' supervised release. Rivkin also was sentenced to pay more than \$88 million in restitution and to forfeit \$51 million for generating and selling fraudulent biodiesel credits in the federal renewable fuel program.

Prosecuting illegal discharges from mining operations

The Salmon River in Alaska is important for the spawning of all five species of Pacific salmon (chinook, chum, coho, pink, and sockeye). After flowing through federal Bureau of Land Management land, the Salmon River crosses the Togiak National Wildlife Refuge before entering the Pacific Ocean at Kuskokwim Bay. XS Platinum, Inc. (XSP) operated a platinum mine along the Salmon River. During 2010 and 2011, the mine systematically discharged large amounts of heavily polluted mine wastewater into the river. Turbid water was observed for miles below the mine, extending all the way to the ocean.

Following a trial in October 2015, in the case of *United States v. James Slade* (D. Alaska), James Slade, former

Chief Operating Officer of XSP, was convicted on two misdemeanor Clean Water Act counts for violating permit conditions with respect to the mine's discharges. In addition, Slade later pleaded guilty to a felony Clean Water Act violation for knowingly violating permit conditions. He was sentenced in March 2016 to 12 months' incarceration. XSP General Manager Robert Pate, who previously pleaded guilty to three felony Clean Water Act counts for discharging without a permit, violating permit conditions, and making a false statement, was sentenced in April 2016 to three years' probation and a \$60,000 fine. Plant operator James Staeheli pleaded guilty to a misdemeanor Clean Water Act charge for violating permit conditions and was sentenced to three years' probation.



Contaminated water on a rocky shore, Environmental Crimes Section

Prosecuting illegal hazardous waste storage



Spatig evidence photo, Environmental Crimes Section

In *United States v. Max Spatig* (D. Idaho), Max Spatig was convicted by a jury in June 2015 for violations of the storage and disposal provisions of the Resource Conservation and Recovery Act. Spatig operated a concrete finishing business known as M&S Enterprises. In June 2010, officials discovered approximately 3,400 containers of waste at his residence, most of which was derived from paint, some in heavily corroded and leaking containers.

Investigators also found containers of corrosive wastes, including hydrochloric acid. The ensuing EPA cleanup cost close to \$500,000 and

was the second cleanup Spatig had caused. The State of Idaho Department of Environmental Quality conducted a prior cleanup in 2005 at a different property owned by Spatig, in southeast Idaho.

On October 8, 2015, Spatig was sentenced to 46 months' incarceration, followed by three years' supervised release, and was ordered to pay \$498,652 in restitution to the U.S. EPA for cleanup costs.

Vessel pollution prosecutions

Since the 1990s, the Division has had a robust program of prosecuting shipping companies and crew for the intentional discharges of pollutants from ocean-going vessels. At the end of fiscal year 2016, criminal penalties imposed in these cases totaled more than \$363 million in fines and more than 32 years of confinement.

In fiscal year 2016, the Division's successful prosecution of these violations included the cases below:

- *United States v. Paul Dancu* (S.D. Ala.) – Since January 2010, Norwegian-based shipping company Det Stavangerske Dampskibsselskab AS (DSD) was aware that the oily-water separator (OWS) aboard the vessel *M/T Stavanger Blossom* was inoperable. Rather than repair or replace the OWS, the company used various methods to bypass the device and discharge



M/T Stavanger Blossom, Environmental Crimes Section

oil wastes overboard. During the last months of the vessel's operation, prior to its arrival in the Port of Mobile in November 2014, the ship illegally discharged approximately 20,000 gallons of oil-contaminated waste water. Company employees also intentionally discharged fuel oil sludge directly into the ocean after placing it in plastic garbage bags. They attempted to hide these discharges from the Coast Guard by making false entries in the vessel's oil record book and garbage record book. During an inspection in Mobile, Second Engineer Xiaobing Chen and Fourth Engineer Xin Zhong lied to the Coast Guard about the sludge discharges and ordered lower-ranking crew members to do the same.

In November 2015, a jury convicted DSD, Chief Engineer Bo Gao, Chen, and Zhong of, variously, conspiracy, violating the Act to Prevent Pollution from Ships (APPS), obstruction, and witness tampering charges. DSD was sentenced to pay a \$2 million fine, make a \$500,000 community service payment to the Dauphin Island Sea Lab Foundation, complete a three-year term of probation, and implement an environmental compliance plan. Gao and Chen were sentenced to six months' incarceration, and Zhong was sentenced to two months. Chief Engineer Paul Dancu previously pleaded guilty to a conspiracy charge for his involvement in the illegal discharges of oily wastes from the *M/T Stavanger Blossom* and was sentenced to five days' incarceration, followed by immediate deportation.

- *United States v. Briese Schifffahrts GmbH & Co. KG* (N.D. Fla.) – During an inspection of the vessel *M/V BBC Magellan* at the Port of Pensacola in March 2015, the Coast Guard discovered an improperly attached rubber hose. Officials later determined that, between January and March 2015, the crew of the *BBC Magellan* had installed and illegally used the hose to remove oily wastes from the vessel's holding tanks and discharged them directly into the ocean. The crew also failed to make the required entries in the vessel's oil record book. When questioned about the hose's purpose and how oily wastes were discharged from the ship, Grigorii Simagin, the chief engineer, instructed other crew members to lie to the Coast Guard. Simagin pleaded guilty to violating APPS and witness tampering and was sentenced in

January 2016 to time served (10 months) and a \$1,000 fine. The owner and operator of the *M/V BBC Magellan*, Briese Schifffahrts GmbH & Co. KG MS Extum, and Briese Schifffahrts GmbH & Co. KG, respectively, pleaded guilty to a three-count information alleging violations of APPS and witness tampering. They were sentenced to pay jointly and severally a fine of \$1.25 million and to make a community service payment of \$250,000, which will go to the Florida Keys National Marine Sanctuary. Additionally, the vessel is barred from the United States for five years.

Operation Crash

“Operation Crash” is an ongoing nationwide effort led by FWS and ENRD, in conjunction with other investigative agencies and U.S. Attorneys’ Offices, to investigate and prosecute those involved in the black market trade of rhinoceros horns and other protected species, that continues to produce numerous successful prosecutions. (A “crash” is a herd of rhinoceroses.) All rhinoceros species are protected under United States and international law, and the black rhinoceros is listed as endangered under the Endangered Species Act. Several major dealers in the illegal rhino horn trade were successfully prosecuted in 2016.

- *United States v. Linxun Liao* (S.D.N.Y.) – Canadian national Linxun Liao was a partner in an Asian art and antiques business located in China. Liao’s role was to purchase items, including wildlife items, in the United States and arrange for their export to China. Between March 2012 and May 2013, Liao made online purchases of 16 rhinoceros horn products, more specifically libation cups, from auction houses in the United States; he then smuggled the cups to China without the required declarations and permits. Liao did not declare the rhinoceros exports to the FWS or obtain the required permits. Liao’s co-conspirators sold the items at their antique business in China. The market value of the libation cups in this case was more than \$1 million. Liao was arrested in February 2015.

In November 2015, Liao was sentenced to two years of incarceration, followed by two years of supervised release, for his role in trafficking the rhinoceros horn libation cups. Liao was also sentenced to forfeit \$1 million and 304 pieces of carved ivory found during a search of his U.S. storage site and is banned from future involvement in the wildlife trade.

- *United States v. Lumsden Quan* (D. Nev.) – In 2014, Lumsden Quan and a co-defendant negotiated the sale of two black rhinoceros horns by e-mail and telephone, ultimately communicating with an undercover agent. Quan’s co-defendant offered to sell two black rhinoceros horns for \$55,000 and agreed to meet the buyer in Las Vegas. In March 2014, after directing another person to drive from California to Las Vegas with the horns, Quan and his co-defendant flew from California to Las Vegas to complete the sale. Quan met the undercover agent in a Las Vegas hotel room, where he completed the transaction for the agreed-upon amount. In August 2015, Quan pleaded guilty to conspiring to violate the Lacey Act and the Endangered Species Act, and to a substantive Lacey Act violation for his role in the illegal sale of black rhinoceros horns.

Protecting Wildlife through Prosecutions

Prosecuting Illegal Logging

Lumber Liquidators, the largest retailer of hardwood flooring in the U.S., imported millions of dollars’ worth of illegal timber that had been poached from Far East Russia, the home of the last 450 wild Siberian tigers. Illegal logging is the primary risk to the tigers’ survival, as they are dependent on intact forests for hunting and because Mongolian oak acorns are a chief food source for the tigers’ prey species. From April through July 2013, Lumber Liquidators’ U.S. imports alone exceeded the amount permitted to be harvested from a specific concession in Far East Russia by more than 800 per cent. The timber was then shipped from Russia to China, where it was manufactured into hardwood flooring. Some of that same flooring was also falsely declared upon entry into the U.S. as having come from wood harvested in Germany. Additionally, seven

shipments declared upon import as Indonesian mahogany were actually from the Myanmar Timber Enterprise, a company under sanction by the U.S. Treasury with which U.S. companies were prohibited from conducting business.

In October 2015, in the case *United States v. Lumber Liquidators, Inc.* (E.D. Va.), Lumber Liquidators, Inc., pleaded guilty to felony Entry of Goods by Means of False Statements and misdemeanor Lacey Act violations related to its importation of timber products, marking the first felony conviction for trafficking in illegal timber. Lumber Liquidators was sentenced to pay a \$7.8 million fine, the largest criminal fine to date for Lacey Act violations. It also must forfeit \$969,175, make \$1.23 million in community service payments, complete a five-year term of probation, to include the implementation of an environmental compliance plan and independent audits, and pay more than \$3.15 million in civil forfeiture.



Tiger released from cage into habitat, Department of Justice

In December 2015, Quan was sentenced to a year and two days' incarceration, followed by three years' supervised release. Quan was also sentenced to pay a \$10,000 fine and was banned for three years from working in the art and antique business.

- *United States v. Patrick Sheridan* (W.D. Tex.) – Irish national Patrick Sheridan and his co-defendant Michael Slattery, Jr., conspired to traffic in horns from black rhinoceros. In 2010, the defendants used a “straw buyer” to purchase two black rhinoceros horns from a taxidermist in Texas. The horns were subsequently sold in New York.

Sheridan was extradited from the United Kingdom in September 2015 and subsequently pleaded guilty to a conspiracy charge for his role in trafficking black rhinoceros horns. In January 2016, Sheridan was sentenced to 12 months' incarceration, followed by three years' supervised release, and a \$1,000 fine. Slattery was previously sentenced to 14 months in prison for his role in the conspiracy.



Rhino horn from Quan, Department of Justice

- *United States v. Joseph Chait* (S.D.N.Y.) – Joseph “Joey” Chait was a Senior Auction Manager of the I.M. Chait Auction Gallery in Beverly Hills, California. Undercover FWS agents consigned a carved figure made from rhinoceros horn. Another undercover agent then bought the carving at auction for \$230,000. Chait agreed to sell the item even though he knew it was not an antique. He also offered to fabricate paperwork to aid the buyer in smuggling the rhino horn carving out of the United States. Chait provided a fake invoice stating that the item was made of plastic and cost only \$108. Chait also helped to smuggle items made from rhinoceros horn, elephant ivory, and coral out of the country on several other occasions.

In March 2016, Chait pleaded guilty to a two-count information charging a conspiracy to smuggle wildlife and to violate the Lacey Act, and a substantive felony violation of the Lacey Act. On June 22, 2016, Chait was sentenced to a year and a day of incarceration, followed by three years’ supervised release, and a \$10,000 fine.



Auction poster from Chait, Department of Justice

Protecting Federal Enforcement at the Appellate Level

The Division preserved important criminal enforcement actions with several key appellate successes this year.

Tonawanda Coke Corp. (TCC) ran a coke production facility situated between Niagara Falls and Buffalo, New York. For over four years, TCC knowingly emitted huge quantities of “coke oven gas” into the atmosphere through a pressure release valve in its by-products department in violation of its Clean Air Act permit. Coke oven gas contains benzene, a known human carcinogen. And, for over a decade, TCC knowingly stored and disposed of huge quantities of hazardous wastes on the ground at its facility without a permit under RCRA. A jury convicted TCC of violating the CAA and RCRA. The district court sentenced TCC to a five-year probation term and, as a condition of probation, ordered TCC to fund two specified “impact studies” in an amount not to exceed \$12.2 million. The court also fined TCC \$12.5 million. TCC appealed. On January 11, 2016, in *United States v. Tonawanda Coke Corp.* (2nd Cir.), the Second Circuit affirmed the lower court’s decision, rejecting TCC’s claims that it did not have fair notice that its conduct violated RCRA; that one of the RCRA counts should have been dismissed as time-barred; that it was entitled to a unanimity instruction specific to the RCRA storage count; and that the district court should not have ordered, as a condition of probation, that the company fund studies to evaluate the effects of the company’s illegal conduct on human health and the environment. The court found no merit to any of these arguments.

On February 10, 2016, the First Circuit issued a favorable published decision upholding the conviction in *United States v. Andrew Zaruskas* (1st Cir.). After a jury trial, Andrew Zaruskas was convicted in district court of conspiracy, money laundering, and smuggling, all in connection with his importation of narwhal tusks into the United States from Canada. The district court sentenced him to 33 months in prison. On appeal, Zaruskas argued that the prosecutor’s conduct in examining witnesses and commenting on the evidence violated his Fifth Amendment right not to testify and shifted the burden of proof from the government to the defense. The First Circuit disagreed, finding that the district court’s instruction and the strength of the government’s

evidence assured that the jury's verdict was not prejudiced by any such violation. The First Circuit also rejected Zaruskas's claim that the district court erred in admitting certain records on the grounds the reports were inadmissible hearsay, concluding that the reports had all of the indicia of non-adversarial public records.

Robroy MacInnes and Robert Keszey were co-owners of Glades Herp Farm in Bushnell, Florida, and Keszey used to star in the Discovery Channel show "Swamp Brothers." Undercover investigations by state and federal wildlife officials revealed that the two were trading in Eastern timber rattlesnakes illegally taken from the wild in New York, as well as Eastern indigo snakes, which are listed as threatened under the Endangered Species Act. MacInnes and Keszey were convicted and sentenced, respectively, to 18 months and 12 months and one day in prison. They appealed. On March 3, 2016, in *United States v. Robroy MacInnes and Robert Keszey* (3d Cir.), the Third Circuit affirmed the defendants' convictions. First, the court found that the district court did not err in excluding a recorded conversation between the Government's cooperating witness and a state investigator because the witness "said little, if anything, of value." Second, the court found that the district court did not unfairly limit the scope of defendants' cross examination. Third, the court held that cross-examination on certain topics was properly prohibited because the Government did not raise those issues in its direct examination. Fourth, the court upheld the district court's decision to exclude both expert and lay testimony from a defense witness. Finally, because the court found no error at trial, it declined to address defendants' argument that the cumulative effect of the district court's evidentiary rulings violated defendants' rights under the Confrontation Clause.

In 2006, Mark Sawyer and four co-defendants formed A&E Salvage and purchased the salvage rights to a former industrial site in eastern Tennessee in order to demolish the buildings and obtain salvageable material. Despite the presence of large amounts of asbestos, A&E Salvage knowingly failed to comply with the asbestos National Emission Standards for Hazardous Air Pollutants when demolishing the building. The defendants' actions eventually led EPA to intervene and clean up the site at a total cost of over \$16 million. The defendant pled guilty to one count of conspiring to violate the Clean Air Act. The district court sentenced the defendant to a 60-month prison term, and held him and his co-defendants jointly and severally liable for over \$10 million in restitution to the EPA. Sawyer appealed, and on June 3, 2016, the Sixth Circuit affirmed his conviction in *United States v. Sawyer* (6th Cir.). The appellate court concluded that his 60-month sentence was reasonable. It also upheld the restitution award even though it was based on facts found by the judge as opposed to the jury. The court rejected Sawyer's argument that the Supreme Court's decision in *Southern Union* required the jury to find the facts supporting restitution awards.

The United States indicted four captains of commercial fishing vessels for violating the Lacey Act by selling Atlantic striped bass that they landed after trips in federal waters off North Carolina in knowing violation of federal regulations prohibiting such fishing. The district court (E.D.N.C.) dismissed the indictments on the ground that the defendants' conduct fell within an exception to the Lacey Act for activities "regulated by a fishery management plan in effect" under the Magnuson-Stevens Act, relying on a plan prepared by an interstate compact commission regulating bass fishing in *state* waters. This ruling meant that the United States could use the Lacey Act to prosecute fishermen illegally fishing for striped bass in state-regulated waters, but could not prosecute fishermen illegally fishing for striped bass in federally-regulated water. The United States appealed the dismissals and, on July 5, 2016, the Fourth Circuit reversed the district court in *United States v. Saunders* (4th Cir.). It held that the exception does not apply because the interstate commission's management plan does not purport to authorize the Secretary of Commerce's regulations prohibiting bass fishing in *federal* waters. Even if the interstate plan could be interpreted as attempting to provide the Secretary some sort of authority over fishing in federal waters, the court held, the plan could not have done so because the Secretary's power derives from federal statutes, not some grant of authority by a group of states. Finally, the court of appeals rejected the defendants' arguments that the statutory scheme at issue was unconstitutionally vague.

PROTECTING VITAL FEDERAL PROGRAMS AND INTERESTS

The Division supports the missions of its client agencies under the many federal environmental and natural resource laws they implement in a number of ways. The Division defends client agencies' regulations and other decisions taken to implement vital federal programs and interests. The Division also responds to congressional and public inquiries, supports capacity building and engagement with law enforcement partners domestically and internationally to protect our interests, and participates in litigation as *amicus curiae* where the government has an interest in the outcome or legal principles at issue in the case.



Gila River Indian Community, Google Maps

Protecting and Promoting the Development of Transportation Infrastructure

The Division successfully defended the cooperative efforts between the Federal Highway Administration (FHWA) and the Arizona Department of Transportation to authorize and construct a 22-mile freeway in *Protecting Arizona's Resources and*

Children v. Federal Highway Administration and *Gila River Indian Community v. Federal Highway Administration* (D. Ariz.). The challenged project was designed to address future traffic needs in the Phoenix metropolitan area. In a pair of consolidated cases, environmental groups, homeowner's associations, and a tribe challenged the project under NEPA, Section 4(f) of the Department of Transportation Act, and the National Historic Preservation Act (NHPA). The district court ruled in the agency's favor and the Division continues to defend the project on appeal. The Division worked closely with the State of Arizona in defending this project.

In *Conservation Alliance of St. Lucie County v. Department of Transportation* (S.D. Fla.), the Division successfully defended the FHWA's decision to approve construction of a six-lane bridge across the North Fork St. Lucie River Aquatic Preserve and Savannas Preserve State Park in southern Florida. The project is designed to address traffic congestion on two existing bridges in the City of Port Saint Lucie and meet future projected traffic demands. The district court found that FHWA's decision to approve the project was reasonable, supported by the record, and included all possible planning to minimize harm to the protected resources.

The Division's efforts also helped clear the path for a critical transportation project in one of the areas of the country most plagued by congestion and transportation-related air pollution. On one main thoroughfare in Los Angeles, buses and vehicles move as slowly as 7 miles per hour. The Federal Transit Administration-approved subway line will move passengers to their destinations at 40-65 miles per hour. The Division's defense of the



Six-lane bridge across the North Fork St. Lucie River, Google Maps



Katahdin Woods and Waters National Monument, National Park Service

\$6 billion, approximately nine-mile Westside Subway Extension Project through Beverly Hills, Century City, and Westwood in Los Angeles resulted in a decision that allows funding and preconstruction activities in furtherance of that project to proceed. In *Beverly Hills Unified School District v. FTA* and in *City of Beverly Hills v. FTA* (C.D. Cal.), the school district and the city claimed the Federal Transit Administration and the Los Angeles County Metropolitan Transportation Authority violated NEPA, Department of Transportation Act Section 4(f), the Clean Air Act, and the NHPA. The district court issued a 216-page opinion that identified flaws in the environmental analysis supporting the decision. Nonetheless, after expedited discovery and four rounds of briefing regarding the most appropriate remedy, the court held that the public interest in the subway weighed in favor of allowing the funding, contracting, and preconstruction activities to move forward while the governmental agencies complete supplemental analysis to cure defects in the earlier analysis. The Division coordinated closely with Los Angeles County Metropolitan Transportation Authority on discovery, settlement discussions, and briefing.

In *Highway J Citizens v. United States Department of Transportation* (E.D. Wis.), the Division—working closely with the Wisconsin Department of Transportation—successfully repelled attempts to obtain a preliminary injunction stopping improvements of Highway 164 in suburban Milwaukee. The highway is badly out-of-date and has a crash rate that is 63% higher than the state-wide average for similar roads. Our victory allows the Wisconsin Department of Transportation to move forward with this important local infrastructure project.

In *Detroit International Bridge Company v. U.S. Coast Guard* (D.D.C.), the Division successfully obtained dismissal of all claims in this long-running dispute concerning the existing international bridge between Detroit, Michigan and Windsor, Ontario, a key border crossing that carries nearly 25% of all commerce between Canada and the United States. Canada and the State of Michigan are seeking to build the New International Trade Crossing, a second international bridge, to increase border security and improve trade in the region.

The Division also helped move forward an airport expansion project. In earlier litigation, the environmental groups in *Sierra Club v. Department of Transportation* (N.D. Cal.), successfully challenged the actions of the Federal Aviation Administration (FAA) and the Town of Mammoth Lakes regarding a project to expand the local airport under NEPA for failure to prepare an EIS. As a result, the court enjoined the defendants from commencing any construction or other work pending completion of an EIS. No appeal was taken, and the project was abandoned without the completion of an EIS. Over a decade later, the town has begun to develop a similar airport project. The Department obtained relief from the injunction to allow the FAA to conduct the appropriate level of environmental review for the new airport project.

Defending EPA Decisions Regarding Administrative Petitions

In *Environmental Integrity Project v. EPA* (D.D.C.), a plaintiff sued EPA under the APA, alleging that EPA had unreasonably delayed in responding to a 2011 administrative petition requesting that EPA designate ammonia as a criteria pollutant under the CAA and establish an ammonia National Ambient Air Quality Standard. ENRD moved to dismiss, arguing that plaintiff had not provided the required pre-suit notice under the applicable waiver of sovereign immunity in the CAA. On December 1, 2015, the court granted our motion to dismiss. The court concluded that although the duty to respond to an administrative petition seeking a CAA rulemaking derives from the APA, both plaintiff's cause of action for EPA's alleged unreasonable delay in carrying out that duty and the applicable waiver of sovereign immunity are found in section 304(a) of the CAA. Section 304(a) requires pre-suit notice. Because plaintiffs failed to provide pre-suit notice, the court held that plaintiffs had "failed to satisfy a mandatory condition precedent to bringing suit and securing the government's waiver of its sovereign immunity under the CAA." The court further held that because section 304(a) "expressly forbids" suits filed without pre-suit notice, plaintiffs could not rely on the APA section 702 waiver of sovereign immunity as a backstop.

Facilitating Disposal of Nuclear Waste

In *State of Washington v. U.S. Department of Energy* (E.D. Wash.), ENRD obtained a largely favorable consent decree amendment in light of technical issues that had undermined DOE's ability to comply with milestones for constructing the Waste Treatment Plant and removing mixed nuclear and chemical waste from underground storage tanks at the Hanford Nuclear Reservation in southeast Washington. In March 2016, the court modified the consent decree to extend the time for DOE to complete the Plant from 2022 until 2036. In addition, the court granted DOE an additional two years to complete the removal of waste from 19 tanks and rejected proposals by the State that would have interfered with DOE's ability to advance its waste treatment mission.



Hanford Nuclear Reservation, Wikipedia

Defending the Actions of the Animal and Plant Health Inspection Service

The Division continues to work successfully with the USDA's Animal and Plant Health Inspection Service (APHIS) to defend the Agency's efforts to protect and improve the health and quality of our nation's animals and animal products.

For example, in *Davis v. United States* (S.D. Tex.), the Division successfully defended APHIS's use of CO-RAL, the insecticide approved by APHIS and the EPA for dipping cattle, as the center-piece of its cattle fever tick control efforts in southern Texas. The program is a joint program of the Texas Animal Health Commission and APHIS.

In *Center for Biological Diversity v. Vilsack* (D. Nev.), the Division defended actions by APHIS and the Fish & Wildlife Service to control the spread of saltcedar, an invasive species, through the release of the tamarisk leaf-eating beetle. The court ruled in favor of the government on the NEPA claims and one of the two ESA claims.

Defending Federal Water Rights and the Operation of Reclamation and Flood Control Projects

The Division participated as a real party in interest, at the invitation of the State of Nevada, in defending the Nevada State Engineer's highly favorable decision to limit future groundwater withdrawals in the vicinity of Devil's Hole National Monument and Ash Meadows National Wildlife Refuge. This decision in the proceeding *In re: Nevada State Engineer Ruling No. 5902 and Order No. 1197* (Fifth Judicial District Court, Nev.), was predicated in part on the need to protect federal reserved water rights. The state district court, in upholding the State Engineer's actions, supported by evidence presented by the National Park Service, recognized that in the case of Devil's Hole "there is little or no room for error."

The Division participated in the negotiations that led to a comprehensive settlement of litigation involving the Truckee Meadows Water Authority and the Truckee-Carson Irrigation District, under which the Truckee Meadows Water Authority acquired the Truckee-Carson Irrigation District's interest in Donner Lake in California. Although the United States was not a party to this settlement, the Division was able to secure significant litigation benefits including the dismissal with prejudice of three lawsuits challenging the Truckee River Operat-

ing Agreement: (1) *United States v. Orr Water Ditch Co.* (D. Nev.); (2) *Churchill County v. Jewell* (D. Nev.); and (3) *Truckee-Carson Irrigation District v. State Water Resources Control Board* (D. Nev.).

The Division had several major accomplishments in state adjudications in Idaho last year. In the *Snake River Basin Adjudication* (District Court, County of Twin Falls, Idaho), a general stream adjudication covering 87% of the State, following five years of negotiations, the Division entered into a settlement agreement that secures federal reserved water rights for instream flows to maintain Wild and Scenic River values for 16 Wild and Scenic Rivers on lands managed by BLM totaling 316 river miles in the Owyhee Canyonlands area of southwestern Idaho. In the *Coeur d'Alene-Spokane River Basin Adjudication* (District Court, County of Twin Falls, Idaho), a general stream adjudication covering the Panhandle area north of the Snake River basin, the Division negotiated a settlement agreement that provides for approval of the United States' federal reserved water right claims on behalf of the Forest Service for the St. Joe Wild and Scenic River.

The Division successfully concluded three years of negotiations over a set of agreements among the FWS, the Storrie Project Water Users Association (of which the FWS is 60% owner), and the City of Las Vegas in the New Mexico state general stream adjudication. These agreements resolved a number of contentious matters related to the water rights in the Gallinas sub-basin of the Pecos River. The agreements provide for the sale of storage space in Storrie Reservoir from the Association to the City and the settlement of a number of disputes among those parties, including ongoing administrative and judicial litigation. The agreements also concluded the litigation over the City's application to enlarge Bradner Reservoir.

The Division successfully adjudicated the decree in Colorado Water Division No. 5 approving the Forest Service's application for absolute and conditional water rights for a well operated by Copper Mountain Ski Area in the White River National Forest.

Plaintiffs challenged the Corps' approval of the Fargo/Moorhead flood risk reduction project that was being constructed to prevent flooding the cities of Fargo, North Dakota and Moorhead, Minnesota in *Richland/Wilkin Joint Powers Authority v. Army Corps of Engineers* (D. Minn.). The Richland/Wilkin Joint Powers Authority alleged that the Corps should have considered different alternatives to the project under NEPA and failed to address public comments with respect to the project. The Court ruled in favor of the Corps on all counts.

Acquiring Property for Public Purposes

When federal agencies acquire private property for public use, ENRD strives to ensure that all landowners receive just compensation and taxpayers pay no more than market value. In addition to ENRD's work to guarantee justice under the Fifth Amendment, the Division reviews title for federal land acquisitions and provides guidance to client agencies on the Attorney General's title regulations before public money is spent.

This year, the Division worked closely with the Department of the Interior and its National Park Service on several notable acquisitions to protect our nation's cultural and natural resources. In particular, the Division enabled the approval of title on three significant historical sites: the Sewall-Belmont House in Washington, D.C., Christopher Park near the Stonewall Inn in New York City, and Werowocomoco in Gloucester County, Virginia. The Division also reviewed title on two noteworthy acquisitions for environmental protection, one in Maine and the other in Everglades National Park.

Sewall-Belmont House

ENRD applied the Attorney General's title regulations to permit the National Park Service to accept donation of the historic Sewall-Belmont House from the National Woman's Party (NWP) for designation as the Belmont-Paul Women's Equality National Monument. The Sewall-Belmont House, which is adjacent to the Hart Senate Office Building and across the street from the Supreme Court, served as the headquarters for the NWP beginning in 1929. The NWP organized and lobbied for women's suffrage, and the monument pays tribute to NWP's founder and the struggle for equality and women's rights.

Stonewall National Monument

ENRD advised the National Park Service on the acquisition and later designation of the Stonewall National Monument in New York City. The Stonewall Inn, Christopher Park, and the surrounding neighborhood was the scene of the Stonewall Uprising in 1969, which is credited as the catalyst for the modern LGBTQ civil rights movement. The President designated Christopher Park as the Stonewall National Monument to commemorate this historic moment and elevate public discourse on LGBTQ civil rights.

Werowocomoco

ENRD approved title under provisions of the Attorney General's title regulations when the National Park Service acquired 264 acres known as Werowocomoco—a historic site in Gloucester County, Virginia, once home to Chief Powhatan and his daughter, Pocahontas, and where Powhatan may have met Captain John Smith in 1607—for addition to the Captain John Smith Chesapeake National Historic Trail.

Katahdin Woods and Waters National Monument

The National Park Service was able to accept the donation of 87,500 acres in Penobscot County, Maine, for designation as the Katahdin Woods and Waters National Monument. The monument protects the Maine North Woods' rich biodiversity, scenic beauty, and historical landscape, while still allowing visitors to enjoy traditional recreational uses valued by the region.

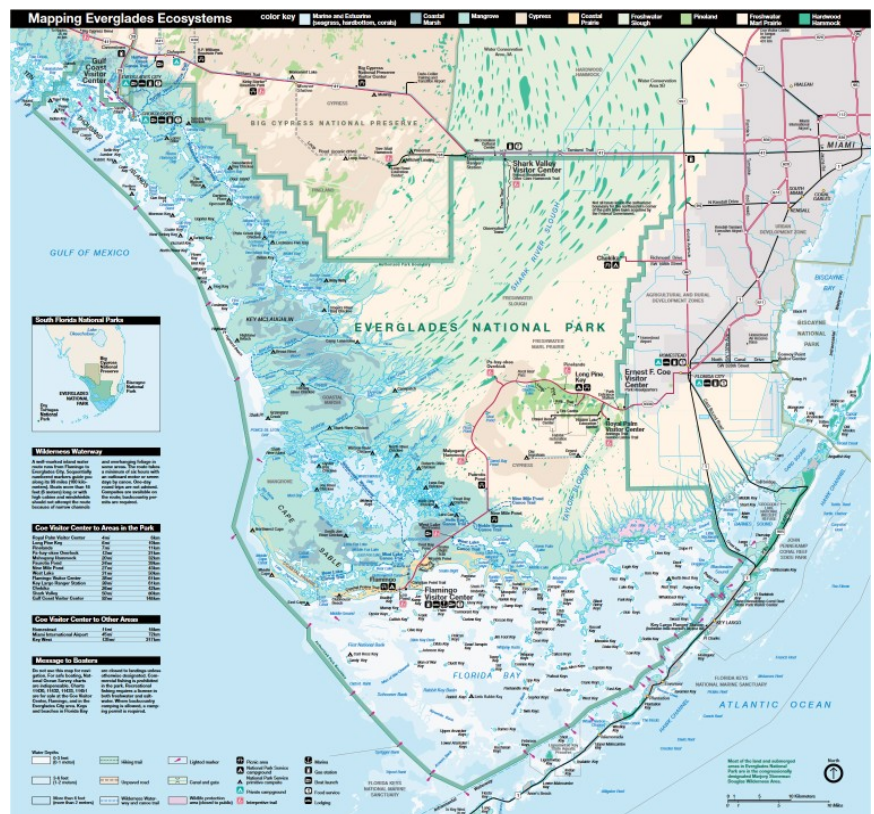
Everglades National Park

ENRD also facilitated one of the final acquisitions for Everglades National Park. Since the 1989 Everglades National Park Protection and Expansion Act, the National Park Service has acquired more than 8,000 tracts totaling over 109,000 acres in South Florida for inclusion in the Park. This year, ENRD assisted in the acquisition of one of the last of six tracts necessary to complete the expansion. ENRD approved title for the acquisition of 40.69 acres along the Tamiami Trail with the ultimate goal of restoring natural hydrological and ecological conditions to Everglades National Park.

Litigating Condemnation Cases

Although ENRD works closely with federal agencies to acquire property without resorting to condemnation, ENRD continued its history of successful condemnation litigation and negotiated settlement this year.

ENRD exercised the power of eminent domain in *United States v. 131,675 Rentable Square Feet of Space Located at 400 South 18th Street in St. Louis* (E.D. Mo.), to acquire a 33-month leasehold interest on behalf of General Services Administration for the continued occupation of a Veterans Benefits Administration office. The landowner claimed additional compensation for the uncertainty of whether the United States would condemn the property for a subsequent term after the expiration of the lease. Following a favorable ruling by the court on the United States' motion on this issue, the parties settled the case on the eve of trial for \$5,000,000, a savings to the government of \$2,670,000.



Everglades National Park, National Park Service

The Division also reached a favorable settlement in *United States v. 102.871 Acres of Land Situate in Cameron Parish* (W.D. La.), a condemnation action on behalf of the U.S. Army Corps of Engineers to provide a disposal site for dredged spoil from the operation and maintenance of the Sabine Neches Waterway, a major thoroughfare from and to the Gulf of Mexico for deep-draft commercial marine traffic. The site had been subject to a 50-year easement for spoils placement; by this suit, the Corps acquired title to the remaining surface estate. The landowner claimed ownership of adjacent river accretions on the bank and thus additional damages, asserting a total market value of \$1,100,000. Following excellent motions practice and discovery, ENRD negotiated a settlement of \$60,570.42.

Defending Against Challenges Brought Under the National Historic Preservation Act

The Division frequently successfully defends challenges to agency decisions that allegedly result in impacts to cultural and historical sites. In most cases, these challenges assert that an agency failed to properly complete a National Historic Preservation Act (NHPA) Section 106 analysis, which generally requires an agency to take into account the potential effects of its undertakings on properties that could be listed on the National Register of Historic Places.

For example, in *Battle Mountain Band of the Te-Moak Tribe of Western Shoshone Indians v. Bureau of Land Management* (D. Nev.), the Division successfully defended the BLM's approach to protecting sensitive tribal properties under the NHPA. The Battle Mountain Band sought emergency injunctive relief to block the construction of a power line by a mining concern operating under a right of way. The Band alleged that BLM had failed to carry out its responsibilities under NHPA Section 106 and a programmatic agreement with respect to recently-identified Traditional Cultural Properties. The court denied the Band's motion, finding that under the terms of the governing Programmatic Agreement, BLM was not required to reopen its NHPA Section 106 process with respect to these new properties.

In *Epstein v. United States Army Corps* (E.D. La.), property owners alleged harm to their historical properties resulting from construction of the Southeast Louisiana Urban Flood Control Project (SELA). As part of this project, the Corps and the Louisiana State Historical Preservation Officer signed a Programmatic Agreement under the NHPA. That agreement memorialized the Corps' process for identifying potential historical properties that could have been impacted by the SELA project. The property owners claimed that the Corps did not comply with the Programmatic Agreement, resulting in damage to their properties, and moved to immediately suspend construction on this important project. The court dismissed the complaint, finding that there was no private right of action in the NHPA and that property owners failed to plead a claim as required by the APA.

Protecting the Public Fisc

National Trails System Act Cases

In 1983, Congress enacted the National Trails System Act, 16 U.S.C. § 1247(d) (Trails Act) which established the Rails-to-Trails program. When a railroad company abandons a railroad, there is the option to preserve the corridor for potential future rail use by "railbanking" the corridor. In the interim, if there is a local sponsor, it can be used for other purposes, such as trail use. The Division is presently defending approximately 120 cases involving some 10,000 parcels of property



New York City High Line, Wikipedia

brought under the Fifth Amendment by landowners alleging that the operation of the Trails Act has resulted in a taking of their property rights in railroad corridors throughout the country. Landowners adjacent to these railroad corridors allege that the “conversion” of these corridors from railroad use to trail use under the Trails Act results in a taking of their rights to regain unencumbered fee title to the lands within the corridor upon the cessation of rail service. As a result, landowners frequently sue the United States for compensation. The Division is actively working to identify pending Trails Act cases that may be fully or partially resolved through settlement, and has a number of cases that are in settlement negotiations.

The Division has also successfully litigated certain significant issues in other Trails Act cases. For example, the Division successfully opposed the certification of class actions in *Atkins v. United States* (E.D. Mo.), *Edward Huffman Living Trust v. United States* (E.D. Ark.), and *Brown v. United States* (Fed. Cir.). The Federal Circuit decided several such cases this past fiscal year, issuing favorable rulings to the government on various issues that arise in this kind of litigation. In *Rogers v. United States* (Fed. Cir.), the Division successfully defended an appeal from the trial court’s ruling that the United States was not liable for a taking because the railroad company acquired fee simple title by deed to lands comprising a right-of-way in Sarasota County, Florida. The *Rogers* appeal included the certification of state law questions to the Supreme Court of Florida, which confirmed that no state law, policy or other factual considerations operate to limit the interest acquired by the railroad regardless of the language used in the deed.

The Division was also successful in *Haggart v. United States* (Fed. Cl.), in which the Federal Circuit held that, because the applicable fee-shifting statute already provides for reimbursement of a reasonable fee, the trial court may not award class counsel a percentage of the class action settlement or “common fund” as a fee. *Haggart* was a class action suit involving the conversion of a railroad corridor east of Seattle, Washington, to trail use. The Court of Federal Claims approved a settlement for 250 class members that included \$110 million in just compensation, \$27 million in accrued interest, and \$2.5 million in statutory attorney fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c) (URA). The Court of Federal Claims then awarded class counsel an additional \$33 million in attorney fees, to come out of the just compensation award, under the “common-fund” doctrine. Several of the class members objected to the settlement, arguing they had not received from class counsel sufficient information to assess whether their share of the overall award was appropriate. They also objected to the common-fund fee award. The United States joined the dissenting class members in this appeal, arguing that there had been inadequate disclosure and that class counsel should not be awarded common-fund fees as the statutory fee award, which is required to be a “reasonable” fee, adequately compensated them. On January 8, 2016, the court of appeals agreed on both counts, and reversed the lower court’s approval of the settlement agreement. Class counsel then asked the Supreme Court to review the common-fund fee award issue, which it declined to do.

Another Rails Act case, *Romanoff Equities, Inc. v. United States* (Fed. Cir.), involved the “High Line,” an elevated railroad corridor that was constructed in the 1930s that runs along the western edge of New York City. Railroad traffic ceased in the early 1980s. Ultimately, it was converted to trail use and has become a well-used tourist and recreational trail. Romanoff Equities, Inc., an owner of land underneath and adjacent to the rail line, sued in the Court of Federal Claims, arguing that the conversion of the corridor to trail use deprived it of its property. The Court of Federal Claims rejected that claim, and Romanoff appealed. On March 10, 2016, the Federal Circuit affirmed the judgment in favor of the United States. It found that the 1932 easement granted by Romanoff’s predecessor to the railroad was broad enough in scope to include the present day trail uses. It also rejected Romanoff’s argument that the easement automatically terminated when the railroad ceased operations in the 1980s.

Defending the Corps’ Decisions as to Post-Hurricane Katrina Projects

On August 23, 2016, the Fifth Circuit issued a favorable decision in *Louisiana v. United States Army Corps of Engineers* (5th Cir.), reversing in part and vacating in part the district court’s adverse judgment against the U.S. Army Corps of Engineers. Louisiana had challenged the Corps’ decision requiring the State to share in rehabili-

tation costs by paying \$500 million in costs for undertaking projects that will restore wetlands that were eroded, by some accounts, by the Corps' operation and maintenance of the Mississippi River-Gulf Outlet, as well as the costs of maintaining a rock structure that keeps the Outlet closed to deep-draft vessels. Citing provisions in several appropriations and authorization statutes, the district court ruled that Congress had clearly required the Corps to undertake the ecosystem-restoration projects at full federal expense of more than \$1.3 billion, and it held that even if the statute were ambiguous, the Corps could not reasonably interpret its obligations otherwise. The Fifth Circuit reversed that ruling.

As a threshold matter, the Fifth Circuit held that Louisiana's challenge to the portion of the Corps' decision concerning the ecosystem-restoration project must be dismissed because the agency has not yet taken final action under the APA. Specifically, the court concluded that the Corps' decision about how to cost-share the project, set forth in a report to Congress, was tentative and interlocutory because going forward with the project is contingent on finding a non-federal sponsor to share the costs, which Louisiana has refused to do. The court also held that the report has no legal consequences on the State for that refusal, and thus, the State's challenge to the Corps' cost-sharing must be dismissed for failure to challenge final agency action. On the merits, the Fifth Circuit reversed the district court's judgment that overturned the Corps' decision, through a memorandum of agreement, requiring Louisiana to pay the costs of maintaining the closure structure, which the court held constitutes a reasonable interpretation of ambiguous appropriations and authorization statutes.

Protecting the Interests of the United States in Litigation Involving Third Parties

Filing Amicus Briefs

The Division participates as *amicus curiae* in cases in which the United States is not a party and in which United States participation may help protect or advance the interests of the United States. Our *amicus* briefs do this by explaining how the resolution of particular legal questions could impact important federal programs and otherwise providing information and viewpoints that may be helpful to the judges tasked with resolving cases.

On March 25, 2016, the Alaska Supreme Court issued a decision in *State v. Central Council of Tlingit and Haida Indian Tribes of Alaska*, an important case in which the Division filed an amicus brief. The case involved the State of Alaska's refusal to enforce child support orders issued by the first Alaska Native tribe to receive certification of its child support program by the U.S. Department of Health and Human Services. The Tribes sought a declaratory judgment that its tribal court system had subject-matter jurisdiction over child-support matters and an injunction requiring the State to recognize the tribal court's child support orders. On behalf of the United States, we filed a brief in support of tribal jurisdiction. In its decision, the Alaska Supreme Court, adopting arguments that we put forward as amicus, held that "tribal courts have inherent subject matter jurisdiction to decide the child support obligations owed to children who are tribal members or are eligible for membership, and that state law thus requires the State's child support enforcement agency to recognize and enforce a tribal court's child support orders." The Court reached this determination even though the tribes in Alaska (with one exception) do not have reservation lands. The Court went on to affirmatively decide that tribal courts have inherent jurisdiction to decide child support cases that involve non-member parents of children who are tribal members or are eligible for tribal membership. The court noted that this left questions of personal jurisdiction open for future resolution in particular cases.

The Division also participated as *amicus* in *Sierra Club v. Talen Montana*, (D. Mont.), a citizen suit action against the owner of several Montana power plants in which the plaintiff groups claimed that defendant had violated Clean Air Act provisions relating to modifications made to emitting facilities. In the course of the litigation, plaintiffs argued that an EPA applicability determination issued to a separate facility was relevant to the Court's analysis of whether the defendant had violated the Act. The defendant disagreed, arguing that such EPA applicability determinations could not properly be cited in analyzing another facility, pointing to EPA's briefing in a previous case that discussed such applicability determinations. The United States' *amicus curiae* brief explained why the EPA applicability determination was relevant to the Court's determination, and that the previ-

ous brief cited by the defendant was not to the contrary. The Department also participated at oral argument before the Court. After the Court issued a ruling that agreed with the position set forth in the United States' brief, the parties subsequently entered into a consent decree that requires defendant to comply with specified emission limits at various generation units. The Division also participated as *amicus* in a Clean Water Act citizen suit, discussed below in the context of the Division's review of citizen suit complaints and settlements.

Reviewing Citizen Suit Complaints and Settlements

The Division also conducts the Department's review of citizen suit complaints and consent judgments as required by the Clean Air Act and the Clean Water Act. These statutes authorize citizens to file suits to enforce many of the statutes' key provisions, and require that citizen suit complaints and consent judgments be served on the Department and EPA. The Division reviews consent judgments to ensure that they comply with the requirements of the relevant statute and are consistent with the statute's purposes. ENRD also provides assistance to counsel for the parties, where requested.

Harpeth River Watershed Association v. City of Franklin (M.D. Tenn.) is a Clean Water Act citizen suit based on allegations that a sewage treatment plant owned and operated by the City of Franklin, Tennessee, discharged pollutants in violation of its National Pollutant Discharge Elimination System (NPDES) permit. The Defendant City argued, *inter alia*, that the scope of the federal NPDES program was relatively narrow, and that certain permit violations (violations of overflow prohibitions, nutrient management plans, and monitoring provisions) were not federally enforceable. The United States, through an *amicus* brief, disagreed. The district court held that the challenged provisions were federally enforceable. As a result of the Court's favorable decision, the parties agreed to a settlement that provided robust relief, including \$10 million for work on the City's sewer system, significant monitoring, and up to \$150,000 for additional studies. The parties, at our request, confirmed that they will inform the United States regarding the recipients of any funding provided for additional studies, and that funds from the \$10 million will be exclusively used to upgrade the City's sanitary sewer collection system and for storm water management projects.

Responding to Congressional Proposals for Environmental and Natural Resources Legislation and Related Matters

The Division responds to a variety of legislative proposals and congressional requests, prepares Division witnesses to testify before congressional committees, and drafts legislative proposals, including proposals implementing settlements of litigation handled by the Division. In fiscal year 2016, we continued our work in these areas.

One example of federal legislation enacted this year of importance to the work of the Division in which ENRD was engaged is the Illegal, Unreported, and Unregulated Fishing Enforcement Act, which became law on November 5, 2015 (Pub. L. No. 114-81). Among other things, this law amends existing laws to provide the National Oceanic and Atmospheric Administration and the U.S. Coast Guard with authority to enforce against illegal, unreported, or unregulated fishing through vessel forfeiture and civil and criminal penalties. Another example is the Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act, which became law on October 7 (Pub. L. No. 114-231). This law extends the various authorities of the Presidential Task Force on Wildlife Trafficking of which the Division is a co-chair; requires designation of and reporting on major wildlife trafficking countries; extends programs to strengthen the capacity of partner countries to counter wildlife trafficking; and provides some added authority to make some wildlife trafficking violations predicate offense under money laundering statutes, among other things.

Reviewing Federal Administrative Rulemakings

The Department serves as part of the interagency review team for federal rulemakings developed pursuant to Executive Order 12866. The Division reviewed a substantial number of such rules in fiscal year 2016. Of note were the Division's work on Interior's final rule entitled "Procedures for Reestablishing a Formal Government-

to-Government Relationship with the Native Hawaiian Community” (43 C.F.R. part 50) and final regulations implementing the Indian Child Welfare Act (25 C.F.R. part 23). The latter work was undertaken as part of the Attorney General’s initiative to promote compliance with the Indian Child Welfare Act, which is also discussed in this report’s sections addressing Protecting Tribal Rights and Resources and Addressing Tribal Claims and the Division’s *amicus* practice.

Responding to Freedom of Information Act Requests

ENRD continues to be one of the Department’s highest-performing components in its Freedom of Information Act (FOIA) work. In fiscal year 2016, the Division completed processing of approximately ninety requests, and ended the year with only five backlogged requests and zero backlogged consultations. ENRD was also able to close all of the oldest pending requests from 2015.

The Division continues to explore the use of new technology to expedite processing, increase proactive disclosures, and reach out to requesters to ensure efficient processing of their requests. ENRD has also worked to expand FOIA training opportunities for ENRD, providing guidance about both legal and practical FOIA issues during new attorney orientation and section meetings. Our FOIA staff continues to engage with the wider FOIA community as well, serving on a Department-wide FOIA working group to develop interagency coordination guidelines and attending FOIA public forums to better understand how to serve the requester community.

Supporting Domestic and Global Enforcement Efforts by Working with International Partners on Capacity Building and Other Activities

The Division implements a robust and diverse international portfolio designed first and foremost to support our efforts to successfully prosecute environmental law and natural resource crimes that are transnational in nature. Such crimes may often involve the illegal import or export of regulated species or products (ranging from illegally trafficked wild animals or timber to efforts to dispose of hazardous wastes or ozone depleting substances). Such cases can involve foreign evidence or foreign assistance, or may be predicated on the violation of underlying foreign statutes. Division attorneys also provide critical training for law enforcement partners in other countries. Such training enhances the “rule of law” globally and helps develop effective partners who can more ably combat environmental and natural resource crimes in their own countries, as well as work more effectively with us in investigating and prosecuting transnational environmental crimes. Attorneys from the Division also support Administration priorities and efforts to comply with international commitments by participating in negotiation and implementation of trade and investment agreements, international environmental agreements, and domestic implementing legislation to ensure that they protect and promote effective environmental enforcement.



Attorney General Conference in Ghana, Department of Justice

In collaboration with, and with the financial support of, partners from other federal agencies, in fiscal year

2016, ENRD attorneys implemented capacity building workshops or spoke at conferences and meetings in Austria, Bangladesh, Brazil, Burma, Cameroon, China, Colombia, France, Gabon, Ghana, Honduras, Iceland, Indonesia, Laos, Liberia, Namibia, Panama, Peru, Singapore, South Africa, Thailand, United Kingdom, Vietnam, and Zambia. ENRD attorneys also participated in and spoke at conferences, trade negotiations, and meetings in Washington, D.C., with officials from other governments and non-governmental organizations from several other countries.



ENRD International Training, Department of Justice

Through the Division's capacity-building efforts, we seek to help law enforcement partners, particularly in countries where illegal poaching of wildlife and deforestation occur, to strengthen their investigative and evidence-gathering capabilities and improve their judicial and prosecutorial effectiveness. These training programs help to develop more effective partners to investigate and prosecute transnational environmental crimes, while also increasing our ability to enforce criminal statutes such as the Lacey Act and Endangered Species Act that have extraterritorial dimensions. These training initiatives also foster positive relationships with prosecutors in other countries in a way that better enables us to share information and assist in prosecuting transnational crimes.



Cameroon Illegal Logging Rural Timber, Law and Policy Section

In particular, Division attorneys promoted the Administration's priorities to combat wildlife trafficking and illegal logging by developing and presenting a series of capacity building workshops on these topics for environmental investigators, prosecutors, and magistrates in Southern, Western, and Central Africa in the past year. This included a Congo Basin regional workshop on illegal logging law enforcement in Douala, Cameroon for enforce-

ment officials from Cameroon, Gabon, the Republic of Congo, and the Democratic Republic of Congo. For each of these training programs in Africa, the Division partnered with the United Nations Office on Drugs and Crime and experts from other federal agencies. Experts from INTERPOL also participated in the illegal logging training. A Division attorney also partnered with the Environmental Law Institute and European Union in conducting three workshops for forestry and law enforcement officials, prosecutors, and judges in Liberia on forestry governance.

Division attorneys also implemented a variety of environmental capacity building programs in Central and South America in the past year. Attorneys implemented capacity building programs on enforcing illegal logging laws for prosecutors and other law enforcement officials in Brazil, Colombia, Honduras, and Peru. In Honduras, a Division attorney worked with the Department of the Interior's International Technical Assistance Program and Honduran officials to develop an officially sanctioned university certificate course on timber trafficking law enforcement for prosecutors and other officials in the Honduran Public Ministry. In Colombia, Division attorneys helped to organize and implement training workshops for enforcement officials on prosecuting wildlife trafficking and illegal logging cases, as well as a workshop on enforcement and needs assessment with respect to illegal mining. The mining workshop included instruction on mercury investigation techniques, methods to assess injuries to natural resources resulting from illegal mining, and response actions that can be taken with respect to those injuries.

In Asia, the Division participated in training programs for prosecutors in Burma, Laos, Thailand, and Vietnam



Assistant Attorney General John Cruden (right) and LPS Attorney Tom Swegle (left) in Beijing, Department of Justice

on wildlife trafficking law enforcement organized by the UN Office on Drugs and Crime. A Division attorney also participated in a wildlife trafficking training program focused on tiger poaching in Bangladesh, one of the last remaining countries where tigers are found in the wild. Another environmental prosecutor from the Division participated in a workshop for prosecutors in Indonesia on maritime law enforcement and enforcement of fisheries laws. And a Division attorney participated in an effort to evaluate and propose changes to

the laws of Burma regarding wildlife trafficking.

In April 2016, Assistant Attorney General John Cruden was a keynote speaker at the World Environmental Law Congress held in Rio de Janeiro, Brazil on the importance of environmental enforcement. Mr. Cruden also spoke on the importance of dedicated environmental prosecutors and the Division's efforts to counter wildlife trafficking at the World Conservation Congress of the International Union for the Conservation of Nature held in Honolulu, Hawaii. In June 2016, Mr. Cruden joined other members of the Presidentially established Wildlife Trafficking Task Force to engage for the fourth year with counterparts in China to discuss efforts to combat wildlife trafficking. These discussions occurred in connection with the annual U.S.-China

Strategic & Economic Dialogue, held this year in Beijing, China. During that trip Mr. Cruden also met with senior officials in China's Ministry of Environmental Protection, spoke at a workshop for private attorneys on citizen suit environmental litigation, and spoke about the Division's work to approximately 175 members of the public at the U.S. Embassy-sponsored Beijing American Center.

Division attorneys also held leadership positions in important INTERPOL bodies relating to environmental law enforcement and actively participated in meetings of these groups. Environmental Crimes Section Chief Deborah Harris serves on the Advisory Board of INTERPOL's Environmental Security Sub-Directorate. Deputy Section Chief Joe Poux chairs the Pollution Crimes Working Group.

ENRD attorneys also participated in negotiations, led by the Office of the U.S. Trade Representative, of the environment chapter of the Trans-Pacific Partnership Trade Agreement with eleven countries in Asia and the Americas, and the Transatlantic Trade and Investment Partnership Agreement with the European Union. The United States is working to incorporate conservation provisions in these trade agreements to deter trafficking in illegally taken flora and fauna. A Division attorney also served as a U.S. representative to the meetings in Lima, Peru, of the Experts Group on Illegal Logging and Associated Trade, one of the working groups of the Asia Pacific Economic Cooperation (APEC) forum. And Division attorneys also participated in the U.S. delegation to the 17th Conference of the Parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Johannesburg, South Africa.

PROMOTING NATIONAL SECURITY, ENERGY SECURITY, AND MILITARY PREPAREDNESS

Promoting National Security and Military Readiness

The Division often defends the environmental compliance of Department of Defense agencies as they seek to efficiently perform their national defense mission. For example, in *Zbitnoff v. James* (D. Vt.), the Division prevailed in a case challenging the U.S. Air Force's decision to base a squadron of F-35 aircraft at Burlington International Airport.

Defending the United States' Energy Agenda

Oil and Gas Development

In *White Earth Nation v. Kerry* (D. Minn.), tribes and environmental groups filed suit against the State Department alleging that it permitted Enbridge to re-construct a pipeline across the international border with Canada in violation of NEPA. They also alleged that the State Department approved interconnections with a separate pipeline that allow Enbridge to transport more oil across the border than is allowed by the existing Presidential permit and that doing so violated NEPA. On December 9, 2015, the court issued an order granting summary judgment in favor of the State Department. The court found that the State Department's actions were Presidential in nature and therefore were not reviewable under the Administrative Procedure Act. The court reasoned that, in responding to inquiries from Enbridge regarding its existing Presidential permits, the State Department was carrying out the directives of the President in Executive Order 13337, and therefore its actions were Presidential actions.

In *Louisiana v. Salazar* (D.D.C.), state plaintiffs challenged the Bureau of Ocean Energy Management's decision to correct its methodologies for sharing revenue among the United States, Louisiana, Alabama, Texas, and Mississippi from oil and gas development on the Outer Continental Shelf in the Gulf of Mexico.



Outer Continental Shelf Oil Rig, Bureau of Ocean Energy Management

The states challenged the new methodologies alleging that they violated the Outer Continental Shelf Lands Act (OCSLA) and the Submerged Lands Act. The Division successfully defended against these claims and obtained summary judgment as to all substantive legal issues. The court held that the Bureau's correction of its methodologies reflected a reasonable interpretation of the statutory language, finding that "the defendants' persuasive force is strong, as their interpretation of the revenue-sharing provision is consistent with the plain language, legislative history, and the purpose of the OCSLA."

The Division also frequently defends lawsuits involving the regulation of oil and gas activities on Indian trust lands. During the past fiscal year, the Division defended several high-profile cases that alleged that Interior's



F-35 Aircraft, Wikipedia



Ocotillo Wind Energy Facility on Public Lands in Southern California, Google Maps

proposed regulations for oil and gas activities were unlawful and that the Interior Department did not undertake proper NEPA analyses before authorizing oil and gas activities on tribal lands.

In *Southern Ute Indian Tribe v. Interior* (D. Colo.), the Tribe challenged BLM’s final rule regarding hydraulic fracturing, alleging that it violates the Indian Mineral Leasing Act and the Indian Reorganization Act. The Tribe promulgated its own regulations and therefore alleged that BLM’s final rule cannot be enforced on the Tribe’s reservation. The District Court for the District of Wyoming enjoined implementation of the BLM rule in July. Interior and the Tribe commenced settlement negotiations which ultimately proved successful as the parties reached an agreement to end the litigation. Under the terms of the settlement, BLM and the Tribe agreed that the Tribe will act as the primary regulatory authority for purposes of administering hydraulic fracturing activities on the Tribe’s lands. The settlement will also facilitate cooperation between the Tribe and BLM in regulating oil and gas activities on the Tribe’s lands.

The Division represented Interior in defending its management of oil and gas development in Osage County, Oklahoma, in five cases.

- In *Hayes v. United States* (N.D. Okla.), a land surface owner challenged Interior’s compliance with NEPA in approving leases and permits to drill on the property. The land surface owner alleged that Interior could not rely on a 1979 EA because the EA was outdated and did not adequately address the impact of hydraulic fracturing. Although the court found that the 1979 EA was inadequate, the Division successfully defended against a Rule 19 motion.

- In *Donelson v. United States* (E.D. Okla.), multiple plaintiffs filed a proposed class action of Osage County surface owners seeking to challenge Interior’s NEPA compliance in approving leases and permits to drill. The Division obtained dismissal on the grounds that plaintiffs could not assert their claims as a class and also defeated the request for class certification discovery.



Osage County Oil Drilling, the Department of the Interior

- In two related cases—*Osage Minerals Council v. Jewell (OMC)* (N.D. Okla.) and *Osage Producers Association v. Jewell (OPA I)* (N.D. Okla.)—the Division defended challenges to new oil-and-gas drilling regulations in Osage County. After the plaintiffs in the consolidated *OMC/OPA* litigation obtained a preliminary injunction against the new rule, the Division successfully negotiated a voluntary remand of the rule to correct the specific rulemaking irregularities that supported the motion for a preliminary injunction.
- Finally, in *Osage Producers Association v. Jewell (OPA II)* (N.D. Okla.) the plaintiff challenged hundreds of agency actions and alleged instances of inaction related to oil and gas leases and drilling permits claiming that the agency had unlawfully delayed or denied action on pending applications. The Division suc-

cessfully obtained dismissal of these challenges as an improper programmatic challenge under the APA. The Court afforded the plaintiff an opportunity to amend its complaint to correct this deficiency, which it neglected to do, resolving the litigation in our favor.

Renewable Energy

One component of the continuing efforts to increase domestic energy supplies is expansion of cleaner domestic sources of energy like wind and solar power. The Division has defended challenges to permits and rights-of-way in approximately 40 cases involving solar and wind projects across the country. Our successes over the last several years included favorable rulings in cases involving the Ivanpah Solar Project, the Genesis Solar Project, the North Sky River Wind Energy Project, the Ocotillo Wind Energy Project, the West Tennessee Solar Farm Project, the Deerfield Wind Project, the Blythe Solar Project, the Rice Solar Project, the Cape Wind Project, and the Tule Wind Project. These decisions have enabled substantial development of renewable energy resources across the country. These cases often raise issues at the intersection of energy security issues and natural resources issues.

In *Western Lands Project v. Bureau of Land Management* (S.D. Cal.), citizens groups sued under NEPA, challenging the Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States and accompanying Record of Decision. The Division obtained a favorable ruling on all claims from the district court in 2014; the Ninth Circuit court of appeals affirmed this year. The decision allows BLM to proceed with its plan to streamline environmental siting and evaluation of solar energy projects on public lands.

The Genesis Solar Energy Project was one of the first large-scale renewable energy projects to be constructed on federal public land managed by BLM. The project provides up to 250 megawatts of clean solar energy to southern California. The Division has successfully defended this important project from three different lawsuits, most recently in *La Cuna de Aztlan v. Interior* (C.D. Cal.). In that case, a group of individuals alleged that the BLM violated various laws governing public lands and failed to adequately analyze the impacts of the project. In 2014, the district court entered judgment in favor of the government on all claims. They then appealed the decision on some, but not all, claims. In 2016, the Ninth Circuit issued an opinion upholding the district court's decision.

The Division also successfully defended FWS's assessment of the effects of the Panoche Valley Solar Project, a proposed 2,154-acre solar project in Northern California. In *Defenders of Wildlife v. FWS* (N.D. Cal.), plaintiffs challenged a biological opinion issued by FWS under the Endangered Species Act addressing the effects of the Panoche Valley Solar Project. After emergency injunction proceedings seeking to halt the project, the Court denied emergency relief in all respects.

In *Garden Peninsula Foundation v. Heritage Sustainable Energy, LLC* (W.D. Mich.), plaintiffs brought claims challenging the operation of Heritage Wind Farm in western Michigan against FWS under the ESA and the Bald and Golden Eagle Protection Act. Division attorneys successfully obtained an order dismissing all claims against FWS.

The Division was similarly successful in *Center for Environmental Science, Accuracy & Reliability v. National Park Service* (E.D. Cal.), a case brought by agricultural groups challenging the annual operations of the Hetch-Hetchy Water and Power Project in Yosemite National Park in water year 2014. The groups alleged that the Park Service violated NEPA by failing to prepare an Environmental Impact Statement and the ESA by failing to consult with the FWS and NMFS concerning the effect of Project operation on delta smelt, spring and winter-run chinook, and the green sturgeon. After extensive summary judgment briefing, Division attorneys obtained favorable judgment dismissing plaintiff's challenge under the Endangered Species Act to the National Park Service's operation and management of the Hetch-Hetchy Water and Power Project located inside Yosemite National Park.

The Division also had significant victories in the federal appellate courts in cases involving the intersection of

energy security issues and natural resources issues.

- *Desert Protective Council v. Interior* (9th Cir.), was one of three cases challenging a BLM decision granting a right-of-way for the construction and operation of the 112-turbine Ocotillo Wind Energy Facility on public lands in southern California. DPC alleged violations of NEPA and the Federal Land Policy and Management Act, based primarily on the project's impacts to raptors and bats. The district court rejected those challenges, and on November 19, 2015, the Ninth Circuit affirmed. It held that BLM sufficiently evaluated and disclosed the impacts of the project, and that the agency's inclusion of certain raptor studies and data in a final mitigation plan, but not in the draft, was not a violation of NEPA. The Court also rejected DPC's challenges to the methodology of BLM's raptor surveys, and deferred to BLM's decision not to require turbine curtailment as mitigation for impacts to raptors other than golden eagles.
- The Tule Wind Power Project, a privately-developed project, is located in eastern San Diego County, California. It is designed to generate up to 200 megawatts of clean power, enough to serve approximately 60,000 homes. In *Protect Our Communities Foundation and Backcountry Against Dumps v. Bureau of Land Management* (9th Cir.), the plaintiffs, who opposed the Project, sued BLM, challenging its approval of a right-of-way across federal lands. They asserted that the approval of the right-of-way violated NEPA and the Migratory Bird Treaty Act. The district court rejected these claims, and plaintiffs appealed. On June 7, 2016, the Ninth Circuit affirmed. It rejected plaintiffs' NEPA arguments, holding that the agency had articulated a legally sufficient purpose and need for its action, analyzed a reasonable range of alternatives, adequately considered mitigation, and took a hard look at the Project's potential impacts on avian species, climate change, noise and electromagnetic fields. The court held that BLM's approval of the right-of-way did not constitute a "take" of birds because the MBTA "does not contemplate attenuated secondary liability on agencies like BLM that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the take of migratory birds." The Court also rejected the notion that BLM's action in approving a Project that may lead to third-party "take" of migratory birds in the future violated the "contrary to law" provision of the APA because BLM did not authorize the take of migratory birds and, in fact, required the Project proponent to comply with the MBTA as a condition of the right-of-way.

PROTECTING TRIBAL RIGHTS AND RESOURCES AND ADDRESSING TRIBAL CLAIMS

Supporting Tribal Authority Over Tribal Lands and Resources

Affirming Reservation Boundaries

In *Nebraska v. Parker*, the U.S. Supreme Court concluded that an 1882 statute opening the western part of the Omaha Reservation to homesteading did not diminish the Reservation's boundaries, unanimously affirming the decision of the Eighth Circuit. The Village of Pender and several liquor retailers brought this challenge seeking to avoid the Tribe's liquor regulations. The district court remanded the matter to Omaha Tribal Court for consideration, and the Division filed an amicus brief in the tribal court proceeding supporting the Tribe. Following the Tribal Court's determination that the 1882 statute did not diminish the Reservation, the challenge returned to federal district court. The United States then intervened in support of the Tribe and Nebraska intervened for Pender. The district court concluded that the Reservation's boundaries remained intact, as did the Eighth Circuit. The Supreme Court, in a unanimous opinion authored by Justice Thomas, concluded that the statutory text of the statute "bore none of the[] hallmarks of diminishment" that might reflect congressional intent to diminish the Reservation. The Court reaffirmed that only Congress can diminish reservation boundaries, and nothing in the language of the statute or the circumstances surrounding its passage evidenced an unequivocal congressional intent to diminish the Reservation.

Defending Tribal Court Jurisdiction

On June 23, 2016, the U.S. Supreme Court issued a *per curiam* decision in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, affirming the judgment below by an equally divided Court (4-4 tie). Dollar General had sought review of a Fifth Circuit decision holding that the tribal court of the Mississippi Band of Choctaw Indians had jurisdiction to adjudicate a civil tort claim brought by tribal members against a nonmember corporation that operates a store on tribal trust land pursuant to a lease with, and business license from, the Tribe. The claim arose from the store manager's alleged assaults upon a tribal member who was, pursuant to an agreement with the Tribe, working at the store as an intern. The petitioner corporation had made sweeping arguments before the Supreme Court urging it to hold that tribal courts had no authority to adjudicate civil cases involving nonmember defendants. The United States filed an amicus brief in support of tribal court jurisdiction.

Defending Bureau of Indian Affairs Regulations that Protect Tribal Interests

The Division successfully defended comprehensive revised Department of the Interior regulations governing rights-of-way over Indian lands in *Western Energy Alliance v. Interior* (D.S.D.). Western Energy Alliance, an association of more than 450 companies and individuals engaged in oil and natural gas extraction, exploration, and development, filed suit and moved for a preliminary injunction to block implementation of the Bureau of Indian Affairs' revised regulations, which are codified at 25 C.F.R. Part 169. The agency overhauled its right-of-way regulations, which had not been updated for over three decades, to clarify and streamline the process for granting rights-of-way across tribal and individual Indian lands and to empower tribes and their members in



Crow Fair, Montana, Alex Berger



Crow Fair, Montana, Alex Berger

the right-of-way granting process. Western Energy Alliance challenged the regulation’s protections for tribal jurisdiction, arguing that tribes lack jurisdiction over right-of-way lands. The Alliance further alleged that the revised regulations altered the property rights of grantees by allowing owners to terminate new rights-of-way without agency involvement. Concluding that the plaintiff “failed to shoulder the heavy burden of demonstrating a facial challenge to the [final regulations] is likely to succeed on the merits,” the court denied Western Energy Alliance’s request for a preliminary injunction. The plaintiff subsequently dismissed its lawsuit.

Protecting Tribal Fishing Rights

The United States intervened in *Penobscot Nation v. Janet Mills* (D. Me.), a suit brought by the Penobscot Indian Nation against Maine’s Attorney General to protect the hunting and fishing rights of its members in the 60-mile stretch of the Penobscot River adjacent to the islands constituting the Penobscot Reservation, which is known as the “Main stem” of the River. The suit also claimed that the Penobscot Reservation, as defined by the Maine Implementing Act, a state law ratified by the federal Maine Indian Claims Settlement Act (Settlement Acts), includes some or all of the 60-mile stretch of River. At summary judgment, the district court affirmed that the Settlement Acts “intended to secure the Penobscot Nation’s retained right to sustenance fish in the Main Stem, as it had done historically and continuously.” The court, however, held that for all other purposes,

the Reservation did not include the Penobscot River. The Nation and the United States have appealed to the First Circuit Court of Appeals.



Penobscot Reservation, Google Maps

Defending Tribal Water Rights

A significant portion of the Division’s work involves securing tribes’ federal rights to water, one of the most valuable and increasingly scarce natu-

ral resources in the western United States. Many of these cases are resolved through complex, multi-party settlements involving tribes, states, and the United States. These settlements generally require ratification by federal legislation in order to alter tribal rights and provide critical funding for infrastructure projects designed to solve water-related problems (e.g., safe drinking water unavailability or concerns related to the ESA). The Division works closely with Interior at the negotiation and legislative phases of these settlements. Following congressional ratification, the Division, working in conjunction with the other parties to the settlement, moves to have the adjudication court affirm the settlement through a decree. This phase often involves litigation to overcome challenges to entry of the settlement.

As in past years, the Division worked with Interior and other parties to reach water rights settlements for various tribes that, when approved by Congress, solve substantial water problems and end lengthy litigation or prevent litigation in the future. We also worked with the parties to support the development of legislation that would effectively ratify and implement these settlements. Congress ratified four such settlements this year, as part of the Water Infrastructure Improvements for the Nation Act of 2016.

For example, ENRD assisted Interior in negotiations with the Chickasaw and Choctaw Tribes of Oklahoma, the State of Oklahoma, and Oklahoma City to resolve certain tribal water resources regulatory issues and address the water rights of Indian allottees. These negotiations resulted in a unique settlement. Legislation to ratify this settlement has been enacted.

Similarly, after six years of negotiations, the United States and the Pechanga Band of Luiseno Mission Indians completed a water rights settlement with the main water district in a southern California basin in early 2016. The settlement, which has been ratified by Congress, resolves claims to water by the United States on behalf of the Pechanga Band in a decades-old case, *United States v. Fallbrook Public Utility District et al.* (S.D. Cal.).

ENRD's years of work with Interior to settle the water rights of the Blackfeet Nation led to successful resolution of a wide variety of complex and outstanding issues regarding implementing legislation which Congress enacted this year.

In addition, ENRD worked closely with Interior and OMB to address a variety of issues that have prevented implementation of a settlement that Congress enacted in 1988 addressing the water rights of five Southern California Bands in the San Luis Rey River basin. After years of failed efforts, these talks led to an agreement that was contingent on Congress amending the 1988 San Luis Rey Indian Water Rights Settlement Act, which it did.

The Division has also worked closely with Interior, the Office of Management and Budget, and the House Committee on Natural Resources to address new procedures that the Committee put in place to address Indian water rights settlements. As a result of these efforts, the Justice and Interior Departments sent joint letters to the Committee supporting the legislation that would implement the Blackfeet, Pechanga, and San Luis Rey settlements.

Once a settlement passes Congress, it is typically subject to objection by any potentially harmed water user. The Division completed the defense of the Crow Tribe's water settlement, with the Montana Supreme Court issuing a favorable opinion rejecting the challenges of the last group of opponents, and the Supreme Court denying review. And a federal court in New Mexico entered the final judgment resolving the Taos Pueblo's water rights under a 2010 congressionally approved settlement.

Not all tribal water rights claims are resolved through settlement. The Division obtained a significant favorable ruling in the *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District* (C.D. Cal.) litigation, in which ENRD had intervened seeking a judicial declaration of the rights to groundwater of the Agua Caliente Band of Cahuilla Indians. In 2015, the court held that the United States reserved groundwater for the Band when it established the Agua Caliente Reservation. That holding is presently on appeal before the Ninth Circuit. Pending its resolution, the district court stayed litigation on most remaining issues, but ordered briefing on whether defendants could raise certain equity-based, affirmative defenses (laches, balance of the equities, and unclean hands) to declaration of the existence and scope of the waters reserved. The United States and the Tribe moved for partial summary judgment on that issue, and the court granted the motions.

Defending Retrocessions of Civil and Criminal Jurisdiction

A federal district court, in *Klickitat County v. Interior* (E.D. Wash.), rejected a claim by the County that Interior should not have accepted the State of Washington's partial retrocession of civil and criminal jurisdiction over the Yakima Reservation without resolving a dispute about the boundaries of the Reservation.

Upholding Agency Authority to Acquire Land in Trust for Tribes and Defending Trust Lands

The Division continued to have considerable success in defending decisions by Interior to take land into trust for the benefit of tribes under the Indian Reorganization Act (IRA).

In *Confederated Tribes of the Grand Ronde Cmty. v. Jewell* (D.C. Cir.), the D.C. Circuit affirmed a district court decision which upheld the Assistant Secretary–Indian Affairs' decision to acquire land in trust for the Cowlitz Indian Tribe of the State of Washington for gaming and related purposes. Two suits were filed in the case, one from the Confederated Tribes of the Grand Ronde Community of Oregon, and another from Clark County, Washington, the City of Vancouver, Washington, and others who opposed the proposed casino.

The litigation was the first “test case” for evaluating Interior’s interpretation of the phrase “under Federal jurisdiction” in the first definition of “Indian” in the IRA, following the 2009 Supreme Court decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Supreme Court held that the word “now” in the phrase “now under Federal jurisdiction” referred to 1934, when the IRA was enacted, concluding that the Secretary’s authority to acquire land in trust was limited to those tribes that were “under Federal jurisdiction” in 1934. The Supreme Court, however, did not opine on the meaning of “under Federal jurisdiction.”



BIA Regions Map, Bureau of Indians Affairs

As part of its decision to acquire land in trust for the Tribe, Interior engaged in a thorough statutory interpretation analysis of the phrase “under Federal jurisdiction,” concluding that it was ambiguous and its meaning could not be readily ascertained by the statute or its legislative history. Examining the statute against the historical relationship between Indian tribes and the federal government, Interior concluded that the framework for determining whether a tribe was “under Federal jurisdiction” in 1934 required an examination of historical evidence in or prior to 1934 reflecting that the federal government took some action for, asserted authority over, or otherwise recognized an obligation to the tribe, such that a jurisdictional relationship was formed, and that such jurisdictional relationship remained intact in 1934.

The D.C. Circuit agreed that the phrase was ambiguous, deferring to Interior and upholding its conclusion that the Tribe was “under Federal jurisdiction” in 1934. The D.C. Circuit further held that the phrase “recognized Indian tribe” that precedes “now under Federal jurisdiction” in the first definition of “Indian” in the IRA was ambiguous and rejected plaintiffs’ arguments that the statute must be read as requiring recognition as of 1934. The D.C. Circuit upheld Interior’s determination that the Tribe had a significant historical connection to the subject property such that it was eligible for gaming under the Indian Gaming Regulatory Act, concluded that the agency fully complied with NEPA, and rejected plaintiffs’ claim that the agency had to “investigate” the expansion in the Tribe’s membership following its 2002 federal acknowledgment before deciding to acquire land in trust for it.

The court in *Stand Up for California! v. Interior* (D.D.C.) rejected, in a comprehensive 170-page opinion, challenges by a citizens group and Picayune Rancheria of Chukchansi Indians to three separate but related decisions of the Secretary of the Interior concerning accepting a parcel of land into trust for the North Fork Rancheria of Mono Indians. The plaintiffs challenged the agency’s determinations under five separate laws, the IRA, the Indian Gaming Regulatory Act (IGRA), NEPA, the Clean Air Act, and the APA. The Court granted the United States’ and the North Fork Tribe’s motions for summary judgment on all claims related to the IGRA and IRA determinations and dismissed the challenge to the tribal-state compact as moot, because that compact is no longer in effect and the Secretary, pursuant to IGRA, had since issued Secretarial Procedures providing an alternate basis for gaming on the tribal lands at issue. The Court also held that any part of the claims predicated on challenges to the Governor of California’s concurrence were dismissed for failure to join an indispensable party.

In *Butte County, California v. Hogen* (D.D.C.), the court, following remand from the D.C. Circuit to the Secretary of the Interior for further consideration of documents submitted by the County, granted the Division’s motion for summary judgment and affirmed Interior’s decision to take land into trust for the purpose of gaming for the Mechoopda Indian Tribe of the Chico Rancheria.

In *County of Amador, California v. Interior* (E.D. Cal.), the court granted the Division’s motion for summary judgment in a lawsuit filed by Amador County, California challenging Interior’s decision to acquire approximately 228 acres of land in trust for the Lone Band.

The status of trust lands arose in a different context in *Poarch Band of Creek Indians v. Hildreth* (11th Cir.). In that case, the Poarch Band of Creek Indians sued the tax assessor of Escambia County, Alabama (Hildreth) in federal court when he attempted to assess approximately \$23 million in ad valorem taxes and penalties against the Band for land situated within the County that the United States holds in trust for the Band. Hildreth did so based on his belief that under the Supreme Court’s 2009 decision in *Carcieri v. Salazar*, the Secretary of the Interior lacked authority to have taken this land into trust years earlier. The district court issued a preliminary injunction against Hildreth, which he appealed. On July 11, 2016, the Eleventh Circuit affirmed. It first rejected the tax assessor’s argument that the district court lacked jurisdiction of the Band’s suit due to the Tax Injunction Act, holding that by enacting 28 U.S.C. 1362, Congress intended to broaden federal-court jurisdiction to include claims arising under federal law brought by Indian tribes to the same extent as suits brought by the United States, which is not subject to the Tax Injunction Act. On the merits, the appellate court noted that the Band’s likelihood of success was “strong” in light of its prior decision in *PCI Gaming*, which involved the same underlying challenge regarding the Secretary’s trust acquisition. The Division filed an amicus brief in support of the Band.

Protecting Indian Treaty Rights

The United States and the tribal signatories to the 1854-1855 Stevens Treaties with Pacific Northwest Indian Tribes brought litigation in 2001 seeking to enforce a treaty-based duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that block access to fish habitat so that anadromous fish runs are reduced. The district court, interpreting the treaty to prevent certain kinds of environmental degradation, ruled in the Tribes’ and United States’ favor. It also dismissed the State’s counterclaims against the United States and entered an injunction requiring the State to correct most barrier culverts by 2030 at the latest. The State appealed in *United States v. Washington* (9th Cir.).



Salmon, Wikipedia

On June 27, 2016, the Ninth Circuit affirmed the finding of a treaty violation, the issuance of the injunction, and the dismissal of the counterclaims. The court rejected the State’s argument that the treaties’ reservation of the right of taking fish at usual and accustomed grounds did not impose any obligation on the State to ensure that anadromous fish will, in fact, be available. Reviewing the history of the treaties and relevant principles of treaty construction, the Court concluded that “the Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there

would be fish sufficient to sustain them.” The Court found important that there had been a showing that State culverts blocked approximately 1,000 linear miles of streams suitable for salmon habitat, and that if these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon each year would be available to the Tribes, whose members currently cannot obtain a moderate living from fishing.

The Court also rejected the State’s claim that the United States had waived any treaty violation because some of the culverts were designed according to standards set by the Federal Highway Administration and some had received federal approvals under the Clean Water Act and the Endangered Species Act. The Court stressed that such actions by agents of the United States cannot render unenforceable otherwise valid Indian treaty rights. The Court also affirmed the dismissal of the State’s counterclaim that sought to require the United States to fix its culverts before the State had to act. While the United States has in some cases been found to have waived sovereign immunity to counterclaims seeking recoupment, the injunctive relief counterclaims here did not qualify as recoupment since they did not seek monetary relief. An en banc petition for rehearing has been filed by the State and is pending.

Protecting Tribal Rights Under Leasing Agreements

The court in *Elk Petroleum, Inc. v. Rocky Mountain Regional Director, Bureau of Indian Affairs* (D. Mont.) rejected a claim that an Indian Mineral Development Agreement between Elk Petroleum and the Crow Tribe is unenforceable. An Interior appeals body had upheld a Bureau of Indian Affairs Regional Director’s determination that Elk Petroleum was responsible for payments under the Agreement and that it had not paid bonus and rental amounts. The court granted the Division’s motion for summary judgment, and entered a judgment against Elk Petroleum that it is liable for payments under the Agreement in the amount of \$869,176.89. The court determined that the administrative decision to affirm the Regional Director’s approval of the Agreement was not arbitrary, capricious, or an abuse of discretion, and that by failing to assert a due process claim against Interior in its pleadings any such claim had been waived.

Indian Child Welfare Act

In December 2014, the Attorney General announced that the Department of Justice would focus additional resources on promoting compliance with the Indian Child Welfare Act (ICWA). ENRD is leading this initiative, with support from the Office of Tribal Justice, the Civil Rights Division, the Office of Justice Programs, and other DOJ components.

Congress enacted ICWA in 1978 to “protect the best interests of Indian children and promote the stability and security of Indian tribes and families.” The statute was passed in response to concerns over the consequences to Indian children, Indian families, and Indian tribes of abusive child-welfare practices that resulted in



Indian Child Welfare Act, State of Utah

the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. ICWA provides important procedural and substantive standards to be followed in state-administered proceedings involving Indian children and addresses key jurisdictional issues regarding whether child welfare proceedings involving Indian children are to be heard in state or tribal courts.

The Department's ICWA initiative has focused on four primary components. First, we have actively sought out opportunities to participate in precedent-setting litigation addressing important ICWA issues. Since the announcement of the initiative, the United States has participated as *amicus curiae* in five state-court and federal-court cases addressing key issues relating to the interpretation and implementation of ICWA. We had some significant successes in such cases in fiscal year 2016:

- In *In re Isaiah*, we argued that compliance with ICWA's provisions requiring notice to parents and tribes of child welfare proceedings applied in both foster-care and termination-of-parental-rights proceedings, and that the failure to comply with this requirement in the termination proceeding could be appealed even if the failure was not appealed in the foster-care proceeding. On July 7, 2016, the California Supreme Court issued a decision consistent with the United States' amicus brief. The Court's opinion recognizes the affirmative and continuing duty on juvenile courts and social service agencies to inquire about a child's Indian status and, where appropriate, to provide notice to the parents and the child's tribe(s).
- In *In re Abbigail A.*, the United States filed a brief at the California Supreme Court's request addressing whether certain California Rules of Court are preempted by ICWA. We answered in the negative, but further argued that the rule requiring a juvenile court to treat all children eligible for membership as if they were an "Indian child" appeared to go beyond the state law definition of "Indian child." We argued that a different rule that directs the juvenile court to pursue tribal membership for a child who is already an Indian child as defined in ICWA did not conflict with either federal or state law. On July 14, 2016, the California Supreme Court issued an opinion that adopted the outcome and much of the reasoning urged in the United States' brief.

Second, we have partnered with the Department of the Interior and the Department of Health and Human Services to make sure that all the tools available to the federal government are used to promote compliance with ICWA. In June 2016, Interior published a comprehensive regulation addressing the implementation of ICWA and in April 2016, the Department of Health and Human Services proposed regulations that would require state title IV-E agencies to collect and report Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements related to ICWA. In addition to assisting those agencies in their ICWA-related regulatory efforts, ENRD has partnered with them in an interagency process to develop other ICWA compliance tools.

Third, ENRD has engaged in targeted actions to increase awareness of ICWA's requirements and promote compliance with the statute, including participating in training and outreach around the country.

The fourth and final component is ENRD's defense of lawsuits that seek to undermine both the statute and agency efforts to promote compliance with the statute. In *National Council for Adoption v. Jewell* (E.D. Va.), the Division obtained dismissal of all claims challenging Interior's issuance of non-binding guidelines interpreting ICWA. Within days of the oral argument, the court agreed with our position and held that the Council and other parties lacked standing, that there was no final agency action regarding the guidelines, and that the guidelines were an interpretative rule that did not require notice and comment rulemaking. The court also concluded that equal protection, due process, and Indian Commerce Clause claims could not be asserted, and further stated that even if those claims had been active, there was no authority to support the argument that the Guidelines violate these constitutional provisions. Finally, the court determined that the Guidelines do not "commandeer" state entities in a manner inconsistent with the Tenth Amendment of the Constitution.

Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act (IGRA) was enacted to promote tribal economic development through gaming on tribal lands, and the National Indian Gaming Commission (NIGC) was created by IGRA to regulate and support tribal gaming. The Division defends decisions made by the NIGC as well as decisions made by Interior that may affect gaming on tribal lands.



National Indian Gaming Commission

In *State of Kansas v. National Indian Gaming Commission* (D. Kan.), ENRD secured the dismissal of a lawsuit by the State of Kansas and a county board of commissioners that challenged a National Indian Gaming Commission legal opinion that a 124-acre strip of land acquired in Kansas by the Quapaw Tribe of Indians of Oklahoma, and put in trust by Interior, qualifies for gaming under the “last recognized reservation exception” to IGRA. The court granted ENRD’s motion to dismiss, holding that the Commission’s general counsel’s legal opinion regarding gaming eligibility on the Quapaw tract in Kansas is not a “final agency action” subject to judicial review, and that a challenge to Interior’s promulgated regulations governing the “last recognized reservation exception” is time-barred. The court also granted the tribal defendants’ motion to dismiss, holding that the tribal officers and entities had not waived their sovereign immunity and that the claims did not satisfy a recognized exception to tribal immunity.

In *Jamul Action Committee and the Jamul Community Church v. Stevens* (E.D. Cal.), the court dismissed all but one claim in a citizen group’s challenge to NIGC’s actions in connection with a pending gaming management contract. The remaining claim alleged that the NIGC failed to comply with NEPA when evaluating the Indian tribe’s proposal to build a casino. The plaintiffs filed a motion for writ of mandamus seeking to require the Commission to comply with NEPA. The district court denied the writ. Plaintiffs subsequently appealed the decision but the appellate court sided with the Commission.

In *Amador County Office of Board of Supervisors v. Jewell* (D.D.C.), the court granted ENRD’s motion for summary judgment on the D.C. Circuit’s remand for a merits determination of whether the Buena Vista Rancheria qualifies as a reservation and thus “Indian lands” under IGRA. Interpreting the terms of the 1983 and 1987 judgments in the *Tillie Hardwick* litigation regarding the termination of California tribes, the court determined that the County unambiguously bound itself to treat the Rancheria as a reservation for all purposes and is thus precluded from now arguing otherwise. In the alternative, the court found that the Interior Secretary has been delegated authority to determine whether specific lands qualify as a reservation for purposes of IGRA and that the Secretary’s approval of the Tribe’s initial Tribal-State Compact in 2000, combined with an approval of an amendment to the Compact in 2004, evidenced the Secretary’s treatment of the Rancheria as a reservation.

Tribal Claims against the United States

The Division secured an important decision in *Ramona Two Shields v. United States* (Fed. Cir.) interpreting the scope of the release of liability provision in the *Cobell* settlement, regarding Interior’s management of individual Indian trust accounts. The liability release in *Cobell* precluded parties to that settlement from bringing later suits based on two types of mismanagement at issue there. In *Two Shields*, individual Indians alleged a breach of trust relating to oil and gas leases in North Dakota. The Federal Circuit held, however, that the claims presented were the same kind of land administration claims at issue in the *Cobell* litigation, so they were precluded by the *Cobell* liability release. This resolution secured the benefit of the bargain for the United States

in that \$3.4 billion dollar settlement that resolved historic accounting claims of thousands of individual Native Americans.

In *Wyandot Nation of Kansas v. United States* (Fed. Cl.), a non-federally recognized Indian entity sued for an accounting and money damages related to alleged mismanagement of payments under an 1867 Treaty and alleged mismanagement of a cemetery held in trust for a separate, federally recognized Indian Tribe. The court granted our motion to dismiss all claims, holding that the entity's claims were time-barred and that plaintiff did not have standing to assert its cemetery claims. The court also held that the plaintiff was not a federally recognized tribe pursuant to the List Act and was therefore not entitled to receive an accounting under the Trust Fund Management Reform Act.

Resolution of Tribal Claims of Historical Trust Accounting and Mismanagement

The Department of the Interior manages about 2,500 tribal trust accounts for more than 250 federally-recognized tribes. In addition, it manages almost 56 million acres of tribal trust lands and more than 100,000 leases on those lands for various uses, including housing, timber harvesting, farming, grazing, oil and gas extraction, business leasing, rights-of-way and easements. In a series of long-running disputes, tribal governments claim that Interior and the Department of the Treasury failed to provide legally required trust accountings, that Interior and Treasury mismanaged their trust funds, and that Interior also mismanaged their natural resources. These cases have been both highly contentious and resource-intensive. In 2016, ENRD continued its initiative to resolve these lawsuits without the need for decades of resource-draining litigation. Between January 1 and September 26, 2016, alone, ENRD reached settlements with 17 tribes for almost \$493 million.

The 2016 settlements continued the success of the current administration in settling these lawsuits. Since January 20, 2009, ENRD has settled the claims of 104 tribes for \$3.35 billion, resulting in the resolution of 69 lawsuits without the need for protracted litigation. The settlements represent a significant milestone in the improvement of the United States' relationship with Indian tribes, and they will allow the federal government and the tribes to move beyond the distrust exacerbated by years of litigation. In announcing the 2016 settlements, Attorney General Lynch noted that "[t]hese historical grievances were a barrier to our shared progress toward a brighter future," but that with the settlements "those barriers have been removed and decades of contention have been ended honorably and fairly."

Among the cases settled during 2016 were several notable high-dollar claims:

- ENRD resolved the "breach of trust" claims of the Jicarilla Apache Nation, which spanned almost 70 years and numerous trust fund and natural resource mismanagement claims. This case was marked by a prior adverse ruling from the United States Court of Federal Claims on the merits of the Nation's trust fund mismanagement claims for the period between 1974 and 1992. Conversely, it also featured a successful challenge in the Supreme Court to the lower court's decision that the United States was not protected by the attorney-client privilege when Interior Department lawyers provided legal advice to the Secretary of the Interior in her capacity as trustee. The United States paid \$124 million to settle all of the Nation's claims regarding the management of the tribe's trust funds and natural resources. The agreement also paves the way for more cooperation and improved relations between the United States and the Nation in the future. ENRD settled the long-standing claims of the Colorado River Indian Tribes ("CRIT"), without the need for protracted litigation. As part of the settlement agreement, the United States paid CRIT \$45 million, and in return CRIT dismissed its "breach of trust" claims with prejudice, accepted certain trust account statements as the accountings required by law, and agreed to improved communications and informal dispute resolution with the United States regarding any future trust account disputes.
- ENRD resolved the claims of the San Carlos Apache Tribe and the Southern Ute Tribe under similarly favorable terms and conditions for \$68 million and \$126 million, respectively.

SUPPORTING THE DIVISION'S STAFF

Promoting Diversity at Work

ENRD continues to be an active participant in the Department's Diversity Inclusion and Dialogue Program (DIDP) through the work of its Diversity Committee and by sponsoring 20 participants and 2 facilitators in 2016. The purpose of the DIDP is to facilitate a deeper understanding of diversity and inclusion issues among DOJ employees. The program focuses on enhancing personal growth and effectiveness through communicating, listening, introspection, and building acceptance for differing perspectives. The DIDP provides a safe, open, structured, and confidential environment where employees can freely discuss and explore the full spectrum of diversity and inclusion topics and how these aspects of diversity affect our ability to work together. The Diversity Committee also has initiated a practice of sharing articles with management and employees, as appropriate, regarding various topics such as working across generations, engaging employees, and diversity in environmental practice.

The Division also provided trainings on implicit bias and micro-inequities to all managers and hiring committee members. This training has been integrated in the standard training suite mandated for all new managers. Additionally, resume screening training has been made available to all hiring committee members. The goal of these trainings is increase sensitivity to issues of unconscious bias along the entire continuum of employment, from the hiring process through day-to-day work life.

In support of its law clerk program and participation in the Attorney General's Honors Attorney program, the Division relaunched the ENRD Ambassadors program in 2016. The ENRD Ambassadors Program facilitates relationships with 189 law schools around the country by fostering personal relationships between Division attorneys and school faculty. The 75 ambassadors also compile information about their assigned schools including, but not limited to, updating contact information for career services offices, affinity groups, litigation clinics, and environmental law staff. This information is utilized to inform these law schools of upcoming employment opportunities (both law clerk and attorney) with ENRD and to provide a channel to foster a greater understanding of the Division's work. These relationships have also resulted in visits to 20 law schools in 14 states, the District of Columbia, and Puerto Rico this year by Division attorneys while on personal or work-related travel. Also this year, the Division has also participated in 9 conferences and hiring events across the nation, including the Southeastern Minority Job Fair, the 2016 Lavender Law Conference & Career Fair, the 41st Annual Indian Law Conference, and the Talk2Ten Event which was sponsored by 6 Historically Black Colleges and Universities. The hiring pools of this year's honors attorney and law clerk applicants reflect increased geographic diversity, which the Division will continue to work to improve in the future through these and similar outreach efforts.

Recognition of Division Staff

- In September 2016, the Partnership for Public Service, along with White House Chief of Staff Denis McDonough and actor Michael Kelly (who plays "House of Cards" Chief of Staff Doug Stamper) presented EES attorneys Thomas A. Mariani, Jr., Steven O'Rourke and Sarah D. Himmelhoch with the 2016 Samuel J. Heyman Service to America Medals (the "SAMMIE" Award), in the category of Homeland Security and Law Enforcement, for leading the government's five-year-long litigation against BP over the massive 2010 *Deepwater Horizon* oil spill. The trio led the Department of Justice and five states in securing a record-breaking \$20.8 billion settlement, the government's largest-ever civil penalty against a single defendant.



ENRD Earth Day Community Service Event, Department of Justice

- The Attorney General’s Award for Distinguished Service was presented for Distinguished Prosecutorial Achievement in the *Deepwater Horizon* Rig Disaster to the vanguard of the Department’s BP enforcement team, including EES’s Thomas A. Mariani, Jr., William D. Brighton, Patrick M. Casey, Scott M. Cernich, Deanna J. Chang, Michael J. McNulty, Michael J. Zevenbergen, Nancy A. Flickinger, Steven R. O’Rourke, Abigail E. André, Rachel A. Hankey, Sarah D. Himmelhoch, and Mark Fuller, as well as Ellen J. Durkee of the Appellate Section, Judith B. Harvey of the Law and Policy Section, and several attorneys from the Civil Division’s Aviation and Admiralty Section.
- On May 4, 2016, the Department of Agriculture’s General Counsel’s Office awarded six ENRD attorneys its Award for Excellence for their work representing the Forest Service in district court and court of appeals litigation in the case of *United States v. Hage* (D. Nev. and Ninth Circuit). *Hage* was an action by the United States seeking trespass damages and injunctive relief against a Nevada rancher for grazing livestock on federal land without permits and without payment of grazing fees. The district court decided the case against the United States in 2013, but in January 2016 the Ninth Circuit reversed, ordering that, on remand, damages and injunctive relief be awarded and that the case be reassigned to a new judge because of the extreme bias of the original judge. Pictured receiving their awards are Stephen Bartell, Bruce Trauben, and Anna Stimmel from NRS



Hage Team Accepting the Department of Agriculture’s Award for Excellence, Department of Justice

and Ann Peterson from Appellate. They are flanked on the left by Ken Paur, the lead Agriculture lawyer on the case, and on the right by Jeff Prieto, former ENRD attorney and now Agriculture General Counsel. Other ENRD Team members unable to attend the ceremony were Cindy Huber (NRS) and former Appellate attorney Vivian Wang.

- The Attorney General presented a John Marshall Award for Support of Litigation to ENRD’s Pacific Salmon Team—Michael R. Eitel, Carter H. Howell, and Andrea E. Gelatt in the Wildlife and Marine Resources section, and Romney S. Philpott III and Kristofor R. Swanson in the Natural Resources Section—for their outstanding litigation support in multiple cases involving salmon in the Pacific Northwest.
- The Attorney General presented the John Marshall Award for Alternative Dispute Resolution to the ENRD attorneys who successfully negotiated, defended, and implemented the Crow water rights settlement—S. Craig Alexander, David W. Harder, and J. Nathanael Watson of the Indian Resources Section, Stacy R. Stoller of LPS, Tyler G. Bair of NRS, and John L. Smeltzer of the Appellate Section.
- Deputy Assistant Attorney General Jean E. Williams and former Special Counsel for Indian Affairs Gina L. Allery were part of the team that received the Attorney General’s Award for Equal Employment Oppor-

tunity for their outstanding leadership in furthering equal employment opportunity and diversity in the Department of Justice.

- EES National Bankruptcy Coordinator Alan Tenenbaum received a National Notable Achievement Award from EPA for his work on the Nevada Environmental Response Trust, which was established in the Tronox bankruptcy to clean up groundwater and other contamination near Henderson, Nevada. Mr. Tenenbaum also received the Rachel Lehr Memorial NAAG/SABA Sprit Award for his work in fostering federal and state cooperation in bankruptcy litigation. (NAAG is the acronym for the National Association of Attorneys General; SABA stands for the States Association of Bankruptcy Attorneys.)
- EPA conferred Bronze Medals and a National Notable Achievement Award for an Enforcement Team on EES attorneys Keith Tashima, Claire Woods, Patricia McKenna, and Marcello Mollo for their work on *United States v. Pechiney Plastic Packaging, Inc., et al.* (D.N.J.) regarding the Pohatcong Valley Groundwater Contamination Superfund Site in New Jersey.
- EES attorneys Mark Elmer and Jerry Ellington received a Gold Medal from EPA for their work on *United States and State of Colorado v. Noble Energy, Inc.* (D. Colo.), which dealt with emissions from oil-and-gas exploration and production activities north of Denver, Colorado.
- Jason Dunn received a Silver Medal from EPA Region 9 for a settlement governing the Four Corners power plant located on the Navajo Nation near Shiprock, New Mexico. *United States, et al. v. Arizona Public Service Co., et al.* (D.N.M.).
- EPA awarded Bronze Medals to Myles Flynt and Laura Rowley for their work in *United States v. Virgin Islands Water and Power Authority* (D.V.I.), which addressed CAA violations at electric power generation plants on the islands of St. Thomas and St. John.
- Jason Barbeau in EES was awarded an EPA Bronze Medal for his work on *United States v. Delek Refinery, Ltd.* (E.D. Tex.), a CAA case related to a fire and explosion at Delek’s oil refinery in Tyler, Texas.
- EPA conferred a Bronze Medal on EES attorney Cara Mroczek for her work on *United States v. E.I. DuPont De Nemours and Co.* (S.D. W.Va.), regarding releases of extremely hazardous substances from DuPont’s facility in Belle, West Virginia.
- EES attorney Dan Smith received an EPA Bronze Medal for *United States v. Bayer CropScience LP* (S.D. W.Va.), a Clean Air Act case regarding an explosion at the Bayer facility in Institute, West Virginia.
- James Maysonett of the Appellate Section was awarded an EPA Bronze Medal from EPA Region 4 for his work in reaching a favorable settlement in *Kentucky Waterways Alliance v. EPA*, (E.D. Ky.), a case involving the intersection of the CWA and ESA.
- Martin McDermott and Martha Mann of EDS received Bronze Medal’s from EPA Region 4 in October 2016, for their past work in the Saraland CWA Act section 404 enforcement case, which resulted in the substantial restoration of aquatic resources in Dodge County, Georgia.
- EPA Region 4 gave EES attorney Paul Cirino a Bronze Medal for Superior Service for his help in the settlement of a civil action challenging aspects of EPA’s approval of Kentucky’s water quality standards for selenium, and related issues.
- Early in FY 2016, EPA awarded David Carson of EDS a Silver Medal Award for “exemplary work in [defending] EPA’s approval of the CAA Treatment as State application for the Wind River Reservation.”
- In March 2016, AAG Cruden conveyed to EDS attorney Perry Rosen an award from EPA Region 1 recognizing Mr. Rosen’s tireless work in defending the agency in litigation involving challenges to EPA’s approval of Cape Cod TMDLs (Total Maximum Daily Loads) and its oversight of the CWA Section 208/State Revolving Fund programs to restore embayment water quality on Cape Cod. The litigation commenced

over five years ago. Working together with federal, state, regional, and local agencies, EPA formally approved an updated plan to reduce nitrogen levels that are harming the ecological health of ponds, bays and other surface waters on the Cape. As expressed by the Region, “this is a considerable achievement, which in the end would not have occurred without Perry Rosen, who is a truly great lawyer.”

- EDS attorney Alan Greenberg received two Bronze Medal Awards from EPA Region 8 at its award ceremony on December 2, 2015. The first award was for *United States v. Hubenka and LeClair Irrigation District*, a CWA enforcement action arising from the unauthorized construction of four dikes in the Wind River in Fremont County, Wyoming, in which we received a favorable judgment following a two-week trial. The second was for *Gasco v. EPA*, a combined action for judicial review of a CWA administrative order and an enforcement counterclaim arising from gas drilling activities within the floodplain of and in wetlands adjacent to the Green River in Uintah County, Utah, that was resolved through a favorable settlement.

Numerous ENRD employees were recognized with EPA Bronze Medals at the EPA Office of General Counsel’s annual awards ceremony on November 1, 2016:

- The *Murray Energy v. EPA* Litigation Team was recognized “for exceptional counsel and dedication in defending the Agency and meeting its discovery obligations in *Murray Energy v. EPA*,” an unusually complex and contentious mandatory duty suit under the CAA. ENRD staff included in the team award were Laura Brown of EDS, Richard Gladstein of EES, Ashley Hamrick of OLS/CACI, Patrick Jacobi of EDS, Sonya Shea of EDS, LaShawn Williams of in EDS, and Beth Walinskas in OLS.
- Bronze Medals were awarded to the Boilers and CISWI Litigation Team “for exceptional work in defense of three key EPA CAA rules limiting emissions of toxic air pollutants from major source boilers, area source boilers, and commercial and solid waste incineration units.” That team included Norman Rave and Perry Rosen, both of EDS.
- The 316(b) Litigation Team was recognized “for exceptional legal counsel and support for defending the EPA’s 316(b) Rule,” a CWA rule governing cooling water intake structures at existing facilities. The honorees included Simi Bhat and Perry Rosen of EDS, and Bridget McNeil and Clifford Stevens of WMRS.
- Finally, EPA honored the Clean Water Rule Jurisdiction Litigation Team “for exceptional legal counsel and litigation skill in defending EPA’s position that all Clean Water Rule challenges should be consolidated in a single Court of Appeals.” Among the team members receiving the Bronze Medal were Appellate Section attorneys Aaron Avila, David Gunter and Bob Lundman, and EDS attorneys Dan Dertke, Amy Dona, Andy Doyle, Jack Lipshultz, Martha Mann, Jessica O’Donnell, and Steve Samuels.

Adhering to Government Ethics and Professional Responsibility Standards

The Law and Policy Section provides the Division’s government ethics and professional responsibility counsel. In addition to its regular day-to-day counseling on those issues, the section provided in-depth advice on several significant matters in fiscal year 2016. The section also provided live training on government ethics to every ENRD attorney.

Strengthening Public Access to Information on ENRD’s Litigation Priorities

To raise public awareness about the Division’s Animal Welfare Initiative, ENRD’s Office of Information Management published a new webpage on the Division’s public-facing website. The content on the webpage conveys details about the Division’s responsibility for affirmative litigation arising from the Nation’s animal protection laws, and provides information and press releases related to recent animal welfare cases and matters. The Division also published a new webpage describing the new Worker Endangerment Initiative and providing important information and press releases related to that initiative.



Enhancing the Division's In-House Learning and Development Opportunities

The Division continues to provide training to all Division staff based on the needs of each of ENRD's sections. In January 2016, the Division staff were surveyed to assess their training needs. As a result of the survey, ENRD provided skills courses in multi-party negotiations, deposition training,

ENRD Academy, Department of Justice and working with expert witnesses. Trainings were also provided to improve the writing and editing skills of all staff, with particular attention paid to legal writing courses for attorneys and paralegal staff. All employees were offered courses in grammar and proofreading. The Division continued its effort to provide training to professional staff by developing a program specifically for paralegals and legal assistants designed to address the results from the training survey. The survey also confirmed the need to continue ENRD's commitment to trainings offered in the areas of effective communication and management. The Division held its first ever Professional Staff Management Retreat in April 2016, with a follow-up session in June 2016. Discussions at the retreat covered specific communication styles, difficult management topics, and techniques for engaging in constructive conversations. Additionally, training is offered to new managers that focuses on the rights and responsibilities of Division managers.

In 2016, the Division hosted the second ENRD Academy, which is a series of events led by members of ENRD's various sections. The Academy offers a broad range of professional development opportunities for ENRD attorneys and professional staff alike and seeks to expand our staff's skills, understanding of the work of ENRD's different sections, and share innovative practices we have developed in case specific work. Further, ENRD increased its effort throughout 2016 to provide opportunities to promote a healthy work-life balance by sponsoring mindful meditation sessions, trainings about prioritizing and organizing your time, and retirement planning seminars. The Division also continued its 10-day training program for new honor grad attorneys which commenced in September. This training provides CLE credit to the new honor grads and counts towards the Department's professional training requirement. The recent honors attorneys receive practical advice and guidance during this training on many topics including e-discovery, working with client agencies and difficult opposing counsel, deposition skills, negotiations, and oral advocacy skills. The Division provides quarterly reports to management of the training provided to assess current training needs and trends.

ENRD also held two panel discussions in the Great Hall this past year open to all Division employees and other DOJ components. The first was an Alternate Dispute Resolution symposium held in October 2016, which featured distinguished mediators and ENRD attorneys. The panels provided concrete advice on how to effectively select and use mediators, as well as the litigation skills required to reach an effective resolution in our cases. In November 2016, ENRD sponsored a symposium on the future of environmental law which consisted of three lively panels comprised of the nation's leading experts on the future of environmental enforcement, administrative law, and natural resource law. In 2016, ENRD was pleased to sponsor several distinguished guests for its Speakers Series. These guests included A. Stanley Meiburg, Acting Deputy Administrator of the Environmental

Protection Agency; Lisa Heinzerling, Georgetown Law Professor; Donald Verrilli, former Solicitor General of the United States; Elena Kagan, Associate Justice of the Supreme Court; and Sally Jewell, Secretary of the Department of the Interior.

Being a Good Steward of Taxpayer Dollars

In fiscal year 2016, the Division effectively managed approximately \$258 million in budgetary resources from a variety of sources. In light of continued fiscal challenges, the Division had to manage its funding prudently in order to cover inflationary cost increases (such as higher rent costs, employee grade/step increases) and an increasingly challenging workload. Approximately 75% of ENRD's operating budget in fiscal year 2016 was dedicated to personnel expenses. ENRD will continue to pursue cost-saving opportunities and efficiencies to ensure long-term fiscal solvency in the face of future anticipated government-wide fiscal uncertainty and likely constraints.

Supporting the Division's Litigation Needs

During 2016, ENRD's Office of Litigation Support (OLS) took a primary role in providing the necessary staffing, management, and technical infrastructure necessary to support the Division's high-profile litigation related to the use of "defeat devices" on cars, trucks, motorcycles, and small engines designed to evade the emissions controls required by the CAA for these mobile sources. Principal among the cases is *United States v. Volkswagen*, a massive effort that began in September 2015 and has continued to grow both in size and complexity since the filing of the civil complaint in January 2016. OLS provided contract law clerks and paralegals to augment the ENRD support staff assisting the large civil and criminal attorney teams assigned to the matter, and directly processed over 5 million documents (and counting) received from the *Volkswagen* defendants.

OLS also continued to provide valuable technical assistance and guidance for several other high-priority cases in the Division during this year. For example, OLS contractor staff provided the sole pretrial and on-site trial support needed at the *U.S. v. Ameren Missouri* (E.D. Mo.) trial in St. Louis, Missouri, a three-week civil CAA case that is part of the Division's Power Plants initiative. In addition, OLS staff continued to provide daily legal and technical support for the tribal trust cases, assisting the attorney team in reaching settlement with 17 tribal governments in September 2016, and provided pretrial and onsite trial support at the second phase of trial in *Emhart Industries, Inc. v. New England Container Co.*, (D.R.I.), a Superfund action.

In 2016, the Division executed a near-record number of expert witness contract actions with a total value of more than \$61.6 million. The procurement actions carried out by Office of the Comptroller staff engaged a wide variety of experts, including many used during the *Deepwater Horizon* case and in other high-profile litigation.

OLS Project User System (OPUS)

During 2016, OLS continued the successful implementation of its OLS Project User System (OPUS), a software solution specifically designed by OLS management and technical staff to both streamline and effectively manage responses to requests for the full range of automated litigation support services available to the Division. These services include the full spectrum of processing options for electronically-stored information; the hosting of data in Relativity databases; hard copy scanning; and, most importantly, the support for all industry standard document production formats. Over 6,250 requests were submitted and completed during the year, an increase of 9% compared to last year. This increase demonstrates that OPUS is an effective means to track the progress of requests to OLS and confirm that the processing decisions made (and often mandated by court order) are documented and consistently followed.

OLS provides a full range of automated litigation support services that are available to the Division's employees. During 2016, OLS technical staff members processed approximately 10.4 million documents (a 62% increase) and produced 4.6 million unique documents (an increase of 130%).

Working with Client Agencies

During 2016, OLS continued its successful outreach efforts with ENRD attorney teams and client agency technical staff and counsel to provide guidance on all aspects of collecting forensically sound electronically stored information in support of the Division's cases. OLS staff continue to provide advice to the Division's case teams on issues such as the scope of material to be collected, the use of search terms to find relevant documents, the selection of custodians, and the necessary technology needed to effectively handle the data collected.

OLS staff continued their collaborative efforts with client agencies to assist those with either no defined collection process in place, or those with collection processes in the early stages of development. As part of this collaboration, OLS staff provided licenses to the Harvester collection software owned by ENRD to assist those agencies that do not currently own an effective collection tool for preserving metadata. OLS staff also provided instruction and guidance on the use of this software to ensure that collection is done in compliance with federal discovery rules and any agreements reached by the parties in each case. The expertise in the collection of electronically-stored information has made OLS staff a consistent resource for both ENRD attorney teams and client agencies. OLS staff meet weekly with the technical staff at several client agencies to provide advice for resolving issues encountered by their collection teams, which has significantly increased the quality of data received for processing by OLS.

Automating Work Processes

ENRD's Service Center continued to support Division attorneys and staff in fiscal year 2016 by processing more than 33,890 electronic court filings and 649 scanning requests, and reproducing over 2 million pages of electronic documents to paper format. In addition, the Office of Administrative Services (OAS), in conjunction with the Justice Management Division's (JMD) Procurement Services Staff, completed the re-competition of the Service Center contract, awarding another five-year contract to incumbent service provider Novitex for copying, scanning, graphics, mail, and records management services.

Employing Innovative Technology Solutions for ENRD's Workforce

The Office of Information Management (OIM) continues to refine and enhance its web-based Case Management and Time Reporting application (CMS Web), which was released in 2015. CMS Web is an invaluable repository of case and time data, allowing ENRD to provide critical information needed to effectively present Division costs in litigation, support our annual Superfund reimbursable funding agreement with EPA, and respond to various audit and congressional inquiries. CMS Web is also an increasingly useful resource for Division managers, allowing them to manage attorney workloads and case assignments, assess more efficient organizational structures, and streamline docket reviews. In 2016, OIM rolled out several important new Division reports within CMS Web and provided training to several Sections, and the Executive Office, on how to run reports.

OIM continues to support the Land Acquisition Section's (LAS) use of the Appraisal Management application (AMS Web). AMS Web is a pivotal tool that assists LAS in the planning and tracking of Appraisal Reviews. AMS Web handles the intake of review requests, notifies the Chief Appraiser of pending reviews, generates frequent appraisal activity reports, and provides accurate logs of Appraisal Unit workload. Additionally, AMS Web maintains a database of appraisers, and pulls data from CMS Web in real-time.

Cybersecurity upgrades and technology enhancements

The Office of Information Technology (OIT) deployed several new technologies and applications to all ENRD PCs, laptops, and servers to further enhance the Division's cybersecurity posture. Cybersecurity is a priority for ENRD, as it is for the Department and the government as a whole. Over the past year, OIT has made significant improvements that help protect the Division from security threats. OIT will continue to assess the cybersecurity needs of the Division and deploy appropriate security tools and applications where needed.

OIT upgraded 650+ iPhones used throughout the Division to enhance productivity and improve mission effectiveness, and acquired 150 new laptops to replace aging inventory deployed throughout ENRD.

OIT upgraded the Division's primary litigation support IT system to better support the Division's mission, including increasing use of Relativity, one of the most critical of these systems. This upgrade provides more features and capabilities that will significantly improve litigation support and mission effectiveness for the Division.

OIT also upgraded IT system hardware, including storage and server capacity and network bandwidth, for several ENRD locations to support the IT demands of the Division's litigation. OIT will continue to monitor demand and respond with appropriate upgrades where needed.

Supporting ENRD Travel Through the Division's Web-Based Travel-Management System

The Office of the Comptroller continues to support the Division's travel-management system, "E2," which was first implemented in 2014. This system ended the resource-intensive practice of handling paper forms for employees seeking approval to travel and for securing reimbursement for travel expenses. Because E2 is integrated with CWTSato's online booking engine and is a web-based system, travelers, travel arrangers, approving officials, and finance officials have greater flexibility and access to handle the travel needs of the Division. In addition, E2 provides important audit- and compliance-related checks-and-balances ensuring a higher level of data integrity for the Division's travel-related transactions.

Implementation of E2 has enabled us to reduce travel card account aging by helping travelers get more timely travel reimbursements. In addition, through training efforts, counseling, and a consistent notification system, account delinquencies have decreased to less than 1%, making the Division one of the best performing components in the Department.

Securing Resources for Mission-Critical Division Needs

Through the efforts of the Office of the Comptroller, the Division secured resources from the Department's Collection Resources Allocation Board (CRAB) and from the Justice Management Division (JMD) to support ENRD personnel, litigation support, expert services, and other litigation expenses. In 2016, ENRD received multi-million dollar awards of 3% funding from the CRAB to address the Division's significant portfolio of high-profile environmental crimes and civil enforcement cases such as the Volkswagen case. In addition, the Office of the Comptroller was instrumental in obtaining litigation support resources from the Department to address critical initiatives, including our tribal trust litigation and several complex water rights cases.

Supporting Records and Systems Management

The Office of Administrative Services (OAS) establishes and promotes a records management program for the Division in accordance with Department policy. OAS continued to work with key personnel within the Division to plan, control, organize, and train personnel on records policies and procedures. In support of National Archives and Records Administration (NARA) training requirements, OAS provided records management training to all new employees and contractors and ensured that all existing personnel completed their annual records-management training.

NARA'S Managing Government Records Directive (M-12-18) requires agencies to develop records retention policies for all records by the end of 2016. To meet this goal, OAS met with and completed consultations with all section managers by September 30, 2016, to identify any collections that needed to be scheduled.

OAS continued to work with JMD's Office of Records Management and Policy to establish guidance and processes for the Department's Capstone implementation. Capstone is an email management approach developed by NARA to categorize and schedule email based on the employee's position/rank within the Department. OAS also collaborated with OIT and E-Discovery personnel to complete a Department-mandated evaluation that measured the status of ENRD's email management program.

During the year, OAS records personnel supervised the creation and organization of 13,219 litigation files in the Division's Records Management Tracking Database. Over 8,000 files were loaned to Division personnel, 962 cases were closed and 434 boxes of files were transferred to the warehouse or NARA for disposition.

Greening the Division

The Division held its 13th annual Earth Day service celebration at Marvin Gaye Park in April 2016. This year's projects were diverse, focusing not only on the Park's Greening Center, but also on upgrades to the Marvin Gaye Amphitheater and the Dix Street Community Youth Garden. This year over 80 ENRD volunteers helped plant new gardens, remove brush and dead trees, remove trash, and weed and cut grass. Because of ENRD's hard work on cleaning and restoring the Amphitheater, a local high school was able to use the area for its graduation ceremony this year.



Assistant Attorney General Cruden and ENRD Staff Volunteer on Earth Day, Department of Justice

ENRD also continued to lead the Department in green building initiatives. The Division maintained its trend of lowering energy usage in the Patrick Henry Building (PHB) for the 10th consecutive year. PHB, where ENRD is the primary tenant, received an Energy Star certification in 2014 and continues to meet the environmental standards necessary to continue the LEED certification received in 2012.