

# ENRD

## Accomplishments Report Fiscal Year 2014



United States Department of Justice  
Environment & Natural Resources Division



# **SUMMARY OF DIVISION ACCOMPLISHMENTS**

**FISCAL YEAR 2014**



*Morning Peeler Lake, Hoover Wilderness*

*Photo by Steve Macfarlane*

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In fiscal year 2014, the Environment and Natural Resources Division achieved important victories for the American public across its many practice areas. The chapters of this report briefly explain the Division's organizational structure, highlight its continued work toward the goal of achieving environmental justice for all communities, and describe the Division's other key accomplishments.

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*Osprey*

*Photo by Laura Maul*



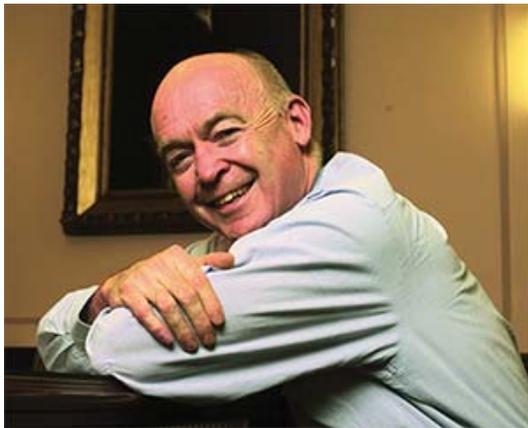
*Wildflowers, Annapolis, Maryland*

*Photo by Jessica White*

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# FOREWORD

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*Assistant Attorney General John C. Cruden*

In January, I returned to the Environment and Natural Resources Division as the Assistant Attorney General following my Senate confirmation. I have 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 the Division's career Deputy Assistant Attorney General, and during that time, I have witnessed the extraordinary efforts of career public servants who work countless hours, representing the United States in federal courts across our great nation. The Division's backbone is those career professionals who have dedicated their lives to public service: upholding our laws, improving the environment, protecting our

natural resources, and assuring the health and safety of our citizens.

In existence for over one hundred years, the Division is built upon a history of service, integrity, and adherence to the rule of law. It has broad responsibilities present in the thousands of cases under the Division's jurisdiction: 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 Native American rights. In this report you will find the highlights of the Division's outstanding work from last year.

In the past year, the Division successfully litigated 926 cases and handled a total of 6,588 cases, matters, and appeals. We recorded over \$400 million 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 \$6.2 billion. ENRD also saved the taxpayers money, avoiding claims of over \$2.0 billion. The Division achieved a favorable outcome in 93 percent of cases, resulting in cleaner air, land, and water in the United States.

Among our top priorities this year are: the continued litigation of all aspects of the Deepwater Horizon oil spill; enforcing and defending EPA's rules and regulations promulgated under the Clean Air Act to reduce greenhouse gases and conventional pollutants; combating wildlife trafficking; promoting responsible energy development; protecting tribal sovereignty, tribal lands and resources, and tribal treaty rights, vigorously litigating while maintaining our commitment to integrity and the rule of law. In all of our work, we continue to pursue the goals of Environmental Justice by ensuring that all communities enjoy the benefit of a fair and even-handed application of the Nations' environmental laws and affected communities have a meaningful opportunity for their voice to be heard in all appropriate instances.

The Division's top civil enforcement priority remains the litigation of the Deepwater Horizon oil spill to hold accountable those responsible for the billions of barrels that were spilled into the Gulf of Mexico for nearly 90 days. In December 2010, the United States brought a civil suit against BP, Anadarko, MOEX, and Transocean for civil penalties under the Clean Water Act and a declaration of liability under the Oil Pollution Act, as part of multidistrict litigation in the U.S. District Court for the Eastern District of Louisiana. We have completed all three phases of a trial for civil penalties under the Clean Water Act, and have settled claims with two of the defendants, MOEX and Transocean. BP also plead guilty to criminal violations of the Clean Water Act and felony manslaughter charges. The remaining defendants in the civil litigation – BP and Anadarko – each face a maximum penalty exposure in billions of dollars. Under the RESTORE Act, the penalties will go to restoring natural resources, environmental improvement, and economic redevelopment in the Gulf States.

The Division continues to make important contributions to combating the effects of climate change and other harmful air pollutants. Last year, the Supreme Court in *Utility Air Regulatory Group v. EPA*, largely upheld EPA's regulation of greenhouse gases under the Clean Air Act at sources that were already regulated for other conventional pollutants. The Division also defended a challenge under the Energy Policy Act to greenhouse gas emission standards for new power plants in *State of Nebraska v. EPA*. The Division had two important wins in challenges to EPA's rules to curb air pollution from power plants. In *EPA v. EME Homer City Generation*, the Supreme Court upheld EPA's Cross State Air Pollution Rule or "Transport Rule", which allows EPA to allocate responsibility to upwind states for air pollution that travels into downwind states. In *White Stallion Energy Center v. EPA*, the D.C. Circuit rejected challenges to EPA's Mercury and Air Toxics Standards and that case is pending Supreme Court review. And as this goes to publication, the D.C. Circuit is hearing ENRD's argument in consolidated challenges to EPA's proposed standards for coal-fired power plants. The Division also obtained the largest Clean Air Act penalty in *U.S. v. Hyundai Motors Company*, for violations related to testing and certification of close to 1.2 million vehicles that will emit approximately 4.75 million metric tons of greenhouse gases in excess of their certification to EPA. Automakers Hyundai and Kia will pay a \$100 million penalty, spend approximately \$50 million on measures to prevent future violations, and forfeit 4.75 million greenhouse gas emissions credits estimated to be worth over \$200 million.

These are only a few examples of the extraordinary work of the Division. I am proud of the work that the Division accomplished last year, and I want to thank Bob Dreher and Sam Hirsch, both of whom served as Acting Assistant Attorney General in 2014, for their leadership during that time. It is a privilege for me to serve as the Assistant Attorney General, and I am grateful to work with so many outstanding colleagues and good friends. The many successes reflected in this report are due to their expertise, dedication, and professionalism, and I encourage you

to take the time to learn about their work. In closing, I would like to leave you with my goals for the coming year:

- Goal 1: Enforce the nation's bedrock environmental laws that protect air, land, and water for all Americans
- Goal 2: 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
- Goal 3: Protect the public fisc and defend the interests of the United States
- Goal 4: Advance Environmental Justice through all of the Division's work and promote and defend tribal sovereignty, treaty obligations, and the rights of Native Americans
- Goal 5: Provide effective stewardship of the nation's public lands, natural resources and animals, including fighting for the survival of the world's most protected and iconic species and marine resources, and working across the government and the globe to end the illegal trade in wildlife

John C. Cruden  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice  
April 22, 2015

# OVERVIEW OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The richness and complexity of the Division's history 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 100th anniversary on November 16, 2009. Today, we are mindful of the strong legacy that we have inherited and the opportunities and challenges that lie ahead of us.

The Division, which is organized into ten sections, 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 7,000 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, the Clean Water Act, the Oil Pollution Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation,

## ENRD LITIGATING SECTIONS

- Appellate
- Environmental Crimes
- Environmental Defense
- Environmental Enforcement
- Indian Resources
- Land Acquisition
- Law and Policy
- Natural Resources
- Wildlife and Marine Resources



*Yellowstone National Park, Wikipedia photo*



*Everglades National Park, Wikipedia photo*

## WHAT WE DO

The Environment and Natural Resources Division has primary responsibilities for litigation as well as policy work on behalf of United States regarding:

- Prevention and Cleanup of Pollution
- Environmental Challenges to Federal Programs and Activities
- Stewardship of Public Lands and Natural Resources
- Property Acquisition for Federal Needs
- Wildlife Protection
- Indian Rights and Claims

The Division has the largest environmental law practice in the country.

and Liability Act, and the Safe Drinking Water Act. 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. The Division's sections that carry out this work are the **Environmental Enforcement Section**, the **Environmental Defense Section**, and the **Environmental Crimes Section**.

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, and suits challenging federal agency decisions that affect economic, recreational, and religious uses of the national parks, national forests, and other public lands; challenges brought by individual Native Americans and Indian tribes relating to the United States' trust responsibility; and actions to recover royalties and revenues from development of natural 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 U.S. Department of the Interior's (Interior) National Park Service, Bureau of Land Management, and U.S. Fish and Wildlife Service. The **Natural Resources Section** is primarily responsible for these cases.

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, 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 **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. The main federal agencies that ENRD represents in this area are the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service.

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 Clean Air Act and Clean Water Act, 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, EPA, the U.S. Army Corps of Engineers, the U.S. Department of Transportation, 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 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. 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.

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 **Law and Policy Section** advises and assists the Assistant Attorney General on environmental and natural resources 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 participation in cases of importance to the United States, as well as other special projects on behalf of Division leadership. Attorneys in the Law and Policy Section serve as the Division's ethics and professional responsibility officer and counselor and as its alternative dispute resolution counselor. In addition, the Section coordinates the Division's Freedom of Information Act and Privacy Act work, and handles international legal matters, often in collaboration with the Environmental Crimes Section.

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.



*Earth Day 2014, DOJ photo*

## ENRD CLIENT AGENCIES

To learn more about the client agencies referenced in this report, visit their websites:

### **United States Department of Agriculture**

*United States Forest Service*  
*Animal and Plant Health Inspection Service*

**www.usda.gov**  
*www.fs.fed.us*  
*www.aphis.usda.gov*

### **United States Department of Commerce**

*National Marine Fisheries Service*  
*National Oceanic and Atmospheric Administration*

*www.nmfs.noaa.gov*  
*www.noaa.gov*

### **United States Department of Defense**

*United States Air Force*  
*United States Army*  
*United States Army Corps of Engineers*  
*United States Marine Corps*  
*United States Navy*

*www.af.mil*  
*www.army.mil*  
*www.usace.army.mil*  
*www.marines.mil*  
*www.navy.mil*

### **United States Department of Energy**

**www.energy.gov**

### **Environmental Protection Agency**

**www.epa.gov**

### **General Services Administration**

**www.gsa.gov**

### **United States Department of Homeland Security**

*United States Customs and Border Protection*  
*Federal Emergency Management Agency*  
*United States Coast Guard*

**www.dhs.gov**  
*www.cbp.gov*  
*www.fema.gov*  
*www.uscg.mil*

### **United States Department of the Interior**

*Bureau of Indian Affairs*  
*Bureau of Land Management*  
*Bureau of Ocean Energy Management*  
*Bureau of Reclamation*  
*Bureau of Safety and Environmental Enforcement*  
*National Park Service*  
*Office of Surface Mining Reclamation and Enforcement*  
*United States Fish and Wildlife Service*  
*United States Geological Survey*

**www.doi.gov**  
*www.bia.gov*  
*www.blm.gov*  
*www.boem.gov*  
*www.usbr.gov*  
*www.bsee.gov*  
*www.nps.gov*  
*www.osmre.gov*  
*www.fws.gov*  
*www.usgs.gov*

### **United States Department of Transportation**

*Federal Aviation Administration*  
*Federal Highway Administration*  
*Federal Transit Administration*  
*Pipeline Safety and Hazardous Materials Administration*  
*United States Maritime Administration*

**www.dot.gov**  
*www.faa.gov*  
*www.fhwa.dot.gov*  
*www.fta.dot.gov*  
*www.phmsa.dot.gov*  
*www.marad.dot.gov*

### **United States Department of Veterans Affairs**

**www.va.gov**

# MAKING PROGRESS TOWARD ACHIEVING THE GOAL OF ENVIRONMENTAL JUSTICE

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994), was the federal government's first policy statement on environmental justice. Attorney General Janet Reno represented the Department at the signing of this historic document over 20 years ago. The ideals of Executive Order 12898 are as true today as they were in 1994: every American deserves clean air, water, and land, regardless of income, race, or ethnicity. The Department remains committed to achieving environmental justice, and ENRD plays an important role in making environmental justice a reality. The Division's core mission includes the strong enforcement of civil and criminal environmental laws to ensure clean air, water, land, and other resources for the protection of human health and the environment for all Americans. ENRD seeks to integrate the principles of environmental justice



*Signing of Executive Order 12898*

*Photo Courtesy of William J. Clinton Presidential Library*

**“B**ecause we all deserve the chance to live, learn, and work in healthy communities, my Administration is fighting to restore environments in our country's hardest-hit places. . . . While the past two decades have seen great progress, much work remains. In the years to come, we will continue to work with States, tribes, and local leaders to identify, aid, and empower areas most strained by pollution. By effectively implementing environmental laws, we can improve quality of life and expand economic opportunity in overburdened communities.”

—President Barack Obama, February 10, 2014 Presidential Proclamation: 20th Anniversary of Executive Order 12898 on Environmental Justice

into its work to ensure that all communities enjoy a fair and impartial application of the nation's environmental and natural resources laws and that communities affected by violations of the law have a meaningful opportunity for input in the consideration of appropriate remedies.



*EPA Photo*



*EPA Photo*

In fiscal year 2014, the Division continued to achieve meaningful environmental justice results. This chapter is divided into two sections. First, it describes ENRD's continued collaboration with other federal agencies and Department components. Second, it highlights the Division's actions to further environmental justice through its own work and litigation docket.

## Collaborative Work with Other Federal Agencies and Department Components in Fiscal Year 2013

### Interagency Working Group on Environmental Justice (EJ IWG)

Executive Order 12898 established the EJ IWG and identified the participating federal agency members. The federal government and the public celebrated the 20th anniversary of the issuance of the Executive Order and the creation of the EJ IWG in February 2014. Chaired by EPA and the White House Council on Environmental Quality, the formation of the EJ IWG highlights the importance of federal agencies working collaboratively to address environmental justice concerns. The EJ IWG works to facilitate 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.

Through its work with the EJ IWG, the Division has taken a leadership role in ensuring a coordinated federal response to environmental justice issues. Representatives from ENRD regularly participate in senior staff-level meetings of the EJ IWG and identify ways the Department can support and further the EJ IWG's work. Senior leadership in ENRD attended several EJ IWG meetings in 2014. On November 18, 2014, EPA Chief of Staff Gwendolyn Keyes Fleming hosted a special meeting of the EJ IWG senior leadership team and agency

chiefs of staff. The meeting focused on strengthening coordination on environmental justice projects and activities across federal agencies. It also provided an overview of EPA Administrator Gina McCarthy's planned Cabinet-level meeting on environmental justice, tentatively scheduled for 2015.



DOJ Website

### Implementing the Interagency Memorandum on Environmental Justice

In 2011, the Department of Justice joined 16 other federal agencies and White House offices in signing a Memorandum of Understanding on Environmental Justice and Executive Order 12898 (MOU). The Division played an important leadership role in the development of the MOU and continues to play an important role in its implementation. The MOU, among other things, identifies four specific areas that agencies should focus on when carrying out their environmental justice strategies and other efforts: (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 impacts from commercial transportation and supporting infrastructure.

## **EJ IWG NEPA Committee**

Over the past year, the Division's Natural Resources Section continued its active participation on the NEPA Committee established by the EJ IWG in May 2012. The NEPA Committee seeks to encourage agencies to use their NEPA processes as a vehicle for incorporating environmental justice principles into decision making. NEPA requires federal agencies to determine the environmental consequences of their proposed actions before they act. Additionally, when a proposed action is likely to have a significant impact on the environment, NEPA requires agencies to provide the public with an opportunity to access public information about, and participate in the decision making process for, the proposed action. The Presidential Memorandum accompanying Executive Order 12898 emphasizes the importance of the NEPA process in focusing federal agencies "on the environmental and human health conditions in minority communities and low-income communities with the goal of achieving environmental justice."

The NEPA Committee meets on a monthly basis and employs a robust and innovative process to fulfill its purpose. The co-chairs of the NEPA Committee and its two subcommittees are from the Department of Justice, EPA, the U.S. Department of Transportation, and the U.S. Department of Health and Human Services, while working groups are chaired by EPA, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service, and the U.S. Department of Energy. Seven other federal agencies actively participate in the NEPA Committee's work.

In fiscal year 2014, ENRD's Natural Resources Section continued to work with the NEPA Committee's Education Subcommittee and Community of Practice Subcommittee. NRS serves as a co-chair of the Education Subcommittee, which is developing a training product that will help federal agencies train NEPA practitioners on best practices for incorporating environmental justice into the NEPA process. The Education Subcommittee expects to finalize the training product in the coming year.

The training product is a companion to a document entitled "Promising Practices on EJ Methodologies in NEPA Reviews," which is being developed by the Community of Practice Subcommittee. The document will provide NEPA practitioners with a set of methodologies to use in incorporating environmental justice principles into agency NEPA analyses. The Natural Resources Section provided significant input into the methodologies document, which the Community of Practice Subcommittee expects to finalize in the coming year.

## **EJ IWG Title VI Committee**

ENRD has participated regularly in the Title VI Committee, which is chaired by the Department's Civil Rights Division. The Title VI Committee seeks to ensure consistent enforcement of Title VI across the federal family and to encourage the use of this critical enforcement tool to address environmental justice issues. In 2014, the EJ IWG launched a Title VI webpage.

## **Climate Change**

On June 25, 2013, President Obama announced his plan to cut carbon pollution and prepare the United States for the impacts of climate change. The President's Climate Action Plan calls upon federal agencies to "continue to identify innovative ways to help our most vulnerable communities prepare for and recover from the impacts of climate change." This focus on building capacity in low-income, minority, and tribal communities for climate adaptation comes from a number of policy mandates from both the White House and individual agency leaders. For example, Executive Order 13653 (Preparing the United States for the Impacts of Climate Change), which was signed by President Obama on November 1, 2013, called for the federal government to build on recent progress and pursue new strategies to improve the nation's preparedness and resilience.

ENRD represents the Department of Justice on the interagency Council on Climate Preparedness and Resilience, which was established by Executive Order 13653. In 2014, representatives from ENRD and the Department's Justice Management Division met to discuss the Department's climate adaptation goals as they relate to environmental justice.

## **Annual Reporting**

The Department issued its 2014 Implementation Progress Report on Environmental Justice. This report details the significant efforts and results achieved by the Department to further the goals of environmental justice during fiscal year 2014. The Division contributed significantly to the accomplishments discussed in the report.

## **Environmental Justice Strategy and Guidance**

In 2014, the Department updated and reissued its Environmental Justice Strategy and its Environmental Justice Guidance. The Department initially prepared these documents in 1995 following the issuance of Executive Order 12898, and has made them available to the public on the Internet since 2011 ([www.justice.gov/ej](http://www.justice.gov/ej)). The Department solicited public comments on the documents in 2012, and ENRD played a critical role in the 2014 revisions.

The overarching goal of the 2014 revisions is to ensure that the Department's approach to addressing environmental justice makes a meaningful difference in overburdened communities. First, the documents provide a clearer explanation of the internal operating structure of the Department regarding environmental justice. The structure includes a Director of Environmental Justice in the Office of the Associate Attorney General, a Senior Advisory Council chaired by the Associate Attorney General, an Environmental Justice Working Group chaired by the Director of Environmental Justice, and Environmental Justice Coordinators.

Second, the Department updated the Strategy to reflect the addition of three Department components to the Senior Advisory Council and Environmental Justice Working Group: the Access to Justice Initiative; the Office of Legal Policy; and the Office of Tribal Justice. Third, the Department revised the Strategy and the Guidance, where appropriate, to replace the phrase "federally recognized tribes" with language that encompasses American Indians, Alaska Natives, and Native Hawaiians. The change in terminology better reflects the breadth of circumstance under which environmental justice concerns may arise. Finally, the Department revised the

Guidance to include updated examples of potential “environmental justice matters” to assist Department employees in implementing the Strategy.

### **Increasing Communication and Awareness across Federal Agencies**

The Division also continued to collaborate with other federal agencies to increase the dialogue on and awareness of environmental justice issues. A cross-agency group of career attorneys that ENRD, along with EPA’s Office of General Counsel, organized in fiscal year 2011 remained an important vehicle for increasing communication and awareness. In fiscal year 2014, the group (known as “Law Leaders on Environmental Justice”) continued to serve as an important forum for open dialogue, continuing education, and informal counseling among the federal agencies on environmental justice issues such as legal training.

The Division assisted other federal agencies in providing environmental justice training to their staff. For example, in September 2014, the Department participated in a three-day environmental conference hosted by the Department of Agriculture’s Office of General Counsel. Nearly an entire day of the conference was devoted to environmental justice issues. ENRD’s Environmental Justice Coordinator participated in a panel discussion on environmental justice along with EPA’s Director of the Office of Environmental Justice, the Department of Agriculture’s Deputy Under Secretary for Natural Resources and Environment, and also its Deputy Under Secretary for Rural Development. Several attorneys from ENRD’s Natural Resources Section also participated in panel discussions, and a number of other Division attorneys attended. In addition, the Natural Resources Section provided training on environmental justice issues.

ENRD’s Environmental Crimes Section provided training to criminal environmental investigators at the Federal Law Enforcement Training Center. The training, organized by the EPA Criminal Investigation Division and attended by state investigators from throughout the country, addressed how to identify cases that raise environmental justice issues and what steps may appropriately be taken to seek to identify and address such issues during case investigation, prosecution, and resolution. Also, the Environmental Crimes Section and EPA provided presentations on environmental justice at the March 2014 meeting of the Department’s Environmental Crimes Policy Committee. The EPA presentation focused on implementation of environmental justice principles by its Office of Criminal Enforcement, Forensics and Training.

Also, Land Acquisition Section attorneys, appraisers, and support staff participated in training on federal agencies’ prelitigation responsibilities to assist landowners affected by eminent domain. The Land Acquisition Section remains committed to incorporating environmental justice principles into its condemnation work, including by seeking to ensure that landowners have equal access to justice and receive due process when private property is taken for public use by eminent domain. The Section also discusses environmental justice concerns with agencies that are considering whether to ask the Section to file condemnation actions on their behalf.

### **Participating in Community and Other Outreach**

The Division has continued to help the EJ IWG fulfill one of its critical responsibilities under EO 12898: holding public meetings for the purposes of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice.

On September 4, 2014, the EJ IWG held a public meeting in Bismarck, North Dakota, for tribes and indigenous communities. The purpose of the meeting was to facilitate an interactive discussion and create a supportive environment for exploring how the federal government can strengthen interagency collaboration on environmental justice and work more effectively with tribes and indigenous communities. Attorneys from ENRD and representatives from ten other federal agencies participated in a dialogue with tribal leaders, tribal environmental program personnel, indigenous community groups, students, and community stakeholders. There were approximately 69 attendees, which included representatives from 14 different tribes. EPA has posted a summary of the meeting at: <http://www.epa.gov/compliance/environmentaljustice/resources/publications/interagency/iwg-2014-09-04-meeting-summary.pdf>.

The Division will continue to work with the EJ IWG to conduct listening sessions with communities to discuss federal environmental justice strategies and solicit recommendations on how agency efforts can be improved. Through these sessions we gain valuable feedback directly from communities that often helps us improve how we integrate environmental justice principles into our work. We look forward to continuing our participation in them.

In addition to community outreach conducted with the EJ IWG and in the context of specific cases, the Department utilizes other forums to hear from stakeholder communities. For example, ENRD representatives attended public meetings of the EPA National Environmental Justice Advisory Council held in February 2014 in Denver, Colorado, and in October 2014 in Arlington, Virginia. These public meetings continue to afford communities the opportunity to comment on environmental justice issues of concern to them.

ENRD, the Department's Office of Tribal Justice, and U.S. Attorneys' Offices continue to engage in an unprecedented level of community outreach to ensure that the Department understands and is responding to community concerns. This outreach is conducted in many different forums, including meetings organized by communities, events organized by senior Department officials, EJ IWG listening sessions and community calls, environmental justice conferences, and meetings or calls relating to particular cases.

In addition, ENRD and U.S. Attorneys' Offices have worked with other components in the Department, federal agency partners, and community representatives to otherwise engage in community outreach, including outreach to tribes. Tracy Toulou, Director of the Office of Tribal Justice, Sam Hirsch, ENRD Principal Deputy Assistant Attorney General, and Brendon Johnson, the U.S. Attorney for the District of South Dakota, co-chair the Department's Indian Civil Litigation and Policy Working Group. The working group discusses environmental justice issues, relevant litigation, and opportunities and plans for outreach at its monthly meetings.

Attorney General Holder, and other Department senior staff, also spoke about environmental justice on a number of occasions.

- On July 24, 2014, Ellen Mahan, Deputy Chief in ENRD's Environmental Enforcement Section spoke about environmental justice on a panel on "Civil and Criminal Environmental Enforcement Update" at an American Bar Association program entitled "At the Forefront: An Insider's Perspective on Environmental Enforcement and Litigation."
- On July 29, 2014, Quentin Pair, ENRD trial attorney, and Daria Neal, Deputy Section Chief for the Federal Coordination and Compliance Section of the Civil Rights Division, partici-

pated on an environmental justice panel at a National Bar Association conference in Atlanta, Georgia. Cynthia Ferguson, ENRD's Environmental Justice Coordinator, also attended the panel discussion.

- At a September 2014 meeting with U.S. Attorneys, ENRD Deputy Assistant Attorney General Bruce Gelber discussed environmental justice issues.
- On December 3, 2014, Attorney General Holder spoke about environmental justice during remarks presented at the White House Tribal Nations Conference.

### **Training and Increasing Awareness within ENRD**

During fiscal year 2014, ENRD remained committed to increasing awareness and understanding of environmental justice issues among its attorneys and staff. For example, in October 2014, ENRD provided an overview of environmental justice at its annual training for new attorneys. The Division also held brown-bag sessions for interns during the year to discuss the Department's environmental justice efforts.

In addition to Division-wide training, ENRD's sections provided training regarding environmental justice in the context of each section's work. For example, at the 2014 Environmental Enforcement Section retreat, attorneys from the section gave a presentation on environmental justice and enforcement issues in Indian country. The Natural Resources Section continued to ensure that its attorneys and staff are aware of and adept at identifying environmental justice issues and considering environmental justice principles as they carry out their work. In 2014, the Natural Resources Section provided training on environmental justice during a three-day "Natural Resources Law for Litigators" course at the National Advocacy Center. The majority of the Natural Resources Section's attorneys attended the course, as well as Assistant U.S. Attorneys from across the country.

The Natural Resources Section also conducted a training session for the Civil Rights Division's Federal Coordination and Compliance Section, focusing on NEPA and potential areas of overlap with Title VI. In return, the Federal Coordination and Compliance Section conducted a training session for the Natural Resources Section, providing an overview of Title VI and civil rights litigation while also discussing opportunities for collaboration on environmental justice issues.

## **Integrating Environmental Justice Principles into ENRD Litigation and Outcomes**

### **Civil Enforcement of Federal Pollution Control Statutes and Prosecutions of Environmental Crimes**

Through enforcement of the nation's civil and criminal environmental laws, ENRD's Environmental Enforcement and Environmental Crimes Sections and the U.S. Attorneys' Offices seek to ensure that all communities enjoy the benefit of a fair and even-handed application of the law, and have a meaningful opportunity for input in the consideration of appropriate remedies for violations of the law. The Department's commitment to making a difference in overburdened

communities is demonstrated in part through the results we have secured in civil and criminal enforcement actions.

— On October 16, 2014, the United States lodged a consent decree in *United States v. Metal Dynamics Detroit LLC* (E.D. Mich.), that will resolve violations of the Clean Air Act arising at the defendant’s scrap metal recycling facility in Detroit, Michigan. During the negotiations, Department attorneys and EPA, with the assistance of the Department’s Community Relations Service and the Michigan Department of Environmental Quality, conducted community outreach regarding the alleged violations, potential remedies, and possible supplemental environmental projects (SEPs). Under the proposed consent decree, Metal Dynamics will implement a Clean Air Act compliance program at its facility to eliminate the harmful release of chlorofluorocarbons (CFCs) and modify its torch cutting of metals to keep particulate emissions at or below legal limits. Metal Dynamics will also pay a civil penalty of \$110,000 and implement two SEPs valued at \$400,000. The first SEP is a program that will provide education and economic incentives to scrap metal suppliers in an effort to reduce the venting of CFC-containing gases to the atmosphere. The second SEP consists of the purchase and use of a portable particulate matter control device. This SEP could advance the development of technology and practices to reduce emissions of particulate matter at non-stack sources like the defendant’s.

— In *United States v. Atlantic Richfield Company* (N.D. Ind.), the court approved a consent decree on October 28, 2014, concerning the U.S. Smelter and Lead Refinery Superfund Site. This case arose from the need to address lead and arsenic contamination in the soils of residential properties in East Chicago. Under this consent decree, EPA will be addressing this contamination, including in an area where housing is provided for low-income residents (primarily African-American and Hispanic American). EPA conducted extensive outreach to the communities in developing and selecting the remedy.

— On May 21, 2014, the District of South Carolina approved a consent decree in *United States & South Carolina v. City of Columbia* (D.S.C.), resolving violations of the Clean Water Act stemming from overflows of sanitary sewers. The Department, EPA, and the South Carolina Department of Health and Environmental Control worked jointly with the City of Columbia



*City of Columbia South Carolina, Wikipedia photo*

in implementing extensive outreach. With input from the Department and EPA, the City conducted a survey that asked neighborhood, environmental, and civil groups about their experiences with sanitary sewer overflows, for views on several potential SEPs, and for ideas for ways to reduce sanitary sewer overflows.

The City received 51 responses. The majority of the survey respondents supported restoration of stream banks to reduce flooding. In addition, the Department and EPA contacted community organizations and individuals who had been identified as representing minority and/or low-income neighborhoods. Two of these contacts identified specific stream segments as the cause of flooding in their neighborhoods. Ultimately, the City agreed to spend \$1 million on a SEP to restore segments of three streams in areas with environmental justice concerns, two of which were areas identified by the citizens.

The successful community outreach in this case helped direct the parties' attention to environmental justice considerations that might otherwise have been overlooked. Those considerations were easily incorporated into appropriate SEPs and should have a tangible, positive impact on several low-income, minority neighborhoods.

Additionally, the consent decree contains more robust public participation provisions than consent decrees addressing sanitary sewer overflows have traditionally contained. Typically, a defendant like the City makes information about compliance with consent decree requirements available to the public at a library and also posts the information on a website, but interested parties must proactively check these locations for updates. For the first time in this kind of consent decree, the City will provide email notification to all interested parties before submitting information about consent decree compliance to EPA and the South Carolina Department of Health and Environmental Control. For key deliverables, the City will have a formal 30-day comment period. The City will also post submitted and approved copies of deliverables on its website so the public can track the City's progress in complying with the consent decree.

— As part of the settlement reached in *United States v. Flint Hills Resources Port Arthur, LLC* (E.D. Tex.), the defendant agreed to reduce emissions of harmful air pollutants in an overburdened community in Port Arthur, Texas. In the consent decree lodged on March 20, 2014, Flint Hills Resources agreed to implement innovative technologies to control harmful emissions from industrial flares and leaking equipment at the company's chemical plant in Port Arthur, Texas. This settlement is part of EPA's national effort to advance environmental justice by protecting communities that have been disproportionately impacted by pollution. Once fully implemented, EPA estimates that the settlement will reduce emissions of volatile organic compounds, including benzene and other hazardous air pollutants, by an estimated 1,880 tons per year, and will reduce emissions of greenhouse gases by approximately 69,000 tons per year.



Port Arthur Refinery, Wikipedia photo

The settlement requires Flint Hills to operate state-of-the-art equipment to recover and recycle waste gases and to ensure that gases sent to flares are burned with 98 percent efficiency. The company has spent approximately \$16 million to implement these required controls on industrial flares. In addition, the company will spend \$28 million to reduce “fugitive” pollutant emissions that may leak from valves, pumps, and other equipment. Under the consent decree,

the company must monitor leaks more frequently, implement more aggressive repair practices, adopt innovative new practices designed to prevent leaks, and replace valves with new “low emissions” valves or use packing material to reduce leaks.

To further mitigate pollution impacting the community, the company will spend \$2 million on a retrofit or replacement project that is expected to reduce emissions of nitrogen oxides and particulate matter by a combined 85 tons, and emissions of carbon monoxide by 39 tons, over the next 15 years. The company will also spend \$350,000 to purchase and install technologies to reduce energy demand in low-income homes.

Finally, Flint Hills agreed to make its fence line monitoring data available online to the public. For the past several years, Flint Hills has operated a system to monitor the ambient levels of the hazardous air pollutants benzene and 1,3-butadiene at the boundaries of the facility, also known as the “fence line.” The company has used the information collected to identify, and reduce emissions from, sources of pollution for the benefit of communities living near the facility.

— On November 6, 2014, the United States lodged a consent decree in *United States & Louisiana Department of Environmental Quality v. PCS Nitrogen Fertilizer, L.P., AA Sulfuric, Inc., & White Springs Agricultural Chemicals, Inc.* (M.D. La.). The defendants are three subsidiaries of the Potash Corporation of Saskatchewan, the world’s largest fertilizer producer. Under the settlement, the companies will take steps to reduce harmful air emissions at eight production plants. The settlement resolves claims that the subsidiaries violated the Clean Air Act when they modified facilities in ways that released excess sulfur dioxide into surrounding communities.

The settlement requires the three companies to install, upgrade, and operate state-of-the-art pollution reduction measures. It also requires them to install emissions monitors at eight sulfuric acid plants at facilities in Geismar, Louisiana (one plant), White Springs, Florida (four plants), and Aurora, North Carolina (three plants). The three companies will spend an estimated \$50 million on these measures, and will pay a \$1.3 million civil penalty.

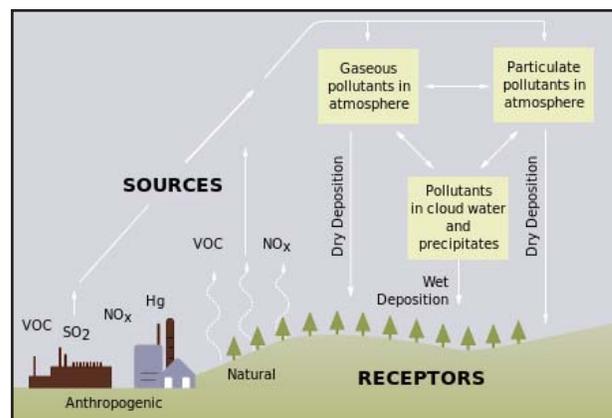
The settlement also includes a SEP that is expected to cost between \$2.5 and \$4 million and to provide important public health and environmental benefits. The SEP will protect the community around a nitric acid plant in Geismar, Louisiana, by requiring one of the subsidiaries to install and operate equipment at the plant to reduce emissions of nitrogen oxide and ammonia. The SEP reflects EPA’s commitment to advancing environmental justice by reducing the disproportionate environmental impacts on communities near industrial facilities. EPA identified the area surrounding the Geismar facility as a community with environmental justice concerns, in part because of high risk indicators for respiratory hazards and cancer.

The SEP addresses these concerns in several ways. Since ammonia is a toxic lung irritant, reducing emissions of ammonia benefits public health. In addition, since nitrogen oxides react in the ambient air to form ozone and fine particulate matter, implementation of the SEP should help reduce ambient air concentrations of these two pollutants. Ozone is a particular concern, because the area is not in compliance with an EPA ambient air quality standards for ozone

In total, EPA expects that the companies will reduce harmful emissions by over 13,000 tons per year, which includes approximately 12,600 tons per year of sulfur dioxide. Sulfur dioxide, the predominant pollutant emitted from sulfuric acid plants, has numerous adverse effects on

human health and is a significant contributor to acid rain, smog, and haze. For example, like nitrogen oxides, sulfur dioxide reacts in the ambient air to form particulate matter, which can cause severe respiratory and cardiovascular impacts and premature death.

This settlement is part of EPA's national enforcement initiative to control harmful emissions from large sources of pollution under the Clean Air Act's Prevention of Significant Deterioration program.



Acid Rain, Wikipedia photo

— On May 28, 2014, the court approved a settlement that will benefit low-income and minority populations in *United States, Alabama, & Oklahoma Department of Environmental Quality v. El Dorado Chemical Co., Cherokee Nitrogen Co., & Pryor Chemical Co. (W.D. Okla.)*. In this settlement, LSB Industries Inc., the largest merchant manufacturer of concentrated nitric acid in North America, and four of its subsidiaries, agreed to reduce harmful emissions of nitrogen oxides at ten nitric acid manufacturing plants in Alabama, Arkansas, Oklahoma, and Texas.

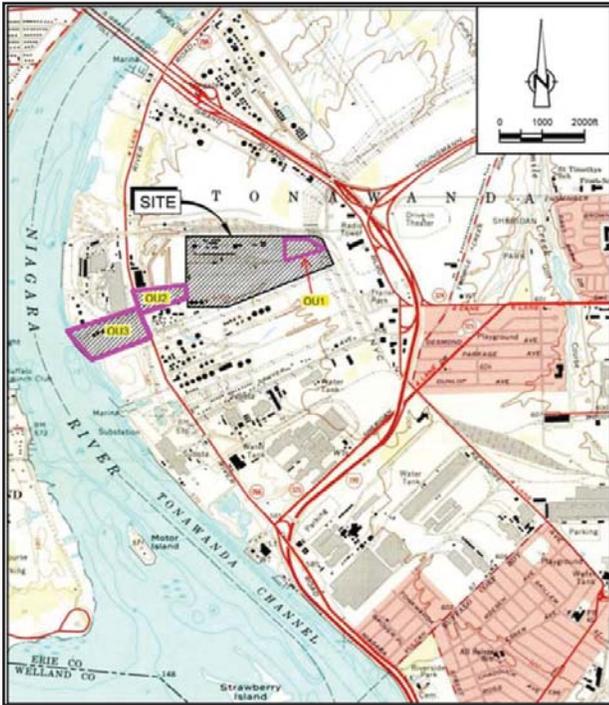
Under the settlement, the companies must meet emission limits that are among the lowest in the nation for the industry. The companies also must continuously monitor emissions and make any necessary operational improvements, such as installing new pollution controls or upgrading current controls, to ensure they continue to meet the limits. The companies estimate that it will cost between \$6.3 and \$11.7 million to implement all of these measures.

EPA estimates that implementation of the measures will reduce emissions of nitrogen oxides by more than 800 tons per year. This will directly benefit surrounding communities, which include low-income and minority populations living near the Arkansas and Texas plants. The companies will also pay a total penalty of \$725,000 to resolve alleged violations of the Clean Air Act and Oklahoma state law.

In addition, the companies will spend \$150,000 to remediate and reforest ten acres of land with acidified soils located near El Dorado, Arkansas. Nitrogen oxide emissions, such as those from nitric acid plants, can contribute to soil acidification. The project will help to minimize erosion, reduce stormwater runoff, improve habitat for wildlife, and capture carbon dioxide, one of the greenhouse gases responsible for climate change.

— Residents of a low-income community near a coke plant in Tonawanda, New York, will breathe cleaner air because of the results achieved in *United States v. Tonawanda Coke Corp. (W.D.N.Y.)*. Tonawanda Coke Corporation, one of the defendants, operates a coke facility in Tonawanda, New York. For approximately 19 years, the company operated a coke oven without the required Clean Air Act permit. The oven emitted gas containing several chemical compounds, including benzene, which is a carcinogen.

The other defendant, Mark Kamholz, was the company's environmental manager. Prior to an EPA inspection in April 2009, Kamholz instructed another employee to conceal the operation of this unpermitted source from inspectors. In addition, the company operated its quench towers without baffles in violation of a Clean Air Act permit. The permit required the baffles to reduce



**Tonawanda Coke Site, NY State Dept. of Environmental Conservation**

the amount of particulate matter that escaped into the atmosphere during coke processing. The company also recycled hazardous waste without a permit, in violation of the Resource Conservation and Recovery Act, and also without appropriate safeguards to prevent releases into the environment.

After a five-week trial in 2013, a jury found that the company committed eleven violations of the Clean Air Act over a five-year period and three violations of the Resource Conservation and Recovery Act over a 19-year period. The jury also found Kamholz guilty of eleven counts of violating the Clean Air Act, one count of obstruction of justice, and three counts of violating the Resource Conservation and Recovery Act.

For years, people living in the low-income community near the plant were forced to breathe air the company had caused to be contaminated

with benzene and particulates. Prior to sentencing, community members submitted 128 impact statements under the Crime Victims’ Rights Act.

On March 19, 2014, a federal judge sentenced the company to pay a \$12.5 million fine, to make a \$12.2 million community service payment, and to serve a five-year term of probation. The community service payment will fund an epidemiological study and an air and soil study to help determine the extent of health and environmental impacts of the coke facility on the Tonawanda community. Kamholz was sentenced to one year of incarceration, followed by one year of supervised release. He also will pay a \$20,000 fine and perform 100 hours of community service.

— In *United States v. Coventry Wrecking* (D.R.I.), Coventry Wrecking pleaded guilty to one count of making false statements to federal officials, in violation of 18 U.S.C. § 1001, and was sentenced to five years of probation and a \$10,000 fine in October 2013. This prosecution arose from the demolition of a site located in a lower-middle income section of Coventry, Rhode Island, a former mill town. Coventry Wrecking demolished an old K-Mart and produced to regulators fabricated inspection reports that falsely represented that the facility had been inspected and found not to contain asbestos. This was not the case, as a later inspection detected asbestos-containing material at a nearby related site. The demolition thus posed a threat to workers and others exposed to airborne particles, including the community where the site was located.

**Litigation and Negotiations on Behalf of Tribes and Tribal Communities**

The Division’s commitment to environmental justice also is demonstrated by the results we have secured in other contexts, including through litigation and negotiations on behalf of tribes and tribal communities by the Division’s Wildlife and Marine Resources Section, Indian Resources Section, and Environmental Defense Section.

— Land on the Wind River Indian Reservation that was lost due to illegal dike construction will be restored as a result of the enforcement action in *United States v. John Hubenka & LeClair Irrigation District* (D. Wyo.). In 2004, John Hubenka was prosecuted under the Clean Water Act for the construction of several dikes in the Wind River. At the location where the dikes were built, the Wind River separated Hubenka’s land from the Wind River Indian Reservation, which is located in a low-income area. The dikes altered the flow of the river, causing it to go more deeply into the Reservation, carving out an area exceeding 300 acres of tribal property. Following his conviction, the court sentenced Hubenka to probation and ordered him, as a condition of probation, to remove the dikes and restore the riverbed under the supervision of EPA. Hubenka was later released from probation without removing the dikes.

In 2010, ENRD’s Environmental Defense Section and the U.S. Attorney’s Office for the District of Wyoming filed a civil action against Hubenka, seeking a penalty and an order compelling him to remove the dikes and restore the site. The Eastern Shoshone and Northern Arapaho Tribes intervened as plaintiffs. Hubenka’s employer, LeClair Irrigation District, was later joined as a defendant. After a bench trial, the court found in favor of the United States and the Tribes. On October 22, 2014, the court ordered Hubenka and the LeClair Irrigation District to immediately remove the dikes, to restore the river’s flow pattern, and to restore the surrounding floodplain ecology. The court ordered that lands lost to the Tribes as a result of dike construction must be restored. The court imposed a \$350,000 penalty against Hubenka and a \$250,000 penalty against LeClair.

— Attorneys in the Wildlife and Marine Resources Section helped the Confederated Tribes of the Warm Springs Reservation of Oregon (“Warm Springs Tribes”) protect off-reservation hunting rights. The Division attorneys met with representatives from the Warm Springs Tribal Council and the State of Oregon on the reservation to discuss whether the Warm Springs Tribes had relinquished off-reservation hunting rights in a treaty executed in 1865. With input from the Division attorneys, the Warm Springs Tribes and the State reached a short-term agreement for the 2014 hunting season, under which the Tribes will regulate their own off-reservation hunting and tribal members will have more hunting opportunities than they had prior to the execution of the agreement. The parties also agreed to continue working on a long-term agreement, and Division attorneys continue to participate in mediation sessions.

— ENRD’s Indian Resources Section successfully defended the reservation boundaries of the Omaha Tribe of Nebraska in *Smith v. Parker* (D. Neb.). The Village of Pender, Nebraska, and Pender business owners sued the Tribe in federal district court claiming that an 1882 act of congress diminished the western part of the Omaha Reservation, removing over 50,000 acres from the Reservation. After extensive expert discovery and litigation in the Omaha Tribal Court, that court held that the 1882 legislation did not result in diminishment. Federal district court litigation ensued, and the district court ordered the parties to file cross-motions for summary judgment. The State of Nebraska intervened on behalf of the plaintiffs, and the United States, which had filed an amicus brief supporting the Tribe in the tribal court, intervened on behalf of the Tribe.

On February 13, 2014, the district court granted summary judgment in favor of the United States and the Omaha Tribe, holding that the 1882 legislation did not diminish the boundaries of the Omaha Reservation. The court analyzed the text of the 1882 legislation, its legislative history and the circumstances surrounding passage, and the subsequent treatment and demographic

history of the disputed area, concluding that none of it demonstrated the requisite clear congressional intent necessary to alter the boundaries of the Reservation. The case was appealed to the Eighth Circuit, which affirmed the district court's decision on December 19, 2014.

The U.S. Attorney's Office for the District of Nebraska supported ENRD's efforts to defend the Reservation boundaries. In addition, EPA had long taken the position that the area in dispute remained within the boundaries of the Reservation. The favorable district court determination affirmed EPA's position that it has authority to issue needed permits and that EPA and the Tribe, not the state, are responsible for ensuring protection of the environment on the Omaha Reservation lands at issue.

## **Defensive Litigation**

More than half of ENRD's work consists of defending the actions of federal agencies. The Division has worked to incorporate the principles of environmental justice into our handling of these cases as well. ENRD works closely with agencies to identify defensive cases that present environmental justice concerns, even where the complaint may not clearly assert a specific claim 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 proactively looks for ways to address concerns of environmental justice communities outside of the traditional litigation context.

The cases below were handled by ENRD's Natural Resources Section.

— In *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb* (W.D. Wis.), ENRD represented the U.S. Department of Transportation in a challenge to a federally funded infrastructure project focused on upgrading and increasing the capacity of the "Zoo Interchange" in western Milwaukee County. The Zoo Interchange is a key link in the local, state, and national transportation network. Community-based organizations brought a challenge under NEPA, including a claim that the agency violated NEPA by failing to comply with Title VI of the 1964 Civil Rights Act. The district court found that NEPA does not provide an avenue through which the plaintiffs may seek to compel compliance with Title VI or implementing regulations. ENRD later participated in mediation sessions with the plaintiffs, two local community groups, and the relevant federal and state agencies. Through those efforts, ENRD was able to achieve a settlement that provided a number of important improvements in public transportation access and mitigation of traffic congestion in affected communities, while still allowing this important infrastructure project to move forward.

— In a number of related cases, ENRD continued to work collaboratively with the Los Angeles County Metropolitan Transportation Authority to defend challenges to three public rail transit projects to expand the public transit rail network in Los Angeles County. The projects will expand light rail transit into the minority and low-income Crenshaw community in south Los Angeles while improving access to the Los Angeles International Airport and decreasing traffic congestion in and around communities throughout the Los Angeles area. In *Japanese Village LLC v. Federal Transit Administration* (C.D. Cal.), private landowners sued, in part, to prevent

the construction of a tunnel under their property. The FTA had decided to relocate the tunnel to that location to reduce the environmental justice impacts of the project on the Little Tokyo community. ENRD successfully defended the agency's decision.

— In *Friends of De Reef Park v. National Park Service* (D.S.C.), a case with environmental justice implications, ENRD worked with the National Park Service to address an affected minority community's concerns about a decision of the agency. The decision approved a proposal to allow the City of Charleston, South Carolina, to transfer the functions of a park in a historically significant, Civil Rights era, African-American neighborhood to another site over a mile away and to allow residential redevelopment of the original park. The plaintiff, a community organization that was formed to preserve the original park, brought the action against the Park Service and the South Carolina Parks Department, seeking declaratory and injunctive relief. The plaintiff alleged violations of the Land and Water Conservation Fund Act, NEPA, and the National Historic Preservation Act, complaining that the Park Service's decision was made without adequate public notice and opportunity for community input. After discussions with the plaintiff and the other parties, ENRD filed a motion for a voluntary remand to allow the Park Service to conduct additional NEPA and National Historic Preservation Act analyses, with opportunity for public notice and comment.



*National Park Service Logo, Wikipedia photo*

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# PROTECTING OUR NATION'S AIR, LAND, AND WATER

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The Division remains committed to civil and criminal enforcement of the nation's environmental laws in order to address air pollution from the largest and most harmful sources; improve 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; compel, or recover the costs of, hazardous waste cleanup; and prosecute criminal violations of environmental and other federal laws. The Division continues to enforce applicable laws and regulations within existing authorities to ensure that we protect human health and the environment.

## **Obtaining Company-Wide Relief for Environmental Violations**

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 expedited resolution of historic and ongoing violations on an efficient scale. Industry benefits because it gains the certainty of knowing that it is bringing its operations into compliance with the nation's laws, avoids the cost and risk of additional litigation, and can obtain a negotiated schedule for important technological upgrades that is efficient and consistent with company operations.

— Lead-based paint was banned in 1978, but it still remains in many homes, apartments, and workplaces across the country. Lead exposure can cause a range of health problems, from behavioral disorders and learning disabilities to seizures and death. Young children are at the greatest risk because their nervous systems are still developing. It is also an occupational hazard. The federal Lead Renovation, Repair, and Painting Rule promulgated by EPA is designed to protect children and others who are vulnerable to exposure to lead dust. Renovators that are certified under EPA's rule are encouraged to display EPA's "Lead-Safe" logo on worker's uniforms, signs, and websites. Consumers can protect themselves by looking for the logo before hiring a home renovator.

In *United States v. Lowe's Home Centers, Inc.*, Lowe's, one of the nation's largest home-improvement retailers, agreed to implement a comprehensive corporate-wide compliance program at more than 1,700 stores nationwide to ensure its contractors—such as window and carpet



*Elizabeth Janes photo*



*Erika Kranz photo*

installers—minimize the creation of lead dust during home renovation activities. The company also paid a \$500,000 civil penalty, the largest ever for violations of the EPA rule.

The government complaint alleged that Lowe’s failed to provide documentation showing that its contractors had been certified by EPA, had been properly trained, had used lead-safe work practices, and had correctly used EPA-approved lead test kits at renovation sites. EPA’s investigation was prompted by tips and complaints submitted by the public.

Lowe’s must implement a comprehensive compliance program to ensure that its contractors comply with the Lead Renovation, Repair, and Painting Rule during renovations of any child-occupied facilities, such as day-care centers and schools, and any housing that was built before 1978. For these projects, Lowe’s must contract only with EPA-certified renovators, ensure they maintain certification, and ensure they use lead-safe-work-practice checklists during renovations. In addition, Lowe’s must suspend anyone who is not operating in compliance with the rule, investigate all reports of potential noncompliance, and ensure that any violations are corrected. The United States District Court for the Southern District of Illinois approved the settlement.

— Hydrochlorofluorocarbons (HCFCs) deplete the stratospheric ozone layer, which allows dangerous amounts of cancer-causing ultraviolet rays from the sun to reach the earth, leading to adverse health effects that include skin cancers, cataracts, and suppressed immune systems. Pursuant to the Montreal Protocol, the United States is implementing strict reductions of ozone-depleting refrigerants, including a production and importation ban by 2020 of HCFC-22, a common refrigerant used by supermarkets. HCFC-22 is also up to 1,800 times more potent than carbon dioxide in terms of global warming emissions.



Safeway, Wikipedia photo

In *United States v. Safeway Inc.*, Safeway, the nation’s second largest grocery store chain, agreed to implement a corporate-wide plan to significantly reduce the emissions of ozone-depleting substances from refrigeration equipment at 659 stores nationwide. The settlement involves the largest number of facilities ever under the Clean Air Act regulations governing refrigeration equipment. Implementation of the settlement is estimated to cost approximately \$4.1 million. Safeway also paid a \$600,000 civil penalty.

The settlement resolves allegations that Safeway violated the Clean Air Act by failing to keep adequate records of the servicing of its refrigeration equipment, and by failing to promptly repair leaks of HCFC-22. Safeway will implement a corporate refrigerant-compliance-management system to comply with stratospheric ozone regulations. In addition, Safeway will reduce its corporate-wide average leak rate by 2015. The company also will reduce the aggregate

refrigerant emissions at its highest-emission stores by 10 percent each year for three years. The United States District Court for the Northern District of California approved the settlement in fiscal year 2014. The measures that Safeway has committed to implement are expected to prevent the release of over 100,000 pounds of refrigerants.

## Reducing Air Pollution from Power Plants

### The Coal-Fired Power Plant Initiative

The Division has continued to litigate civil claims under the Clean Air Act against operators of coal-fired electric power generating plants. Through fiscal year 2014, these matters have settled on terms that will reduce emissions of sulfur dioxide and nitrogen oxides by over 2.3 million tons each year once the more than \$15.5 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 otherwise adversely affected the health of our citizens, especially the elderly, the young, and asthma sufferers.



Voyageurs National Park, NPS photo

These power plants emit, among other things, sulfur dioxide, nitrogen oxides, and particulate matter. Sulfur dioxide and nitrogen oxides contribute to acid rain and ground-level ozone, or smog. Both also can irritate the lungs and aggravate preexisting heart or lung conditions. Nitrogen oxides and particulate matter can cause serious respiratory illnesses and aggravate asthma. Particulate matter, for example, contains microscopic particles that can travel deep into the lungs and cause difficulty breathing and decreased lung function.

— In fiscal year 2014, the Division reached its 27th settlement under this power plant initiative. In *United States v. Allete, Inc. d/b/a Minnesota Power*, Minnesota Power agreed to install pollution control technology and meet stringent emission limits to reduce emissions of harmful air pollutants from the company's three coal-fired power plants located in Cohasset, Hoyt Lakes, and Schroeder, Minnesota. EPA expects that the actions required by the settlement will reduce harmful emissions by over 13,350 tons per year, including approximately 8,500 tons per year of sulfur dioxide. The company estimates that it will spend over \$500 million to implement the required measures.

The settlement, approved by the United States District Court for the District of Minnesota, requires the company to pay a civil penalty of \$1.4 million, of which, the State of Minnesota as co-plaintiff will receive \$200,000. The settlement also requires that the company spend \$4.2 million on projects that will benefit the environment and local communities, including \$2 million to build a large-scale solar installation system to benefit a local tribe, the Fond du Lac Band. The company also will provide between \$500,000 and \$1 million to replace, retrofit, or upgrade wood-burning appliances to reduce pollution, and \$200,000 to the National Park Service to restore wetlands at Voyageurs National Park.

## Successfully Defending the Cross-State Air Pollution Rule

The Division also defends EPA from challenges to its rules that it promulgates under the Clean Air Act to regulate certain greenhouse gases that contribute to global climate change and other hazardous air pollutants that affect our health and environment.

— In an April 2014 decision in *EPA v. EME Homer City Generation*, the United States Supreme Court reversed an adverse decision by the United States Court of Appeals for the D.C. Circuit that had vacated EPA’s Cross-State Air Pollution Rule (or Transport Rule). The Transport Rule is a complex Clean Air Act regulation designed to curb air pollution transported across state lines by reducing emissions of pollutants from power plants in upwind states. EPA expects that when fully implemented, it will provide \$120 to \$280 billion in annual health and environmental benefits.



Cooling Towers of the Homer City Generating Station, Wikipedia photo

ENRD supported the Office of the Solicitor General in connection with briefing and argument of the case before the Supreme Court. In a 6-2 decision, the Court ruled convincingly that it was appropriate for EPA to consider costs when allocating among multiple upwind states the responsibility to address the pollution burden imposed on a downwind state. Also, noting that upwind states had an opportunity to develop their own plans to address cross-state pollution prior to the promulgation of the Transport Rule, the Court held that the statute did not require EPA to provide states with an additional opportunity to develop such plans once the rule was promulgated. On remand from the Supreme Court, the D.C. Circuit lifted a previously imposed stay of the Transport Rule, and the rule became effective on January 1, 2015. The court heard argument on the relatively more discrete remaining challenges to the rule in February 2015.

## Preserving EPA’s Greenhouse Gas Permitting Authority for Stationary Sources

— In its June 2014 decision in *Utility Air Regulatory Group v. EPA*, the Supreme Court held that greenhouse gas emissions, by themselves, cannot trigger Clean Air Act stationary source permit requirements, but that EPA can regulate greenhouse gas emissions from sources already subject to such permit requirements due to their emissions of other pollutants (so-called “anyway” sources). The Court pointed out that the result gave EPA a win on the most important issues, since the overwhelming majority of greenhouse gas emissions come from “anyway” sources. ENRD supported the Office of the Solicitor General in briefing and arguing the case before the Supreme Court.

## **Defending EPA's First-Ever Hazardous Air Pollutant Standards for Power Plants**

— In April 2014, ENRD won a sweeping decision from the D.C. Circuit, which rejected all challenges to EPA's hazardous air pollutant standards for power plants in *White Stallion Energy Center, LLC v. EPA*. Power plants are the largest domestic sources of emissions of mercury, acid gases, and many other toxic metals. The standards, often referred to as the "Mercury and Air Toxics Standards," will provide important public health benefits, including to minority and low-income populations that are disproportionately impacted by asthma and other serious health conditions.

Upholding the standards in their entirety and rejecting numerous arguments advanced by industry, states, and environmental groups, the court endorsed EPA's threshold finding that such regulation was "appropriate and necessary" to protect the public from identified health hazards, and rejected various additional challenges to that threshold finding. The court also rejected a multitude of separate attacks on EPA's decisions concerning standard levels and subcategories. The Supreme Court subsequently granted certiorari on the "appropriate and necessary" issue, and heard argument on March 25, 2015.

## **Continuing Defense of EPA's Greenhouse Gas Rulemaking Process**

— In January 2014, EPA proposed a rule under the Clean Air Act that would set greenhouse gas emission standards for new power plants. In *State of Nebraska v. EPA*, the State of Nebraska sought to preempt that rulemaking, arguing that the rulemaking proposal was contrary to the Energy Policy Act of 2005. The State argued that the Energy Policy Act prohibits EPA from considering technologies receiving funding under the Act, such as carbon capture and storage technologies, in determining what technologies are "adequately demonstrated" for purposes of setting emission standards under the Clean Air Act.

ENRD moved to dismiss the case, and in October 2014, the court issued a favorable decision granting that motion. The court held that EPA's rulemaking proposal was not subject to judicial review under the Administrative Procedure Act because it was not a final agency action, and that the State will have an adequate remedy because it can seek judicial review if and when EPA adopts a final rule. The court also noted that the Energy Policy Act "only forbids the EPA from considering a given technology or level of emission reduction to be adequately demonstrated solely on the basis of federally-funded facilities. . . . In other words, such technology might be adequately demonstrated if that determination is based at least in part on non-federally-funded facilities."

## Addressing Air Pollution from Oil Refineries and Chemical Plants

### Reduction in Pollution from Flares

Improperly operated industrial flares, which are used to burn waste gases, can send hundreds of tons of hazardous air pollutants into the air. As a result, the Division is making a national effort to reduce air pollution from refinery, petrochemical, and chemical flares. The goals are to have companies send less waste gas to flares, and, when gas must be sent, to have companies burn completely the harmful chemicals in the gas. As part of this effort, the Division concluded one innovative consent decree in fiscal year 2014.

— The settlement in *United States v. Shell Oil Co.* resolved alleged violations of the Clean Air Act at a large refinery and chemical plant in Deer Park, Texas. Our complaint alleged that the company improperly operated its 12 steam-assisted flaring devices in such a way that excess volatile organic compounds (VOCs), including benzene, and other hazardous air pollutants were emitted. Consistent with EPA's focus on promoting innovative Next Generation compliance tools, Shell agreed to spend at least \$115 million to control harmful air pollution from industrial flares and other processes, and pay a \$2.6 million civil penalty. Shell agreed to spend \$1 million on a state-of-the-art system to monitor benzene levels at the facility fence line near a residential neighborhood and school and to make the data available to the public through a website. The company also will spend \$100 million on innovative technology to reduce harmful air pollution from industrial flares. Shell Oil's agreement to recover and recycle waste gases at its chemical plant is the first of its kind. Once fully implemented, the pollution controls required by the settlement will reduce emissions of sulfur dioxide, volatile organic compounds (including benzene), and other hazardous air pollutants by an estimated 4,550 tons or more per year. These controls also will reduce emissions of greenhouse gases by approximately 260,000 tons per year.

In addition to reducing pollution from flares, Shell Oil will significantly modify its wastewater treatment plant, replace and repair tanks as necessary, inspect tanks biweekly with an infrared camera to better identify potential integrity problems that may lead to leaks, and implement enhanced monitoring and repair practices at the benzene production unit. When fully implemented, these specific projects are estimated to cost between \$15 and \$60 million. The United States District Court for the Southern District of Texas approved the settlement in fiscal year 2014.



Flare, EES photo

## Refinery Initiative

Under the permitting requirements of the Clean Air Act's Prevention of Significant Deterioration program, certain large industrial facilities making modifications that increase air pollutant emissions are required to install state-of-the-art air pollution controls. EPA investigations in various industries, including petroleum refining, reveal that many facilities fail to install pollution controls after modifications, causing them to emit pollutants that can impact air quality and public health. The Clean Air Act's "new source performance standards" require additional control measures at refineries. Enforcing these requirements reduces air pollution and ensures that facilities that are complying with the requirements are not at a competitive disadvantage.



Petroleum Refinery, DOJ photo

Since March 2000, the EPA has entered into 31 settlements with companies responsible for 90 percent of the domestic petroleum refining capacity. These settlements cover 107 refineries in 32 states and territories. Once the settlements are fully implemented, the companies will have reduced emissions of nitrogen oxides, sulfur dioxide, and other pollutants by more than 360,000 tons per year. The settling refiners have invested, or will invest, more than \$6.5 billion in new pollution control technologies and have paid more than \$93 million in penalties. In addition, the settlements reached to date account for more than \$80 million in supplemental environmental projects. In fiscal year 2014, the Division concluded one new initiative settlement, imposed a penalty for violations of a prior settlement, imposed a penalty for violations of the benzene regulations that are a focus of the initiative, and obtained a commitment for major additional improvements at a refinery covered by a prior settlement.

— The latest settlement in the refinery initiative was reached in *United State v. Big West Oil, LLC*, in which Big West Oil agreed to spend approximately \$18 million to install emission controls at its refinery near Salt Lake City, Utah, and to pay a \$175,000 penalty, a portion of which was paid to the State of Utah, a co-plaintiff. Big West Oil also will invest \$253,000 to improve the monitoring and management of potential releases of hydrofluoric acid at the facility.

The settlement requires Big West Oil to install a state-of-the-art flue gas filter system to control emissions of particulate matter and to place ultra-low burners on four heaters and boilers to reduce emissions of nitrogen oxides. The company will also undertake measures to reduce sulfur dioxide emissions from the refinery by, among other things, restricting hydrogen sulfide in fuel gas and installing and operating a caustic scrubber system at the sulfur recovery plant.

Big West Oil has agreed to make numerous upgrades to its leak detection and repair program, including the installation of low-leaking valves, and to enhance its waste operations to minimize or eliminate fugitive benzene emissions. In addition, the company will spend \$253,000 on a supplemental environmental project to install a laser-detection system to detect leaks of hydrofluoric acid at an alkylation unit.

When fully implemented, the controls and requirements under the agreement will reduce emissions of sulfur dioxide by approximately 158 tons per year, nitrogen oxides by approximately 32 tons per year, and particulate matter by approximately 36 tons per year. Additional reductions of emissions of volatile and hazardous pollutants, such as benzene, are expected as a result of compliance with leak detection and repair requirements.

The reduction in pollutants will benefit communities near the refinery, which include significant minority and low-income populations. The refinery is also located in an area designated as nonattainment for an EPA ambient air quality standard for fine particles. The United States District Court for the District of Utah approved the settlement in fiscal year 2014.

— In *United States v. Total Petrochemicals USA*, Total Petrochemicals agreed to pay an \$8.75 million penalty for failing to comply with the terms of a 2007 settlement regarding its Port Arthur, Texas, refinery. Between 2007 and 2011, the company violated numerous requirements of the settlement, including by failing to comply with emissions limits for benzene, a harmful air pollutant. The company also failed to analyze the cause of, or to perform corrective actions to address, over 70 incidents involving emissions of hazardous gases from flaring.

The earlier 2007 settlement required that Total Petrochemicals pay a \$2.9 million penalty, make upgrades to its facility, upgrade leak detection and repair practices, and implement programs to minimize flaring. The earlier settlement also required the company to comply with a limit on benzene emissions that was 30 percent lower than the federal limit.

The settlement in fiscal year 2014 requires Total Petrochemicals to comply with that lower benzene emissions limit for an additional two years. In addition, the company must hire a third party to audit its compliance under the settlement and must implement a company task force to monitor its compliance. The United States District Court for the Eastern District of Texas approved the settlement.

— In an amendment to the consent decree in *United States v. BP Exploration & Oil Co.*, the United States secured two different kinds of relief from two different entities. First, BP Exploration agreed to pay a civil penalty of \$950,000 for violations of Clean Air Act regulations at the Texas City, Texas, petroleum refinery. The regulations govern benzene emissions from refinery wastewater and stormwater. Second, Blanchard Refining Company LLC—a wholly owned subsidiary of Marathon Petroleum Company LP, the new owner of the Texas City refinery—agreed to assume the consent decree obligations at the refinery and spend an estimated \$190 million to improve the refinery's compliance with the benzene regulations.

Blanchard will add storage tanks, increase the size of sewer lines, and seal or enclose an approximately mile-long stretch of concrete channel that carries benzene-contaminated wastewater and stormwater. The injunctive relief in the amendment to the consent decree is expected to reduce emissions of benzene and other volatile organic compounds by 20 tons per year. The United States District Court for the Northern District of Indiana approved the amendment.

## Reducing Air Pollution at Other Facilities and from Motor Vehicles

### Harmful Air Pollution from Other Large Stationary Sources



Wikipedia photo

With respect to air pollution, EPA is pursuing a national enforcement initiative to control harmful pollution from the largest sources of emissions. As explained, high concentrations of nitrogen oxides in the air can irritate the lungs, contribute to childhood asthma, lower resistance to respiratory infections such as influenza, and cause other respiratory problems. Airborne nitrogen oxides also can significantly contribute to acid rain and lead to

the formation of smog. Sulfur dioxide and nitrogen oxides can be converted to fine particulate matter once released in the air. Fine particulates can become lodged deep in the lungs, leading to a variety of health problems and even premature death. Harmful health and environmental impacts can occur near the facilities emitting the pollutants, as well as in communities far downwind from the plants.

— In *United States v. Cabot Corporation*, Boston-based Cabot Corporation, the second largest carbon black manufacturer in the United States, agreed to pay a \$975,000 civil penalty and spend an estimated \$84 million on state-of-the-art technology to control harmful air pollution. The settlement resolved alleged violations of the New Source Review provisions of the Clean Air Act at the company's three facilities in Franklin, Louisiana; Ville Platte, Louisiana; and Pampa, Texas. The United States' complaint alleged that between 2003 and 2009 Cabot made major modifications at these facilities without obtaining preconstruction permits and without installing and operating required pollution technology.

The agreement is the first to result from a national enforcement initiative aimed at bringing carbon black manufacturers into compliance with the New Source Review provisions. Carbon black is a fine carbonaceous powder used as a structural support medium in tires and as a pigment in a variety of products, such as plastic, rubber, inkjet toner, and cosmetics. It is produced by burning oil in a low oxygen environment to produce soot (carbon black), which

is collected in a baghouse. The manufacturing process creates significant amounts of sulfur dioxide, nitrogen oxides, and particulate matter.

At all three of Cabot Corporation's facilities, the settlement requires the company to optimize existing controls for particulate matter, operate an early-warning detection system that will alert facility operators to any particulate matter releases, and comply with a plan to control fugitive emissions that result from leaks or other unintended releases of gases. To address emissions of nitrogen oxides, the company must significantly reduce emissions by installing selective catalytic reduction technology, continuously monitor emissions, and comply with stringent emissions limits. At the two largest facilities, both in Louisiana, the company also must install wet gas scrubbers to control sulfur dioxide emissions, continuously monitor these emissions, and comply with stringent emissions limits. In addition, the Texas facility is required to comply with a limit on the amount of sulfur in feedstock that is the lowest for any carbon black plant in the United States.

These measures are expected to reduce emissions of nitrogen oxides by approximately 1,975 tons per year, reduce sulfur dioxide emissions by approximately 12,380 tons per year, and significantly improve existing particulate matter controls. At the time of the settlement, none of the 15 carbon black manufacturing plants located in the United States had controls on emissions of sulfur dioxide and nitrogen oxides or had equipment to continuously monitor emissions.

The settlement also requires that Cabot Corporation spend \$450,000 on energy saving and pollution reduction projects that will benefit the communities surrounding the three facilities, such as upgrading air handling units at municipal buildings in the three communities. The State of Louisiana Department of Environmental Quality, a co-plaintiff, will receive \$292,500 of the penalty. The United States District Court for the Western District of Louisiana approved the settlement.

— In *United States v. El Dorado Chemical Co.*, LSB Industries Inc., the largest merchant manufacturer of concentrated nitric acid in North America, and four of its subsidiaries agreed to reduce harmful emissions of nitrogen oxides at ten plants in Alabama, Arkansas, Oklahoma, and Texas. Under the settlement, the companies must meet emissions limits that are among the lowest in the nation for the industry. The companies also must continuously monitor emissions and make any necessary operational improvements, such as installing new pollution controls or upgrading current controls, to ensure they continue to meet the limits in the future.

The companies estimate that it will cost between \$6.3 and \$11.7 million to implement all of these measures. EPA estimates that the measures will reduce emissions of nitrogen oxides by more than 800 tons per year. This will directly benefit surrounding communities, which include low-income and minority populations living near the Arkansas and Texas plants. LSB Industries and its subsidiaries also will pay a total penalty of \$725,000.

Nitrogen oxides emissions, such as those from nitric acid plants, can contribute to soil acidification. The companies have also agreed to spend \$150,000 to remediate and reforest ten acres of land containing acidified soils located near El Dorado, Arkansas. The project will help to minimize erosion, reduce stormwater runoff, improve habitat for wildlife, and capture carbon dioxide, a greenhouse gas.

The settlement applies to the 10 nitric acid manufacturing plants owned or operated by the following Oklahoma City-based LSB subsidiaries: El Dorado Chemical Co. in El Dorado, Arkansas (four plants); Cherokee Nitrogen Co. in Cherokee, Alabama (two plants); El Dorado Nitrogen Co. in Pryor, Oklahoma (three plants); and El Dorado Nitrogen Co. in Baytown, Texas (one plant). The complaint filed by the United



*Downtown El Dorado Arkansas, Wikipedia photo*

States and the States of Oklahoma and Alabama alleged that the companies constructed or made modifications to their plants without first obtaining preconstruction permits and installing pollution controls. Of the total penalty, \$206,250 was paid to the Oklahoma Department of Environmental Quality and \$156,250 was paid to the Alabama Department of Environmental Management. This United States District Court for the Western District of Oklahoma approved the settlement.

— In *United States v. AK Steel Corporation*, the United States and the Commonwealth of Kentucky settled allegations that, before AK Steel closed its coke production facility in Ashland, Kentucky, in June 2011, the company violated the Clean Air Act, the company’s Clean Air Act operating permit, and the Kentucky State Implementation Plan. AK Steel agreed to pay a civil penalty of \$1.65 million, of which \$25,000 was due to the Commonwealth of Kentucky.



*Downtown Ashland, Kentucky, wikipedia photo*

Although AK Steel closed the coke plant, the company continues to operate the Ashland West Works a few miles away from the former coke plant. Under the

settlement, AK Steel agreed to spend at least \$2 million on state projects to reduce particulate matter emissions at the Ashland West Works facility.

Coke is used as a carbon source and as a fuel to heat and melt iron ore at steel making facilities. The United States District Court for the Eastern District of Kentucky approved the consent decree.

— In *United States v. Virgin Island Water & Power Authority*, the Virgin Islands Water and Power Authority agreed to bring its Estate Richmond Generating Facility on St. Croix, U.S. Virgin Islands, into compliance with the air pollution control requirements of the Clean Air Act and pay a \$700,000 penalty. The United States’ complaint alleged that the facility violated applicable emissions limits for nitrogen oxides and particulate matter, and the settlement is expected to reduce emissions of the pollutants by approximately 115 tons per year and 3 tons per year, respectively.

The EPA has worked with the Virgin Islands Water and Power Authority over the past several years to address violations at the St. Croix facility. EPA found that the Virgin Islands Water and Power Authority had not properly operated and maintained its water-injection pollution control systems at various times between October 2005 and December 2012, causing violations of the emission limits established in Clean Air Act permits. The facility also failed to meet the particulate matter emissions limits during tests of emissions from its stacks, and failed to conduct continuous monitoring to ensure compliance with the limits.



*Saint Croix, U.S. Virgin Islands, Wikipedia photo*

The Authority has already repaired and replaced pollution controls and monitoring equipment at the facility. The settlement focuses on improving the operation and maintenance of the facility’s continuous monitoring systems and water-injection pollution control systems. To date, the Authority has spent approximately \$4 million to come into compliance with pollution control requirements and will spend at least \$2 million a year to maintain compliance. The United States District Court for the District of the Virgin Islands approved the settlement.

— In *United States v. Mountain State Carbon*, the Division went to trial in the United States District Court for the Northern District of West Virginia to prove that Mountain State Carbon violated the Clean Air Act and Resource Conservation and Recovery Act at its metallurgical coke manufacturing plant in Follansbee, West Virginia. Although the court did not find that the company violated the Resource Conservation and Recovery Act, it ordered Mountain State to pay a penalty of \$2,381,000 for 908 stipulated exceedances of hydrogen sulfide limits in the company’s Clean Air Act permit. In addition, the court found that Mountain State violated particulate matter and opacity limits, and ordered the company to pay a penalty of \$27,000

(\$1,000 per violation) and to install an automated system to continuously monitor opacity to identify ovens that may cause violations of opacity limits in the future.

### **Clean Air Act Violations Related to Motor Vehicles and Motor Vehicle Engines**

EPA also has an ongoing effort to ensure that all motor vehicles and engines sold in the United States comply with the Clean Air Act's requirements. The Clean Air Act prohibits any vehicle or engine from being manufactured in, or imported into, the United States unless it is covered by a valid, EPA-issued certificate of conformity demonstrating that the vehicle or engine meets applicable federal emission standards. Importers of foreign-made vehicles and engines must comply with the same Clean Air Act requirements that apply to those selling domestic products. Engines operating without proper emissions controls can emit excess carbon monoxide, hydrocarbons, and nitrogen oxides.

— In *United States v. Hyundai Motor Company*, automakers Hyundai and Kia agreed to pay a \$100 million civil penalty, the largest in Clean Air Act history, to resolve violations concerning the testing and certification of close to 1.2 million vehicles sold in America that will emit approximately 4.75 million metric tons of greenhouse gases in excess of what the automakers certified to EPA. Hyundai and Kia will spend approximately \$50 million on measures to prevent any future violations and forfeit 4.75 million greenhouse gas emission credits that the companies previously claimed, which are estimated to be worth over \$200 million. Automakers earn greenhouse gas emissions credits for building vehicles with lower emissions than required by law. These credits can be used to offset emissions from less fuel efficient vehicle models or sold or traded to other automakers for the same purpose. The greenhouse gas emissions that the forfeited credits would have allowed are equal to the emissions from powering more than 433,000 homes for a year. This settlement was filed jointly by the United States and the California Air Resources Board as co-plaintiff in the U.S. District Court for the District of Columbia.



*Hyundai Plant in Ulsan, South Korea, Wikipedia photo*

— In *United States v. Savoia, Inc.*, a Dallas-based group of companies and their owner agreed to either stop importing vehicles or follow a comprehensive compliance plan to settle Clean Air Act violations stemming from the alleged illegal importation of over 24,167 highway motorcycles and recreational vehicles into the United States without proper documentation. The four defendants allegedly imported the vehicles from several foreign manufacturers into the United States through the Port of Long Beach, California. The vehicles were then sold through the Internet and from a retail location in Dallas, Texas.

The settlement requires the four defendants, Savoia, BMX Imports, BMX Trading, and their owner, Terry Zimmer, to pay a \$120,000 civil penalty. It also requires that the companies either certify that they are

no longer engaging in Clean Air Act-regulated activities or follow a comprehensive plan over the next 5 years that would include regular vehicle inspections, emissions testing, and other measures to ensure compliance at various stages of purchasing, importing, and selling vehicles. In addition, the companies are required to export or destroy 115 of their current vehicles that have catalytic converters or carburetors that do not conform to the specifications they submitted to EPA in applying for a certificate of conformity.

— In *United States v. MotorScience Enterprises, Inc.*, two Los Angeles-based consulting firms, MotorScience Inc., and MotorScience Enterprise Inc., and their owner, Chi Zheng, agreed to settle alleged Clean Air Act violations stemming from the illegal importation of 24,478 all-terrain recreational vehicles into the United States from China without testing to ensure emissions would meet applicable limits. The consulting firms provide consulting services for vehicle manufacturers and other clients interested in obtaining certificates of conformity from EPA to allow import of their vehicles into the United States. In 2010, EPA voided 12 certificates held by four of the defendants' clients, which were United States-based importers of recreational vehicles from China. As alleged in separate complaints filed in federal district court by the United States and the State of California, the firms arranged for emissions testing of a limited number of vehicles, and then reused those results to obtain certificates of conformity for numerous other, dissimilar vehicles.

The three defendants agreed to a stipulated judgment under which they will pay a \$3.55 million civil penalty and an additional \$60,000 civil penalty within six months. The United States will receive 80 percent of collected penalties, and California will receive the remaining 20 percent. The settlement also requires that, for the next 15 years, before either the companies or Zheng engage in any further work involving nonroad vehicles and engines, they must follow a rigorous compliance plan to ensure that any emissions testing and certification applications submitted to EPA or California's Air Resource Board accurately describe those vehicles and engines.

— In *United States v. Volvo Powertrain Corp.*, the D.C. Circuit Court of Appeals affirmed the district court's award of approximately \$72 million in civil penalties and interest to the United States and the State of California based upon Powertrain's violations of a consent decree it had entered into to resolve earlier Clean Air Act violations. The consent decree resolved allegations that Powertrain and other truck engine manufacturers improperly modified their fuel injection systems. Under the decree, the manufacturers agreed to meet stricter emissions standards for certain nonroad engines. After the consent decree was approved by a district court, Powertrain used its manufacturing facility in Sweden to produce nonroad engines for Volvo Penta, an affiliate corporation. Around late 2004, Volvo Penta asked EPA to certify that more than 8,000 engines produced at the Powertrain facility conformed with emissions standards for nonroad engines for the upcoming model year. EPA issued certificates of conformity, but later learned that under the terms of the consent decree, the engines should have conformed with more stringent standards. The court of appeals agreed with the district court that the consent decree applies to the engines manufactured for Volvo Penta at the Powertrain plant.

## **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 pathogens that threaten public health, deter recreational use of beaches and waterways, and contaminate fish in downstream water bodies. Our work helps to protect some of

our most vulnerable communities, including low-income and minority communities who often live in older urban areas with the worst infrastructure problems. We also preserve national treasures like the Chesapeake Bay and the Great Lakes.

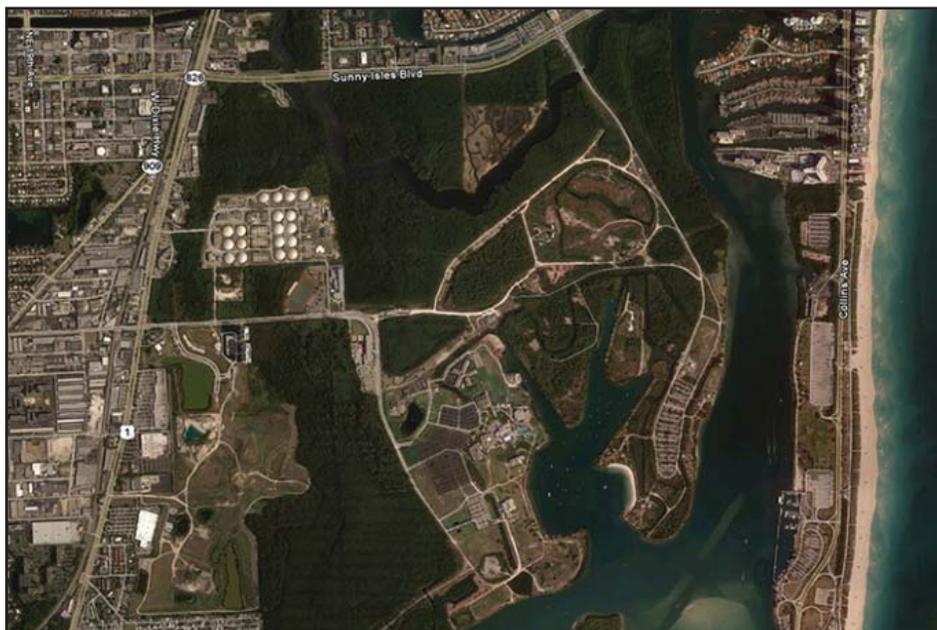
The Division has made it a priority to bring cases nationwide to improve municipal wastewater and stormwater treatment and collection. From January 2009 through September 2014, courts entered 60 settlements in these cases, requiring long-term control measures and other relief estimated to cost violators more than \$27.5 billion.

Twelve consent decrees with municipalities or regional sewer districts were approved in fiscal year 2014. Collectively, they provide for more than \$5 billion in improvements, the payment of more than \$4.8 million in civil penalties, and the performance of supplemental environmental projects (SEPs) valued at approximately \$3 million.

— In *United States v. Miami-Dade County*, Miami-Dade County in Florida agreed to rehabilitate its wastewater treatment plants and its wastewater collection and transmission system within 15 years. The county will also develop and implement capacity management, operation, and maintenance programs to help ensure the sewer system is properly operated and maintained in the future. By implementing these measures, Miami-Dade is expected to eliminate overflows of untreated sewage from its wastewater collection and transmission system and achieve compliance with its Clean Water Act permits. The State of Florida and the Florida Department of Environmental Protection were co-plaintiffs with the United States.

Between January 2007 and May 2013, Miami-Dade reported 211 sanitary sewer overflows totaling more than 51 million gallons. Such overflows included a number of large-volume overflows from ruptured pipes. At least 84 overflows, totaling over 29 million gallons of raw sewage, reached navigable waters of the United States. Miami-Dade's Central District Wastewater Treatment Plant violated the effluent limits contained in its Clean Water Act permit.

Miami-Dade estimates that it will spend approximately \$1.55 billion to complete the upgrades required by the consent decree and to come into compliance with the Clean Water Act. Miami-Dade also agreed to pay a civil penalty of \$978,100 (\$511,800 to be paid to the United States and \$466,300 to the Florida Department of Environmental Protection) and to complete a SEP costing \$2,047,200. The SEP involves the installation of approximately 7,660 linear feet of gravity sewer mains through the Green Technology Corridor. As the area is currently using septic tanks, businesses in the area have been unable to connect to the sewer system. Disconnecting industrial users from the septic



*Miami-Dade County Northern District Wastewater Treatment Plant, EES map*

tanks will improve water quality in the Biscayne aquifer and nearby surface waters and also prevent future contamination. The United States District Court for the Southern District of Florida approved the settlement.

— In *United States v. East Bay Municipal Utility District*, the East Bay Municipal Utility District and seven local communities agreed to resolve alleged violations of the Clean Water Act by conducting extensive system repairs aimed at eliminating millions of gallons of sewage discharges into San Francisco Bay. Encompassing approximately 1,600 square miles, the San Francisco Bay—the largest Pacific estuary in the Americas—is under threat from many sources of pollution, including crumbling wastewater infrastructure that allows sewage to escape.

Under the settlement, the East Bay Municipal Utility District and the communities will assess and upgrade their 1,500 mile-long sewer system. The work is expected to cost the settling parties in excess of \$1 billion. The several defendants will pay civil penalties of \$1.5 million. The utility district also will immediately begin work to offset the environmental harm caused by the sewage discharges. This work will focus on capturing and treating urban runoff and contaminated water that currently flows into the San Francisco Bay untreated, and is expected to continue until the sewer upgrades are completed.

The settlement resulted from a Clean Water Act enforcement action brought by EPA, the Department of Justice, the California State Water Resources Control Board, the San Francisco Bay Regional Water Board, San Francisco Baykeeper, and Our Children's Earth Foundation. The United States District Court for the Northern District of California approved the settlement.

— In *United States v. City of San Antonio & San Antonio Water System*, the San Antonio Water System agreed to make significant upgrades to reduce overflows from its sewer system and to pay a \$2.6 million civil penalty. The State of Texas is a co-plaintiff in this case and will receive half of the civil penalty. Including both remedial measures taken during the parties' negotiations and the comprehensive measures required by the settlement, the San Antonio Water System is expected to spend \$1.1 billion to come into compliance with the Clean Water Act.

The complaint alleged that between 2006 and 2012 the San Antonio Water System had approximately 2,200 illegal overflows from its sanitary sewer system that discharged a total of approximately 23 million gallons of raw sewage into local waterways in violation of its Clean Water Act discharge permit. The overflows resulted primarily from limited capacity: the sewer system was overwhelmed by rainfall, causing it to discharge untreated sewage and stormwater into local waterways.

As part of the settlement, the San Antonio Water System will conduct system-wide assessments, identify and implement remedial measures to address problems that cause or contribute to illegal discharges, and initiate a capacity management, operation, and maintenance program to proactively reduce sanitary sewer overflows. The plan must be fully implemented by 2025. In the early years of the settlement, the San Antonio Water System will take actions that will result in the reduction of sanitary sewer overflows. In addition, it will conduct water quality monitoring to identify other potential sources of bacterial contamination that could be contributing to impairment of the Upper San Antonio River. The United States District Court for the Western District of Texas approved the settlement.

— In addition to the matters described above, the Division concluded settlements with the following entities (estimated costs of compliance shown in parentheses): City of Columbia, South Carolina (\$750 million); the City of Akron, Ohio (in excess of \$700 million); the Metropolitan Water Reclamation

District of Greater Chicago (\$400 million); the City of Shreveport, Louisiana (\$342 million); the City of Mishawaka, Indiana (\$132 million); the City of Wilmington, New Hanover County, and the Cape Fear Public Utility Authority in North Carolina (\$17 million); the Town of Timmonsville, North Carolina (\$12 million, with the nearby City of Florence agreeing to assume control of Timmonsville's sewer and drinking water utilities); the City of West Haven, Connecticut (\$17 million); and the Virgin Islands Waste Management Authority (\$5.7 million).

## Otherwise Protecting the Nation's Waters and Wetlands

This year, the Division also obtained notable results in enforcing or defending other Clean Water Act programs designed to protect the nation's navigable waters and wetlands.

### Enforcing Clean Water Act Pretreatment Requirements

— In *United States v. STABL f/k/a Nebraska By-Products*, the United States District Court for the District of Nebraska found that STABL, the former owner and operator of a beef rendering facility in Lexington, Nebraska, violated effluent limitations in its Clean Water Act pretreatment permit and also discharged wastewater to the City of Lexington wastewater treatment plant, causing the plant to violate the City's own Clean Water Act discharge permit. After trial, the court ruled that STABL was liable for 1533 violations of its Clean Water Act pretreatment permit and ordered STABL to pay a civil penalty of approximately \$2.3 million. The State of Nebraska was a co-plaintiff and shared the penalty with the United States.

### Addressing Stormwater-Related Pollution

Stormwater and other runoff, such as water that runs off of trucks being washed at ready-mix concrete plants, often contains oils, greases, and total suspended solids. These pollutants can settle on the bottoms of water bodies, adversely affecting plants, animals, and fish spawning grounds. Permits issued under the Clean Water Act require that industrial facilities, such as ready-mix concrete plants, sand and gravel facilities, and asphalt batching plants, have controls in place to prevent pollutants from being carried into nearby waterways with stormwater. For example, industrial sites generally must have a stormwater pollution prevention plan.

— In *United States v. CEMEX Concretos, Inc., Cemex Concretos, Inc., and Cemex de Puerto Rico, Inc.*, agreed to implement measures to bring nine active ready-mix concrete facilities in Puerto Rico



*Small Concrete Plant, Wikipedia photo*

into compliance with Clean Water Act requirements relating to stormwater. The companies also agreed to ensure that inactive facilities are brought into compliance with these requirements before they are put back into operation. In addition, the settlement requires the companies to conduct hydraulic studies, develop and implement stormwater compliance plans, improve best management practices, and provide enhanced training and new environmental compliance personnel at all active facilities.

EPA estimates that this injunctive relief will cost approximately \$1.8 million. The companies will also pay a penalty of \$360,000. The settlement also includes a SEP involving the donation of approximately 400 acres of ecologically sensitive and diverse land valued at approximately \$2.36 million. This land will be preserved to ensure it continues to improve local water quality by providing natural water filtration and buffer zones. The United States District Court for the District of Puerto Rico approved the settlement.

### **Enforcing the Clean Water Act's Prohibition Against Unauthorized Filling of Wetlands**

This year, the Division obtained significant favorable settlements under its vigorous program to protect wetlands and other waters of the United States from illegal dredge or fill activity.

— In partnership with the State of West Virginia, the Division successfully resolved three Clean Water Act enforcement cases in the United States District Court for the Northern District of West Virginia involving the unauthorized placement of fill material in waters of the United States at multiple sites in West Virginia. The various defendants planned to conduct hydraulic fracturing operations at these sites to recover natural gas from the Marcellus Shale formation. The cases are: *United States & State of West Virginia v. Chesapeake Appalachia, LLC*; *United States & State of West Virginia v. XTO Energy, Inc.*; and *United States & State of West Virginia v. Trans Energy, Inc.*

In each case, the Division obtained a consent decree requiring the defendant hydraulic fracturing company to pay significant civil penalties. The \$3.2 million civil penalty in Chesapeake Appalachia is the largest ever levied by a court for violations of the Clean Water Act's prohibition against unauthorized filling of wetlands and other waters of the United States. In addition, the companies in each case agreed to restore affected sites, provide for compensatory mitigation, and implement a suite of measures designed to ensure that the companies' operations will comply with the Clean Water Act and West Virginia state law in the future.

Notable cases in which the Division obtained settlements to address unauthorized filling of wetlands or other waters of the United States include the following:

- *United States v. Roberts* (M.D. Tenn.), arose from the unpermitted construction of a large dam in Snake Creek in Tennessee. The Division secured a consent decree that requires the defendants: (1) to perform restorative work; (2) to conserve in perpetuity the natural condition of riparian corridors; (3) to provide more than \$200,000 to water quality programs; and (4) to pay a civil penalty of \$25,000.
- In *United States v. Nally & Hamilton Enterprises, Inc.* (E.D. Ky.), the defendant had filled streams and wetlands at two surface coal mining sites in Kentucky. The Division obtained a consent decree that requires the company to pay a civil penalty of \$660,000 and to restore the site.
- In re *Elgin Mining, Inc.* (W.D. Ky.), arose from Elgin Mining's failure to comply with the on-site mitigation requirements of Clean Water Act permits that authorized fill activity. ENRD obtained a settlement agreement requiring the company to pay approximately \$3.1 million to a mitigation bank approved by the State of Kentucky and to pay \$150,000 in civil penalties.

- In *United States v. Frasure Creek Mining* (E.D. Ky.), ENRD sued the defendant mining company to address unpermitted discharges at two mountaintop mining sites in Kentucky. The Division secured a consent decree that requires the company to pay \$800,000 in fees in lieu of mitigation to the State of Kentucky and \$700,000 in civil penalties.
- A consent decree secured by ENRD in *United States v. Anchoroguy* (E.D. Cal.), requires the defendants to fund a \$795,000 mitigation project and to pay \$300,000 in civil penalties. The settlement resolves alleged Clean Water Act violations arising from the defendants' unpermitted discharges of fill material into tributaries, vernal pools, and swales in California.
- In *United States v. St. Marys Railway West* (S.D. Ga.), the defendants made unpermitted discharges in connection with their expansion of a spur line to enable the cleaning and storage of railroad cars. The Division negotiated a consent decree that requires the defendants to pay \$175,000 for off-site mitigation and \$25,000 in civil penalties.
- In *Gasco Energy, Inc. v. EPA* (D. Colo.), Gasco Energy sought preenforcement judicial review of an EPA-issued administrative order addressing Clean Water Act violations arising in connection with natural gas drilling activities near the Green River in Uintah County, Utah. After ENRD filed a counterclaim for enforcement of the Clean Water Act, the parties reached a settlement under which Gasco Energy agreed to pay a civil penalty of \$110,000 and to restore the affected sites.

The Division also prevailed at trial in several civil enforcement cases arising from illegal fill activity.

- In *United States v. Hamilton Smith* (S.D. Ala.), a jury found that the defendant violated the Clean Water Act when he constructed four dams without a Clean Water Act permit authorizing that activity. Following a subsequent trial on remedy, the court approved a restoration plan for the four dams and order the defendant to pay \$78,000 in civil penalties.
- In *United States v. John Hubenka & LeClair Irrigation District* (D. Wyo.), discussed supra, ENRD also secured a favorable result in a case arising from the unauthorized dredging and filling of waters of the United States.

## **Defending the Clean Water Act Regulatory Program for Protecting Wetlands and Other Waters of the United States from Unlawful Fill Activity.**

The Division also protected wetlands and other waters of the United States from illegal discharges of dredged or fill material by defending EPA's administrative efforts to address such activity and U.S. Army Corps of Engineers' decisions to issue permits authorizing dredge or fill activity in wetlands or other waters of the United States.

— ENRD successfully defended EPA's efforts to reduce environmental impacts from mountaintop coal mining in *Mingo Logan Coal Co. v. EPA* (D.D.C.). There, the U.S. Army Corps of Engineers (Corps) had issued a Clean Water Act permit authorizing the discharge of fill material from a mountaintop mine in West Virginia. The plaintiff coal company challenged EPA's subsequent determination under section 404(c) of the Clean Water Act to restrict the areas in which fill material could be discharged.

In March 2012, the district court granted the company's motion for summary judgment and set aside EPA's determination. It held that EPA may not exercise its "veto" authority under Clean Water Act section 404(c) after the Corps of Engineers has issued a Clean Water Act permit. The court deferred addressing the mining company's argument that EPA's determination was arbitrary and capricious under the Administrative Procedure Act, pending EPA's appeal of its ruling on the Clean Water Act issue.

On appeal, the D.C. Circuit unanimously reversed the district court. Thereafter, the case was remanded to the district court for consideration of the remaining claims. On September 30, 2014, the district court resolved the remaining claims in EPA's favor, holding that the agency decision was reasonable and supported by the administrative record.



acid drainage from surface coal mining, Wikipedia photo

— We also successfully defended a challenge to EPA's regulatory program in *Pebble Limited Partnership v. EPA* (D. Alaska). There, the plaintiff challenged EPA's initiation of the administrative process under Clean Water Act section 404(c) to determine whether the planned Pebble Mine project near Bristol Bay, Alaska, would result in unacceptable adverse environmental effects. EPA undertook this process because the proposed Pebble Mine has the potential to be one of the largest open pit copper mines ever developed and could threaten the world's largest sockeye salmon fishery.

In its complaint, the plaintiff claimed that section 404(c) does not authorize EPA to initiate a veto process in the absence of a permit application. In June 2014, the plaintiff and the State of Alaska filed separate preliminary injunction motions, and the United States filed a motion to dismiss. On September 26, 2014, the United States District Court for the District of Alaska granted our motion to dismiss, ruling that EPA's initiation of its review process was not a final agency action and thus not subject to judicial review.

**The Division also successfully handled numerous cases challenging decisions of the U.S. Army Corps of Engineers to issue Clean Water Act permits authorizing the discharge of dredged or fill materials.**

- In *Cook Inletkeeper v. U.S. Army Corps of Engineers* (D. Alaska), the plaintiffs challenged the Corps' issuance of a Clean Water Act permit to the Alaska Railroad Corporation. The court upheld the Corps' decision to issue the permit, which allows construction of a railroad line that will link Port Mackenzie, in Anchorage, Alaska, with an existing railroad line farther north.

- In *Center for Biological Diversity v. U.S. Army Corps of Engineers* (N.D. Cal.), the court upheld the Corps' decision to issue a permit for the Willits Bypass, a proposed freeway project near Willits, California.
- In *Black Warrior Riverkeeper v. U.S. Army Corps of Engineers* (M.D. Ala.), the district court denied the plaintiff's motion for a preliminary injunction regarding the construction of the first segment of the Northern Beltline highway around Birmingham, Alabama. The court found it unlikely that the plaintiff would be able to demonstrate that the Corps had failed to comply with federal law.
- In *Center for Biological Diversity v. U.S. Army Corps of Engineers & EPA* (C.D. Cal.), the Division defended the Corps' issuance of a Clean Water Act permit needed for the construction of a 12,000-acre housing and commercial development outside of Los Angeles, California. The Division also defended EPA against allegations that it should have considered a "veto" of the permit. The court granted our motion to dismiss the claim against EPA on the ground that the plaintiffs lacked standing and that any veto decision was committed to agency discretion by law.

— In *National Mining Association v. McCarthy*, the D.C. Circuit Court of Appeals upheld procedures developed by EPA and the U.S. Army Corps of Engineers to coordinate their review of certain applications for Clean Water Act permits authorizing the discharge of fill material from coal mining operations into waters of the United States. While the district court held that the agencies could not coordinate their review of the permits without express statutory authority, the court of appeals reversed. "Given the backdrop of Executive Branch tradition, sound government practice, and constitutional principle," the panel declined to "read into . . . statutory silence an implicit ban on inter-agency consultation and coordination." The court of appeals also agreed with ENRD's and the agencies' position that the Administrative Procedure Act did not require the agencies to provide the public with notice and an opportunity to comment on the coordination procedures. Because the procedures had no substantive impact on the respective Clean Water Act responsibilities of the agencies or the criteria under which the agencies assess permit applications, the procedures qualified as procedural rules, which are exempt from the Administrative Procedure Act's notice-and-comment requirements.

The plaintiffs in this litigation also challenged an EPA memorandum that provided guidance for EPA regions to consider when reviewing applications for Clean Water Act discharge permits for surface coal mining operations in Appalachia (and when reviewing state proposals to issue such permits). The district court held that the guidance memo was legally binding and therefore subject to judicial review. The D.C. Circuit reversed and directed the district court to dismiss the plaintiffs' claims. The court of appeals explained that the guidance was a general policy statement, not a final agency action subject to judicial review.

— In *Belle Company v. U.S. Army Corps of Engineers*, Belle Company filed suit challenging the U.S. Army Corps of Engineers' jurisdictional determination that wetlands on the company's property qualified as waters of the United States and thus could not lawfully be filled without a Clean Water Act permit. Belle Company sold this land to Kent Recycling Company, which intended to use it as a landfill, and filed this action instead of applying for a permit authorizing filling of the wetlands at issue. The district court held that the Corps' jurisdictional determination was not a final agency action and therefore not subject to judicial review. The Fifth Circuit Court of Appeals affirmed, explaining that the jurisdictional determination did not determine rights or

obligations, or have legal consequences, because Belle Company could apply for a permit authorizing the filling of the wetlands.

### **Upholding EPA’s Cleanup Plan for the Chesapeake Bay**

— In *Food & Water Watch v. EPA* (D.D.C.), the Division defeated a second effort to derail EPA’s 2010 “Total Maximum Daily Load” determination for the Chesapeake Bay and its watershed area, which encompasses states from New York to Virginia. The Chesapeake Bay determination establishes pollutant loads for nitrogen, phosphorus, and sediment for the Chesapeake Bay and its tidal tributaries. When EPA established the determination, it stated that it anticipated that the states would implement it in part through trading and offset programs.

The plaintiffs in this case essentially challenged EPA’s statements. They characterized the statements as the “trading provisions” of the Total Maximum Daily Load determination, and argued that the use of

such programs will lead to water quality violations. The court granted our motion to dismiss, finding the plaintiffs’ claim highly speculative because any state trading programs must ultimately comply with the Clean Water Act and the determination. More significantly, the court concluded that the determination encourages and supports, but does not require or authorize, state trading and offset programs, and that implementation of the determination remains primarily in the hands of the states.

### **Defending Challenges to EPA Oversight of Water Quality Planning**

— In *City of Dover v. EPA* (D.D.C.), the Division successfully defended EPA’s oversight of water quality planning efforts by the State of New Hampshire. A group of public water supply systems attempted to force EPA to interfere in the State’s efforts to enhance its regulation of nutrient discharges. The Division obtained dismissal of the action, persuading the court that the plaintiffs lacked standing to maintain the action, and that any purported injury the plaintiffs might someday face in the form of more onerous discharge permits could be addressed in subsequent permit proceedings.

### **Addressing PCB Contamination**

Protecting human health is always a critical priority. PCBs are human-made organic chemicals that were widely used in paints, construction materials, plastics, and electrical equipment prior to 1978. PCBs have been banned in the United States for the last 30 years, except for specific uses authorized by federal regulations. When released into the environment, PCBs can persist for decades because they do not break down through natural processes. Exposure to PCBs has been demonstrated to cause cancer and to have other adverse health effects on the immune system, reproductive system, nervous system, and endocrine system.

— In *United States v. Titanium Metals Corp.*, Titanium Metals Corporation, one of the world’s largest producers of titanium parts for jet engines, agreed to pay a record \$13.75 million civil penalty and perform an extensive investigation and cleanup of potential contamination stemming primarily from the unauthorized manufacture and disposal of PCBs at its manufacturing facility in Henderson, Nevada. That penalty is the largest ever imposed for violations of the Toxic Substances Control Act at a single facility. The company will pay an additional \$250,000 in civil penalties for violations related to illegal disposal of hazardous process wastewater in violation of the Resource Conservation and Recovery Act.



*Chesapeake Bay Bridge, Wikipedia photo*

Titanium Metals processes titanium from rutile ore at its 108-acre manufacturing facility. This process generates hazardous waste and PCBs. In the complaint, the United States alleged that the company had been unlawfully manufacturing PCBs as a byproduct of its titanium manufacturing process. The complaint further alleged that the company had disposed of PCB-contaminated waste at a solid waste landfill and also in a trench at the plant. Since 2007, the company has been

working with EPA to bring the facility into compliance. The company has taken steps to reduce significantly the amount of PCBs it generates and to manage appropriately the PCBs it does generate.

EPA expects that the settlement will result in the removal of approximately 84,000 pounds of PCB-contaminated waste from the environment each year, and will prevent the improper disposal of 56 million pounds of hazardous waste each year. The company has already spent approximately \$6 million on investigation, site cleanup, and compliance measures to address the potential contamination. In addition, the company estimates that it will spend at least \$1 million to complete the work required by the settlement. The United States District Court for the District of Nevada approved the settlement.

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# ENSURING CLEANUP OF OIL AND HAZARDOUS WASTE

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## Affirmative Litigation Responding to the Deepwater Horizon Explosion, Fire, and Oil Spill in the Gulf of Mexico and Related Activities

In what continues to be one of the largest civil enforcement efforts ever undertaken by the Department, the Environment Division—in cooperation with the Civil Division—presses forward in seeking to hold accountable all those responsible for the April 2010, multibillion-barrel oil spill in the Gulf of Mexico. This disaster stems from the blowout of the Macondo Well and the loss of the drilling vessel Deepwater Horizon. Those events—already judged by a federal district court to be the result of gross negligence and willful misconduct by one party and negligence by another—caused environmental, economic, and social upsets that continue to this day.



*Deepwater Horizon offshore drilling unit on fire,*

*Wikimedia Photo*

Some of the parties accountable under federal law for this disaster have resolved claims with the United States for key portions of that responsibility:

- MOEX, a minority owner of Macondo Well, settled its civil penalty exposure under the Clean Water Act by agreeing to pay \$70 million and by acquiring and preserving environmentally sensitive lands in several Gulf States. That work, which cost some \$20 million, should preserve and protect in perpetuity habitat and resources important to water quality.



*Environmental Protection Agency warning sign on fence surrounding mine property, Wikimedia photo*



*Polluted Martin's Creek on the Kin-Buc Landfill Superfund site, Wikipedia photo*

- The Transocean companies, which owned and operated the Deepwater Horizon, paid a penalty of \$1 billion to resolve their civil liability under the Clean Water Act and also agreed to implement comprehensive changes in how they operate their drilling vessels in the Gulf of Mexico. At the same time, Transocean resolved its criminal liability for the spill through a \$400 million plea agreement with the Department's Deepwater Horizon Task Force. That agreement included a criminal fine and remedial payments that should further both Gulf restoration and research on measures to make drilling safer both in the Gulf and around the world.
- BP Exploration and Production, the majority owner of and an operator of the Macondo Well, pleaded guilty to criminal violations of the Clean Water Act and felony manslaughter charges. It resolved those violations through a \$4 billion plea agreement comprised of a criminal fine and remedial payments that, like Transocean companies' payments, should further both Gulf restoration and research measures relating to drilling.

BP Exploration and Production and Anadarko (which owned a significant share of the Macondo Well), continue to dispute their civil liability for the spill under the Clean Water Act and the extent of any penalty each should pay. As part of the multidistrict litigation through which one district court is hearing many lawsuits arising from this spill, the United States has completed all three phases of a trial that will culminate with the court assessing a civil penalty against each of those defendants. These multibillion dollar companies each face a maximum penalty exposure of billions of dollars. The Deepwater trial involved hundreds of depositions, production of hundreds of millions of pages of documents, a substantial and robust motions practice, and many weeks of trial.

On June 4, 2014, the Fifth Circuit Court of Appeals unanimously affirmed the district court's February 2012 rulings in the first phase of trial that BP Exploration and Production and Anadarko were liable for civil penalties. The companies claimed that they were not liable for civil penalties under the Clean Water Act because the oil was discharged from the blowout preventer and riser (appurtenances of the vessel Deepwater Horizon), and not directly from the Macondo Well (which they owned). In affirming the companies' liability, the Fifth Circuit held that it was immaterial that oil flowed through parts of the vessel before entering the Gulf of Mexico, because the Clean Water Act proscribes any discharge of oil that ultimately flows into navigable waters, irrespective of the path traversed by the discharged oil.

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 eighty percent of civil penalties ultimately recovered to environmental and economic projects that will benefit the Gulf of Mexico region. Penalties paid by Transocean have been distributed under this framework.

The other major civil claim of the United States is for various damages related to the spill, in particular damages to natural resources. The United States already has secured a declaratory judgment for such damages against defendants BP Exploration and Production and Anadarko. The federal and state agencies that are trustees for the relevant natural resources are presently working to identify both the extent of injury to those resources and the work that would be appropriate to mitigate those injuries and restore those resources. The immense size of the spill

and the complex ecosystems affected (significant portions of the Gulf region) make the work of the trustees a massive undertaking.

## Recovering Damages and Penalties for Other Oil Spills

— In *United States v. BP Exploration* (Alaska), the United States District Court for the District of Alaska approved a consent decree under which BP Exploration (Alaska) will pay a civil penalty of \$450,000 for four separate oil spills on the North Slope of Alaska. In total, approximately 412 barrels of oil spilled from pipelines the company operates in the Greater Prudhoe Bay.

— In *United States v. Chevron Pipeline Co.* (D. Utah), Chevron Pipeline agreed to a settlement under which it paid a civil penalty of \$875,000 to resolve Clean Water Act violations associated with two oil spills at the company's facilities near Salt Lake City, Utah. On June 11, 2010, oil from a discharge of approximately 800 barrels entered Red Butte Creek and flowed to Liberty Lake, part of Liberty Park in downtown Salt Lake City. On March 18, 2013, a discharge of approximately 499 barrels of diesel fuel in Box Elder County affected wetlands adjacent to Willard Bay, a reservoir connected to the Great Salt Lake. The settlement followed other compliance actions associated with the Red Butte Creek spill, including agreements between Chevron Pipeline and the State of Utah and between Chevron Pipeline and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration.

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

The Division brings actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to require responsible parties to clean up hazardous waste and to



Remedial Action Program, USACE photo

recover the costs of cleanup conducted by EPA. In fiscal year 2014, 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.

— In *United States v. Pacific Gas & Electric Co.* (N.D. Cal.), the Pacific Gas and Electric Company

agreed to carry out the remedial action selected by the U.S. Department of the Interior to address groundwater contamination at the company's Topock Gas Compressor Site, located 12

miles outside of Needles, California. The work is estimated to cost \$184 million. The company also agreed to pay all of Interior's future oversight costs at the Site.

A large plume of groundwater contaminated with hexavalent chromium stretches from the compressor site to the groundwater under the Havasu National Wildlife Refuge and lands managed by the Bureau of Land Management, and ultimately to the edge of the Colorado River. The remedy involves the construction of bedrock extraction wells, the construction of an in-situ treatment system, and the injection of fresh water to push the contaminated groundwater through the treatment zone. To effect in-situ treatment, organic carbon material will be injected into the groundwater to promote the microbial reduction of hexavalent chromium to trivalent chromium, which is essentially immobile and therefore contained under most circumstances, including those found at the Site.

— The settlement in *United States v. Alcoa Inc.* (S.D. Ill.), required Alcoa Inc., the City of East Saint Louis, Illinois, and the Alton and Southern Railway Company to clean up the contamination in the “Operable Unit 1” area of the North Alcoa Superfund Site in the City of East Saint Louis. From about 1903 to 1957, Alcoa conducted aluminum manufacturing and production operations on parts of what is now the North Alcoa Superfund Site, located in the southeastern portion of the City. The City owns parts of the Site, and the Railway owns other parts.

The waste material remaining after alumina is extracted during bauxite refining is known as “red mud.” Starting in the early 1900s, Alcoa placed the red mud as fill in various areas of the Site, and the Site is now contaminated with radium, chromium, and vanadium. The remedy for the Operable Unit 1 area addresses the soil contamination and requires, among other things, constructing stormwater controls and installing over the waste a two-foot-thick cover. The City has expressed interest in redeveloping the majority of the area into a solar energy generating station, and the Railway has expressed interest in building a railway line on the eastern edge of the Site.



Red Mud, Wikipedia photo

— After trial in *United States v. Dico, Inc.*, the United States District Court for the Southern District of Iowa ordered defendant Dico to pay over \$4.5 million. In 1994, EPA discovered polychlorinated biphenyl (PCB) contamination in the insulation attached to the beams of certain buildings on Dico's property (which was already a Superfund site

because of groundwater contamination). EPA issued Dico an administrative order that required Dico to encapsulate the walls and floors with epoxy to prevent future releases of PCBs.

In 2007, Titan Tire, the corporate affiliate of Dico, contracted on Dico's behalf with Southern Iowa Mechanical to demolish some of the contaminated buildings. But the corporate affiliate neither notified Southern Iowa Mechanical of the EPA administrative order and PCB contamination nor notified EPA of the demolition. Southern Iowa Mechanical then took the contaminated beams back to its property. EPA required Dico and Titan Tire to perform a removal action at the Southern Iowa Mechanical site, as a result of which the United States incurred oversight and enforcement costs.

The district court ruled that Dico and Titan Tire were jointly and severally liable for past and future clean-up costs because they had "arranged for the disposal" of PCBs within the meaning of the CERCLA. The court also concluded that Dico acted in bad faith and placed the public and environment at substantial risk, and ordered the company to pay \$1.62 million. The Court also determined that Dico's conduct warranted a punitive damages award of at least \$1.48 million, which was the amount of the United States' clean-up costs.

## Protecting Against Interference with EPA's Clean-up Decisions

— In *Town of Acton, Massachusetts v. EPA* (D. Mass.), the Town of Acton sued EPA and W.R. Grace and Co., which is conducting a remedial action at a former manufacturing site within the Town. The Town of Acton argued that W.R. Grace must comply with remediation requirements set forth in the Town's municipal bylaw, which are more stringent than the remediation requirements imposed in a consent decree between W.R. Grace and EPA. The court initially denied the Town's motion for a preliminary injunction, and in September 2014, it granted our motion to dismiss the complaint on federal preemption grounds. The court found that the local bylaw may pose an obstacle to the accomplishment of CERCLA's objectives, which include generating a single remedy that can be carried out without interference from local governing bodies or other interested parties.

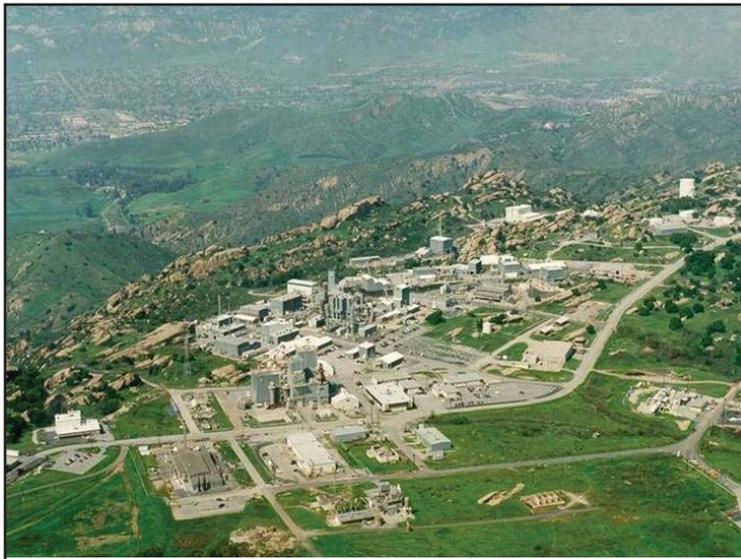
— In *Hobart Corp. v. Waste Management of Ohio*, the Sixth Circuit Court of Appeals adopted ENRD's and EPA's interpretation of two key provisions of CERCLA in resolving a lawsuit filed by Hobart Corp. In 2006, Hobart Corp. had entered into an administrative settlement with EPA that addressed Hobart's responsibility for contamination at a particular site. More than three years later, Hobart filed this lawsuit against other potentially responsible parties seeking to recover clean-up costs it had incurred at that site.



Acton, Massachusetts Town Hall, Wikipedia Photo

Hobart asserted claims under section 107(a) and section 113(f)(3)(B) of CERCLA. Section 107(a) states that any person may recover its clean-up costs from another potentially responsible party (beyond its equitable share). Section 113(f)(3)(B), in turn, states that any person that has resolved its CERCLA liability for clean-up costs in an administrative settlement with EPA may seek to recover costs from others by asserting an equitable claim for “contribution.” In the Sixth Circuit, ENRD filed a brief as amicus curiae arguing that a party like Hobart, which could have timely asserted a claim for contribution under CERCLA 113(f)(3)(b) with respect to certain clean-up costs, cannot seek to recover those costs by filing a claim under section 107(a). The Sixth Circuit agreed, holding that Hobart was ineligible to bring a section 107(a) claim.

The court distinguished a prior decision of the Sixth Circuit in *ITT Industries v. BorgWarner*, where the court held that an administrative settlement based on an older version of EPA’s model settlement did not resolve CERCLA liability to EPA and thus did not give rise to a right to assert a contribution claim. In *Hobart Corp.*, the court of appeals held that EPA’s revisions to its model settlement effectively clarified the parties’ intent to resolve Hobart’s CERCLA liability to EPA, and thus gave rise to contribution rights.



Aerial view of the Santa Susana Field Laboratory, Wikipedia Photo

— In *Boeing Company v. Raphael*, the Ninth Circuit Court of Appeals held that the State of California could not impose cleanup standards through legislation that were more stringent than federal law requires at the Santa Susana Field Laboratory in Southern California, where a federal contractor was addressing nuclear contamination. The contamination at issue resulted from the operation of federal research nuclear reactors and other activities at the site in the decades after World War II. Boeing Company, which was hired by the U.S. Department of Energy and the National Aeronautics and Space Administration to clean up the site,

argued that the state statute violated principles of intergovernmental immunity. The district court ruled for Boeing.

On appeal, the Division filed an amicus brief supporting Boeing. The Ninth Circuit held that the state statute impermissibly regulated the federal government’s cleanup of the site and that in imposing more stringent standards than generally applicable state environmental laws, the statute discriminated against the federal government and Boeing. The statute therefore violated applicable principles of intergovernmental immunity.

## Protecting the Public Fisc Against Excessive or Unwarranted Claims

The Division settles claims asserted under CERCLA against federal agencies where a fair apportionment of costs can be reached. In fiscal year 2014, the Division reached the following multi-million-dollar settlements:

- *State of Maryland v. United States* (D. Md.) (Kurt Iron & Metals Site in Baltimore, Maryland);
- *American International Specialty Lines Insurance Company v. United States and Chubb Custom Insurance Co. v. United States* (C.D. Cal.) (both involving the Whittaker-Bermite site in Santa Clarita, California);
- *Shell Oil Co. v. United States and Cadillac Fairview v. United States* (C.D. Cal.) (both involving the cleanup of the Del Amo Superfund Site in California);
- *City of San Diego v. United States Navy* (S.D. Cal.) (regarding the remediation of contaminated sediment in San Diego Bay);
- *ABB Inc. v. United States* (D. Conn.) (involving the Combustion Engineering site in Windsor, Connecticut); and
- *Minerals Technologies Inc. v. United States* (D. Conn.) (former Plancor 547 facility in Canaan, Connecticut).

— ENRD also defends against CERCLA claims that are not well-founded. In *United States v. ConAgra Grocery Products Co.* (D. Maine), counterclaims were brought against EPA in a CERCLA cost recovery case concerning the A.C. Lawrence Leather Company Sludge Lagoons Superfund Site in South Paris, Maine. The counterclaims alleged that EPA's selected plan for addressing the contamination would have the effect of spreading the scope of the contamination at the site and that EPA was therefore liable for clean-up costs. In March 2014, the court granted our motion to dismiss the counterclaims, holding that the counterclaims failed to state a plausible claim for CERCLA liability.

## Protecting the Public Fisc from Excessive Reimbursement of Contractor Clean-up Costs

Producing a substantial savings for the taxpayers, the Division obtained a significant ruling on the interplay of cost recovery actions under CERCLA and contractor cost recovery under the Federal Acquisition Regulation.

— In *Lockheed Martin Corp. v. United States* (D.D.C.), Lockheed Martin Corp. sought to recover from the United States past and future clean-up costs the company incurred or would incur at three related sites in Redlands and Beaumont, California, where Lockheed manufactured rocket motors under contracts with the United States. While finding the United States liable under CERCLA and directing the United States to pay an equitable share ranging from 19 to 29 percent of future costs at the three sites, the court declined to order the United States to pay any portion of the approximately \$270 million in past clean-up costs that Lockheed Martin

had already incurred. The court found that Lockheed had already recovered 75 to 85 percent of its response costs from the United States as part of its corporate overhead under government contracts, and that to allow it to recover its past costs under CERCLA would allow Lockheed to “profit from CERCLA at the expense of the taxpayer” because Lockheed Martin would receive a significant windfall. The Division has appealed the judgment to the extent it requires the United States to pay a share of the company’s future costs.

## Securing Natural Resource Damages

Even after an oil spill or a release of hazardous substances has been cleaned up, injury to natural resources, such as wildlife, fish, air, land, water, groundwater, and drinking water supplies, will often persist for years. As a result, several statutes authorize federal, state, and tribal trustees of natural resources to sue to collect natural resource damages. Generally speaking, recoveries must be used to help restore, replace, or acquire the equivalent of the injured natural resources.



Ciba-Geigy McIntosh Plant, in McIntosh, Alabama, DOI photo

— The settlement in *United States v. BASF Corporation* resolved claims against BASF Corporation for natural resource damages under CERCLA, the Clean Water Act, and similar provisions of Alabama state law. The federal trustees in this case were the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service. The natural resource damages occurred as a result of releases and threatened releases of the pesticide DDT and its degradation products from the Ciba-Geigy Superfund Site near McIntosh, Alabama. The site contains a facility that produced DDT beginning in 1952 and subsequently produced herbicides, insecticides, and other specialty chemicals. Under the settlement, BASF Corporation, the current owner of the facility, will pay the federal trustees \$4.5 million: \$3.2 million for the development and implementation of restoration projects and \$1.3 million to reimburse the agencies for their damage assessment costs. BASF Corporation will pay the state trustees \$500,000 for restoration of the Mobile Bay watershed. The United States District Court for the District of Alabama approved the settlement.

## 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 2014, the Division obtained four agreements in bankruptcy proceedings under which debtors paid over \$45 million, and also collected over \$73 million under bankruptcy agreements concluded in prior fiscal years. Of the over \$118 million total, debtors reimbursed the Superfund for over \$91 million, paid over \$23 million to clean up hazardous waste sites, and paid more than \$4.5 million in natural resource damages.

— In one case, *In re APCO Liquidating Trust*, the debtor (a successor in interest to APCO Oil Corporation) settled after years of litigation concerning the APCO Liquidating Trust’s liability under CERCLA for costs incurred by EPA in the ongoing cleanup of the Oklahoma Refining Company Superfund Site in Cyril, Oklahoma. Under the settlement agreement, the APCO Liquidating Trust and the APCO Missing Stockholder Trust paid \$14 million to the United States. The money will be used to reimburse EPA for clean-up costs incurred and to be incurred at the Site, which was the location of an oil refinery operated by Anderson-Prichard Oil Corporation and APCO Oil Corporation from 1920 until about 1978, and then in a limited capacity by the Oklahoma Refining Company until 1987.

— In another case, *In re Tronox Inc.*, the United States reached and presented to the Bankruptcy Court for the Southern District of New York a settlement agreement with the Kerr-McGee Corporation and certain of its affiliates (collectively, New Kerr-McGee), and their parent Anadarko Petroleum Corporation, in a fraudulent conveyance case in the bankruptcy of Tronox Inc. and its subsidiaries (collectively, Tronox). The bankruptcy court had previously found, in December 2013, that the historic Kerr-McGee Corporation (Old Kerr-McGee) fraudulently conveyed assets to New Kerr-McGee to evade its debts, including its liability for environmental cleanup at contaminated sites around the country. Pursuant to the April 2014 settlement agreement, the defendants agreed to pay \$5.15 billion plus interest to settle the case, of which approximately \$4.4 billion will be paid to fund environmental cleanup and for environmental claims. The settlement, approved by the court in fiscal year 2015, will result in the largest payment ever for the cleanup of environmental contamination.

According to the complaints of the United States and the co-plaintiff, the Anadarko Litigation Trust, and the written opinion of U.S. Bankruptcy Judge Allan L. Gropper issued on December 13, 2013:

Old Kerr-McGee operated numerous businesses, which included uranium mining, the processing of radioactive thorium, creosote wood treating, and manufacture of perchlorate, a component of rocket fuel. These operations left contamination across the nation, including radioactive uranium waste across the Navajo Nation; radioactive thorium in Chicago and West Chicago, Illinois; creosote waste in the Northeast, the Midwest, and the South; and perchlorate waste in Nevada.

In the years prior to 2005, Old Kerr-McGee concluded that the liabilities associated with this environmental contamination were a drag on its “crown jewel” business, the exploration and production of oil and gas. With the intent of evading these and other liabilities, Old Kerr-McGee created a new corporate entity—defendant New Kerr-McGee—and, through a scheme executed in 2002 and 2005, transferred its valuable oil and gas exploration assets to the new company. The legacy environmental liabilities were left behind in the old company, which was re-named Tronox, and spun off as a separate company in 2006. As a result of these transactions, Tronox was rendered insolvent and unable to address its environmental and other liabilities. In 2009, Tronox went into bankruptcy.

The United States and the bankruptcy estate (now represented by the Anadarko Litigation Trust) brought this lawsuit to hold New Kerr-McGee and the Anadarko Petroleum Corporation accountable and require them to repay the value of the assets fraudulently conveyed from Old Kerr-McGee. Many federal, state, and tribal officials worked tirelessly on this matter. The litigation of this case was assisted by EPA personnel from around the country; the U.S. Fish & Wildlife Service and the Bureau of Land Management; the National Oceanic and Atmospheric Administration; the U.S. Nuclear Regulatory Commission; the U.S. Forest Service; and the U.S. Department of Defense, as well as numerous state governments and the Navajo Nation.

This case was handled by the Environmental Protection Unit and the Tax and Bankruptcy Unit of the Civil Division of the U.S. Attorney's Office for the Southern District of New York, working closely with attorneys from ENRD's Environmental Enforcement Section.

# PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S WILDLIFE AND NATURAL RESOURCES

A critical part of the Division's mission is to protect and promote responsible stewardship of America's wildlife and natural resources. For example, the Division defends decisions by the U.S. Department of Agriculture and the U.S. Department of the Interior with respect to water use and federal land management, actions by the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service to protect threatened and endangered species, and regulations and permits that provide essential oversight for energy and mineral extraction activities.

## Defending Agency Management of Sensitive Resources

— *Drakes Bay Oyster Co. v. Salazar*, is an example of ENRD's efforts to defend agency decisions that protect sensitive marine resources. In this highly contentious litigation, Drakes Bay Oyster Company challenged the Secretary of the Interior's decision to allow a special use permit to expire. The permit had allowed the company to operate an oyster farm within Point Reyes National Seashore in San Francisco Bay. The expiration of the permit eliminated the last commercial use within a tidal region of Point Reyes known as Drakes Estero. After the company's motions for preliminary relief were rejected by the district court and the Ninth Circuit, we engaged in negotiations that led to a settlement with the owners of the oyster farm. The consent decree required the company to cease operations and leave the sensitive region by the end 2014, which enabled the region to be designated as marine wilderness sooner than otherwise could have occurred. The region is now the only marine wilderness on the Pacific Coast outside of Alaska.

— *In United States v. Copar Pumice Company*, ENRD reached a favorable settlement of a lawsuit filed against a mining company engaged in the unauthorized mining of pumice from El Cajete Mine in the Jemez National Recreation Area in the Santa Fe National Forest. The consent decree resolves the U.S. Department of the Interior's claims against the company and four individual mining claimants, including the company's president, for trespass, conversion,



Drakes Estero Schooner Creek Sunset, Photo by Sara Anzalone/NPS



*Yosemite National Park, Wikipedia photo*



*Double-O-Arch Arches National Park, Wikipedia photo*

and unjust enrichment. The settlement requires the defendants to pay \$2,225,000 in damages and to forego any rights to mine pumice in the vicinity in the future.

— ENRD secured an impressive victory in a challenge to the U.S. Department of the Interior’s decision to set aside one million acres of public land near the Grand Canyon, protecting the land from private mining for the next 20 years. Various plaintiffs, including trade organizations, a mining company, and a coalition of local municipalities, challenged the decision in four consolidated cases. The Division obtained favorable rulings on a wide array of claims under the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act, the National Forest Management Act, and the Establishment Clause of the First Amendment.

— Litigation continues in *United States v. South Florida Water Management District* (S.D. Fla.), a case ENRD filed in 1988 to compel the restoration of the Florida Everglades. The Division and EPA resolved the case through a 1992 consent decree with the Florida Department of Environmental Protection and the South Florida Water Management District. The 1992 consent decree set a schedule for abatement of phosphorus pollution from agricultural runoff in the Everglades, but litigation continued over the meaning of the decree’s provisions and whether it had been complied with. In December 2013, the district court entered an order adopting a favorable report of the Special Master on additional remedies intended to ensure the state parties comply with the water quality requirements of the consent decree. The court also confirmed that “[i]n adopting this Report, the Court is not relinquishing its remedial oversight over the Consent Decree.”

— *In San Francisco Herring Association v. U.S. Department of the Interior* (N.D. Cal.), a trade association representing commercial herring fishermen and buyers challenged the National Park Service’s regulation prohibiting commercial herring fishing within the boundaries of the Golden Gate National Recreation Area in California. ENRD persuaded the district court to deny the plaintiff’s motion for a preliminary injunction in January 2014, and the court ultimately granted summary judgment in ENRD’s favor. The court confirmed that, under a 1976 amendment to the National Park Service Organic Act, the National Park Service has authority to prohibit fishing by boats on waters within National Park boundaries, regardless of whether the federal government has a property interest in those waters or the lands underlying them. The 1976 amendment specifically authorizes the Park Service to “[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States.”

— *In Cape Hatteras Access Preservation Alliance v. Jewell* (E.D.N.C.), the Cape Hatteras Access Preservation Alliance challenged the National Park Service’s regulations governing off-road vehicle use in the Cape Hatteras National Seashore Recreation Area in North Carolina. The organization alleged violations of NEPA, the Administrative Procedure Act, the National Park Service Organic Act, and the National Seashore’s enabling legislation. The regulation was required to be issued under a consent decree that resolved an earlier lawsuit, in which the organization intervened as a defendant. In June 2014, the district court entered judgment in favor of the National Park Service, rejecting all of the organization’s claims on the merits. Among other things, the court concluded that an environmental impact statement prepared for the regulation fully complied with NEPA.

— The Bureau of Reclamation operates a system of dams and reservoirs in California known as the Central Valley Project. Located in the Central Valley Basin in California, the Central Valley Project constitutes the largest federal water management project in the United States. Reclamation must

coordinate the project's operations with the California Department of Water Resources, which operates a state water project in the same watershed, to export water from Northern California through the Sacramento-San Joaquin Delta for delivery to southern parts of the State of California. In 2008, the U.S. Fish and Wildlife Service issued a biological opinion pursuant to Section 7 of the Endangered Species Act concluding that the operations of the federal and state water projects were likely to jeopardize the continued existence of the delta smelt, a threatened species, and that the operations are major contributors to (although not the exclusive causes of) the delta smelt's decline.



Cape Hatteras, NPS photo

In *San Luis & Delta Mendota Water Authority v. Jewell*, water users challenged the biological opinion and management decisions that Reclamation had undertaken to comply with the opinion. In issuing a preliminary injunction and then in its final judgment, the district court concluded that the biological opinion was arbitrary and capricious. In so ruling, the district court relied extensively on four expert witnesses the court had appointed for its own benefit and on expert witnesses it had allowed the parties to present during court hearings.

On March 13, 2014, the Ninth Circuit Court of Appeals reversed in an exhaustive, partially divided opinion. The Ninth Circuit severely criticized the district court for allowing expert witness testimony in an Administrative Procedure Act case and for not giving appropriate deference to the Fish and Wildlife Service's scientific judgments. The Ninth Circuit also found that the agency had adequately analyzed and explained the rationale for its jeopardy conclusion and other analyses. Several of the plaintiffs then filed a petition asking the Supreme Court to review the Ninth Circuit's decision, which the Supreme Court denied on January 12, 2015.

## Facilitating Land Management Decisions Designed to Protect Federal Lands From and Respond to Catastrophic Fire and Insects

In the summer of 2013, three large fires burned hundreds of thousands of acres of National Forest System lands in California. ENRD successfully defended initial challenges to the implementation of three timber salvage projects designed to remove hazardous trees from roads and trails, to restore burned forests, and to recover the value of fire-killed trees.

- First, in *Center for Biological Diversity v. Skalski*, we successfully defended multiple challenges to the immediate implementation of the Rim Fire Restoration Project, the largest of the three projects. The Rim Fire burned over 250,000 acres, mostly on the Stanislaus National Forest near Yosemite National Park. The Rim Project received unprecedented support from local

governments, local environmental and conservation groups, industry groups, and the Me-Wuk Indian Tribe.

- Second, ENRD prevailed in opposing a motion for preliminary injunction in *Earth Island Institute v. Gould*, allowing the Aspen Recovery and Reforestation Project to proceed on schedule. This project is designed in response to the Aspen Fire, which burned over 22,000 acres within the Sierra National Forest.
- Third, the Division successfully opposed a motion for preliminary injunction filed in *Earth Island Institute v. Quinn*, a challenge to the Big Hope Fire Salvage and Restoration Project. The project was designed in response to the American Fire, which burned over 22,000 acres on the Tahoe National Forest. Litigation is ongoing, but the Division's work allowed operations to begin promptly, thereby ensuring public safety, allowing treatment to begin while the timber was still commercially valuable, and boosting the local economies.



Stanislaus National Forest, NPS photo

— In *Alliance for the Wild Rockies v. Savage* (D. Mont.), the Division successfully defended a challenge to the Kootenai National Forest's Pilgrim Creek Timber Sale Project, which allows for timber harvest and vegetative treatments in forest areas susceptible to fire and infestation by mountain pine beetles. The plaintiff primarily argued the Forest Service could not construct roads that would be closed with barriers after project completion. But the court upheld the Forest Service's conclusion that the construction of such roads was not barred by forest plan provisions that limit road mileage for the purpose of protecting grizzly bears. The Kootenai Tribe of Idaho, which worked collaboratively with the Forest Service to ensure that the provisions in question also protect ancestral hunting and fishing rights, filed an amicus brief in support of the project.

— In *Sequoia ForestKeeper v. Elliott* (E.D. Cal.), the plaintiffs challenged the Rancheria Forest Restoration Project, which was developed by the Forest Service to mitigate the risk of catastrophic fire in the Sierra Nevada National Forest. Even though the Forest Service developed the project in collaboration with the public, the plaintiffs argued that the Forest Service violated NEPA by failing to circulate adequate information to the public during the preparation of the environmental assessment for the project. The court denied the plaintiffs' arguments, concluding that the plaintiffs were adequately informed about the relevant issues, as their extensive comments on the project demonstrated.

— In *Conservation Congress v. U.S. Forest Service* (E.D. Cal.), the Division successfully defended a challenge to the Algoma Vegetation Management Project in the Shasta-Trinity National Forest, which was designed to improve forest health, enhance old-growth forest conditions, and protect late-successional and old-growth forest, home to the threatened northern spotted owl, from catastrophic wildfire. In May 2014, the district court issued a favorable decision on all counts, allowing this important project to proceed.

— The Division also successfully defended the Millie Hazard Tree Removal Project, which involves the removal of hazard trees along fifteen miles of road, in *Alliance for the Wild Rockies v. Krueger* (D.

Mont.). A fire had killed and weakened the trees, which created a risk that they could fall and impair the Gallatin National Forest transportation network.

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

In addition to defending agency land management decisions that address the risk of wildfire and insect infestation and the effects of wildfire, the Division successfully defended land management decisions in a variety of other contexts.

— On March 25, 2014, the district court in *Idaho Wool Growers Association v. Vilsack* rejected a challenge by industry groups to the U.S. Forest Service's plan for protecting wild populations of bighorn sheep in the Payette National Forest. The plan focused on protecting the bighorn sheep from catastrophic disease outbreaks caused by contact with infected domestic sheep in the Hells Canyon and Salmon River areas of Idaho. After extensive scientific analysis, the Forest Service developed a balanced plan that protected bighorn sheep populations while at the same time allowing domestic sheep grazing to continue, to the extent that it did not pose an unacceptable risk to bighorn sheep. The Forest Service's efforts have received support from the Nez Perce Tribe, environmental groups, and hunters.

— The Division has continued to successfully defend the Forest Service's efforts to use active forest management to help improve forest health and wildlife habitat. For example, the Forest Service's Jazz Project in Oregon's Mt. Hood National Forest is designed to restore the historical diversity of habitats and trees species and to expedite the development of old growth habitat. The project seeks to accomplish these goals by thinning and selectively removing trees in an area that was clearcut 30 to 60 years ago and replanted with a single type of tree. At the same time, the project serves the Forest Service's statutory obligation to provide a supply of commercial timber, and will create or maintain 125 jobs for the local economy. ENRD successfully defended the project in *BARK v. Northrup* (D. Ore.), and the Forest Service has been able to move forward with this important work while the matter is addressed on appeal.



Payette National Forest, USFS photo

— In *Partners in Forestry Cooperative v. U.S. Forest Service* (W.D. Mich.), the Division successfully defended the Delich land exchange in the Ottawa National Forest. The land exchange conveyed a single parcel of private land to the Forest Service in exchange for five scattered parcels of federal land in Ontonagon County. The plaintiffs argued that the Forest Service did not consider the unique characteristics of the area, public concerns about the project, or the environmental effects of the land exchange. The court rejected the plaintiffs' challenge in its entirety. The land exchange will facilitate the restoration, protection, and management of forest resources, and provide enhanced recreation opportunities in the Ottawa National Forest. The land exchange also reduces management costs and improves land management efficiencies for the Forest Service.

— In *Ark Initiative v. Tidwell* (D.D.C.), the Division successfully defended a challenge brought by an environmental advocacy group against a Forest Service project designed to enhance an existing ski egress trail in the White River National Forest in Colorado. This case is the latest in a series of challenges to the management of the ski area. The project creates a safe and clearly marked trail for advanced skiers to exit terrain on Burnt Mountain and return to other trails in the Snowmass Ski Area. The plaintiffs argued that the project was located in a protected roadless area and that the Forest Service did not adequately consider the characteristics of the area or the environmental effects of the project. The court upheld the agency in all respects, concluding that the Forest Service

evaluated all aspects of the project and “ultimately arrived at a well-considered and lawful decision.”



*White River National Forest, USDA photo*

— *Sequoia ForestKeeper v. Benson* (E.D. Cal.), concerns a challenge to the Hume Roadside and Recreation Site Hazard Tree Project in the Giant Sequoia National Monument, which proposed to fell and remove hazard trees along forest roads and in several campgrounds and recreation sites to allow for safe public access and use. Alleging that the removal of felled trees violated the Presidential Proclamation establishing the Monument, Sequoia ForestKeeper filed a motion to enjoin the Project, threatening closure of the campgrounds and recreational sites for the 2014 summer season due to safety concerns. The Division success-

fully negotiated a solution that allowed the Forest Service to fell the hazard trees and allow the public to safely recreate in this extraordinary landscape.

— In *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service* (D.N.M.), the district court denied the plaintiff’s challenge to the Motorized Travel Management Plan for the Santa Fe National Forest. The plaintiff argued that the travel management plan did not comply with NEPA, and its principal argument was that the Forest Service failed to analyze the environmental impacts of a properly-defined “no-action” alternative. The court, however, held that the agency did not act arbitrarily or capriciously in defining the “no action” alternative. The court’s decision permits the Forest Service to proceed with the implementation of its travel management plan governing public motorized access to the Santa Fe National Forest.

— In *Cascadia Wildlands v. Bureau of Indian Affairs* (D. Or.), a coalition of environmental groups challenged the Bureau of Indian Affairs’ decision to authorize a timber sale on the Coquille National Forest in southwestern Oregon. The forest lands at issue are held in trust by the United States for the Coquille Indian Tribe, and the project will provide vital funding to the Tribe. The plaintiffs brought two claims under the Coquille Restoration Act and NEPA, both of which the district court denied. First, the court held that the Coquille Restoration Act did not require the sale to comply with the revised recovery plan for the Northern Spotted Owl. Second, the court held that the environmental assessment prepared for the project adequately disclosed and analyzed the cumulative environmental impacts of ongoing projects.

— In *Maughan v. Vilsack* (D. Idaho), a coalition of environmental groups challenged the Idaho Department of Fish and Game’s deployment of a hunter to exterminate two wolf packs in the Frank Church Wilderness Area in the Payette National Forest in Idaho. The State believed the packs were harming the local elk population. The plaintiffs claimed that the Forest Service violated NEPA, the National Forest Management Act, and the Wilderness Act when it allowed the state agency to use a public airstrip and a Forest Service administrative cabin. After ENRD successfully defended against the plaintiffs’ motion for a preliminary injunction, the parties engaged in negotiations that led to the voluntary dismissal of the case. The Division was able to work cooperatively with the State of Idaho to reach a favorable resolution to the litigation.

## Defending Federal Water Rights and Reclamation Projects

During the 2014 water year, the State of California suffered one of the worst droughts on record, resulting in a wave of emergency litigation in the summer of 2014. ENRD attorneys defeated several efforts by various plaintiffs to obtain temporary restraining orders and preliminary injunctions. Our litigation efforts made it possible for the Department of the Interior to implement emergency measures to protect the ecosystems of sensitive species and the holders of senior water rights.

- In *Friant Water Authority v. Jewell*, several water districts sued the Bureau of Reclamation, challenging its release of water from the Friant Dam to landowners (holding senior water rights) along the San Joaquin River. The plaintiffs alleged that Reclamation’s Drought Plan—developed in consultation with the State Department of Water Resources—violates contract rights, relevant statutory authority, and provisions of California state law. We successfully opposed the plaintiffs’ motion for a temporary restraining order.
- In *Aqualliance v. Bureau of Reclamation*, environmental plaintiffs sought to prevent water deliveries based on allegations that the Bureau of Reclamation failed to properly consider the potential impacts on the threatened Delta Smelt. The court denied the plaintiffs’ motion for a preliminary injunction, finding that, “with respect to the challenge to the content of the [the agency’s environmental assessment], plaintiffs do not [even] present a ‘fair chance of success on the merits.’”
- Finally, in *San Luis & Delta-Mendota Water Authority v. Jewell*, agricultural water users sought a temporary restraining order to prevent the Bureau of Reclamation from releasing up to 62,000 acre-feet of water from the Trinity and Lewiston Reservoirs near Klamath, California. The agency was seeking to reduce the likelihood of a disease outbreak among Chinook salmon that could result in a large scale die-off. The court denied the temporary restraining order.

— In *Navajo Nation v. U.S. Department of the Interior* (D. Ariz.), the United States District Court for the District of Arizona dismissed a lawsuit filed by the Navajo Nation challenging the Department of the Interior’s management of the Lower Basin of the Colorado River. The Navajo Nation asserted a breach-of-trust claim based on the Department of the Interior’s alleged failure to quantify and account for the Nation’s unmet water needs. The Navajo Nation further claimed that Interior violated NEPA in its management of the Lower Basin.

After eight years of settlement negotiations failed to resolve the dispute, the district court granted our motion to dismiss the case in its entirety for lack of subject matter jurisdiction. The court dismissed the Navajo Nation’s breach-of-trust claim, holding that the Nation failed to identify any specific duty owed to it by the United States beyond a general trust obligation. The court further held that

the breach-of-trust claim was barred by the federal government's sovereign immunity. The court also ruled that the Navajo Nation lacks standing to raise NEPA challenges to Interior's management programs for the Lower Basin. The court explained that the Nation could not demonstrate that it had suffered an injury-in-fact, one of the requisite elements of standing, because to the extent the Navajo Nation has reserved water rights, Interior's management programs do not interfere with those rights.

— In fiscal year 2014, the district court in *United States v. Orr Water Ditch Co.* (D. Nev.), granted our request to modify a consent decree approved in the early 1940s, removing a significant obstacle to carrying out an important agreement that will allocate the waters of Lake Tahoe and the Truckee and Carson Rivers among states, the Pyramid Lake Paiute Tribe, and other stakeholders. In the early twentieth century, the United States brought three cases to secure water and water rights for the Newlands Project and for Pyramid Lake, including Orr Water Ditch Co. The final decrees in these cases confirmed certain rights to the United States and are still actively administered and enforced today.



Lewiston Dam, USBR photo

In 2008, the United States, the State of Nevada, the Truckee Meadows Water Authority, the Pyramid Lake Paiute Tribe, and the Washoe County Water Conservation District executed the Truckee River Operating Agreement, which primarily allocates the waters of Lake Tahoe and the Truckee and Carson Rivers among states, the Pyramid Lake Paiute Tribe, and stakeholders. This agreement was conditionally codified by Congress in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990. It was also promulgated as a federal regulation in 2009.

Subsequently, the parties to the Truckee River Operating Agreement filed a joint motion in Orr Water Ditch Co. to amend the decree to incorporate the agreement. In granting the joint motion, the court found that changes of fact and law justified the modifications, and rejected various arguments asserted by entities challenging the modification. This decision removes the most significant obstacle to meeting the federal statutory requirements for the Truckee River Operating Agreement to become fully effective.

— The Division had several major accomplishments last year in our ongoing litigation in the State of Montana's general stream adjudication for all 90 basins in the State, the Montana General Adjudication (Montana Water Court).

- In *Korman & South Philips Water Group v. Bureau of Land Management*, certain objectors contested the Bureau of Land Management's claims for water rights for stock water use. They argued that, as owners of the stock that drink the water, they should be substituted for the United States as the claim owners. The objectors also opposed the agency's claims for water rights for wildlife use. Last year, the Water Master entered favorable decisions granting summary judgment to the United States, confirming the United States' water rights.
- In *National Bison Range Wildlife Refuge Water Right Claims*, a pro se objector opposed entry of a judicial decree approving a compact between the United States and the State of Montana that quantifies the federal government's water rights for the 18,000-acre National Bison Range Wildlife Refuge. The National Bison Range is in Lake and Sanders Counties, Montana, and is

administered by the U.S. Fish and Wildlife Service in cooperation with the Confederated Salish and Kootenai Tribes. The compact had been approved by the United States and the Montana state legislature years ago, but was submitted to the Montana water court to address the objection. Last year, the water court granted our motion for summary judgment and approved the compact. The compact provides the National Bison Range with a federal reserved water right for wildlife and administrative uses, and recognizes an unqualified right to use water for fire suppression.

## 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 U.S. Fish and Wildlife Service and the National Marine Fisheries Service, respectively, to achieve this objective by listing imperiled species and designating critical habitat for such species.

These two agencies play an important role in ensuring that other federal agencies comply with the ESA, such as by analyzing whether an action proposed by another federal agency is likely to jeopardize the existence of a listed species. In addition, the two agencies enforce the Endangered Species Act’s prohibition against the unauthorized taking of listed species. When a plaintiff claims that a federal agency has violated the Endangered Species Act in making a decision, ENRD defends the agency in federal district courts and courts of appeals.

— In fiscal year 2014, we achieved favorable results in several ESA cases, thereby allowing full and effective implementation of the Act and its protections. For example, in *Markle Interests v. U.S. Fish & Wildlife Service* (E.D. La.), landowners challenged the designation of unoccupied critical habitat for the highly endangered dusky gopher frog. Currently, there are at most 100 frogs in the wild and only one viable breeding population located in Mississippi. The plaintiffs raised various claims, including a claim that the designation of unoccupied critical habitat on private land exceeds Congress’ authority under the Commerce Clause. After summary judgment briefing and oral argument, the court upheld the designation in its entirety and rejected the constitutional challenges to the Endangered Species Act. In so doing, the court allowed protections for this highly imperiled frog to remain in effect.

— Likewise, in *Aina Nui Corp. v. Jewell* (D. Haw.), we successfully defended a challenge to the U.S. Fish and Wildlife Service’s final rule listing 23 species and revising the critical habitat designations for 99 other species. Many of these species are native Hawaiian plants, found only on the islands, or even only on the island of Oahu. In this action, a corporation that owns land included in the critical habitat designation brought a number of procedural and substantive challenges to the rule. After summary judgment briefing and oral argument, the court upheld the critical habitat designation in its entirety.



Bison Range NWR, FWS photo

## Defending National Marine Fisheries Service’s Management of Ocean Fisheries

The Magnuson-Stevens Fishery Conservation and Management Act and other related statutes charge the National Marine Fisheries Service 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 fiscal year 2014, ENRD again successfully defended various fishery management actions that were necessary to meet these objectives.



*Dusky Gopher Frog, FWS photo*

— For example, in *Commonwealth of Massachusetts v. Pritzker* (D. Mass.), the States of Massachusetts and New Hampshire challenged Frameworks 48 and 50, which regulate New England’s groundfish fishery. The frameworks reduced certain catch limits to prevent overfishing and to rebuild overfished stocks. Massachusetts argued that the limits would effectively close down the entire fishery. After briefing and oral argument, the court upheld the rule in its entirety. At the same time, in *Oceana, Inc. v. Pritzker* (D.D.C.), ENRD successfully defended against claims by environmental groups that Framework 48 was too lenient. In so doing, the Division ensured that the National Marine Fisheries Service can implement balanced policies for protecting the fishery without causing undue economic hardship.

— The Division had similar success in *Pacific Dawn, LLC v. Pritzker* (N.D. Cal.), where it successfully defended against a challenge by commercial fishing interests to a fishing quota program for the west coast groundfish fishery. The fishing quota program seeks to ensure that the harvest of Pacific whiting can continue at sustainable levels. The Division obtained a similar result in *United Cook Inlet Drift Association v. National Marine Fisheries Service* (D. Alaska), in which the court upheld regulations implementing Amendment 12 to the Fishery Management Plan for salmon fisheries off the coast of Alaska. Industry participants were dissatisfied with the fact that the rule gives the State of Alaska management authority in certain areas. While this case raised several novel issues, Division attorneys obtained summary judgment on all claims.

— Fair enforcement of fishery regulations is also critical to the National Marine Fisheries Service’s fishery program. Consistent with that objective, in *H&L Axelsson, Inc. v. Pritzker* (D.N.J.), Division attorneys successfully defended the agency’s assessment of a \$54,000 penalty against H&L Axelsson and its owners for failing on 27 occasions to submit required reports concerning their harvest of 3.25 million pounds of Atlantic herring. These reporting requirements are essential to ensuring that fisheries are harvested in a sustainable manner. In successfully defending the agency’s enforcement decision, ENRD ensured a level playing field for all participants in the Atlantic herring fishery.

## 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.

— Of note this past year was *Safari Club International v. Jewell* (D.D.C.), involving a challenge by hunting organizations under the Endangered Species Act and CITES to the U.S. Fish and Wildlife Service’s decision to suspend pending further review the importation of sport-hunted elephant trophies from Zimbabwe and Tanzania in 2014. The agency imposed the suspension due to deteriorating conditions for elephants in those two countries. Hunting interests swiftly moved for an emergency injunction seeking to enjoin the moratorium. After briefing by ENRD on an expedited basis, the court denied plaintiffs’ motion for a preliminary injunction, thereby allowing the prohibition to remain in effect and provide needed protection to the elephants.



*African Elephant, FWS photo*

In fiscal year 2014, ENRD also successfully concluded its first CITES civil forfeiture action in more than a decade in *In re 1,016 Yacare Caiman Skins* (E.D.N.Y.). ENRD obtained forfeiture of 1,016 Yacare caiman skins from Bolivia (pictured below) that a leather manufacturing company sought to import through JFK Airport in New York in violation of CITES requirements.

## 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 and a threat to regional stability and global security. Because of this, on July 1, 2013, President Obama signed Executive Order 13648, establishing a new Presidential Task Force on Wildlife Trafficking. Since that time, the Division has represented 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, Treasury, Defense, Agriculture, and Homeland Security.

The Executive Order recognizes that because wildlife trafficking is an escalating international crisis, it is in the national interest of the United States to increase efforts to combat wildlife trafficking. The Executive Order calls for 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, or global development.

In fiscal year 2014, ENRD worked in close coordination with the other Task Force agencies to draft the first-ever National Strategy for Combating Wildlife Trafficking, which was issued by the President on February 12, 2014. ENRD subsequently worked in close coordination with other Task Force agencies to draft a national implementation plan for the strategy, which the President issued in February 2015.

# ENFORCING THE NATION'S CRIMINAL POLLUTION AND WILDLIFE LAWS

ENRD's Environmental Crimes Section, in partnership with U.S. Attorneys' Offices and investigative agents at a host of federal agencies, is responsible for prosecuting criminal violations that arise under a wide variety of statutes. These statutes can be broken into two broad categories: (1) those that protect the environment and public health and safety from unlawful pollution, such as the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Act to Prevent Pollution from Ships; and (2) those that protect wild animals and plants from unlawful poaching, harvesting, and profiteering, such as the Endangered Species Act, the Lacey Act, and the Migratory Bird Treaty Act.



*Key Deer, Wikipedia photo*

## **Protecting the Environment, Public Health, and Worker Safety**

— P&W Waste Oil Services, Inc., of North Carolina collected used oil from automotive service stations, transformer repair companies, and marinas to blend for industrial use. The company's facility was located near the Cape Fear River and a federally recognized wetland. The operation included a tank farm consisting of tanks ranging from 20,000 to 500,000 gallons in capacity.

In July 2009, a company employee collected and transported waste oil containing fluid from five transformers that was contaminated with PCBs (polychlorinated biphenyls) in concentrations in excess of 500 parts per million. Despite knowledge of an investigation into the company's



*Black Rhinoceros, Wikipedia photo*



*Potomac River at Goose Creek, Wikipedia photo*

illegal handling of PCB-contaminated used oil, company owner Benjamin Franklin Pass and a company employee continued to unlawfully dilute and sell the contaminated used oil. The mishandling of the PCB-contaminated used oil led to wide-spread contamination at the tank farm and at the sites of other companies that accepted the contaminated oil.

Benjamin Franklin Pass and P&W Waste Oil Services pleaded guilty to a variety of charges, including two Toxic Substances Control Act violations, a false statement charge, and tax-related charges. On July 16, 2014, the court sentenced Pass to serve 42 months' incarceration, to pay \$538,857 to the Internal Revenue Service for taxes he failed to pay between 2002 and 2011, and to pay \$21,373,143 in restitution for clean-up costs associated with the environmental contamination at his business and other affected victim-businesses. The court sentenced the company to a five-year term of probation and joint and several liability for the restitution. The court also ordered the company to take remedial action to address the environmental contamination at its facility and other leased property in eastern North Carolina.

— From October 2005 through June 2009, Steven Murray directed employees of his pest control services company, Bio-Tech Management Inc., to use outdoor pesticides indoors, contrary to instructions provided by the manufacturer and in violation of the Federal Insecticide, Fungicide, and Rodenticide Act. Employees of Murray's company repeatedly misapplied the registered pesticide Termidor SC in nursing homes in the State of Georgia. After the Georgia Department of Agriculture made inquiries regarding Bio-Tech Management's misuse of Termidor and other pesticides, Murray directed several of his employees to alter the service reports in order to cover up the misuse and obstruct the investigation.

Murray and Bio-Tech Management pleaded guilty to conspiracy, violations of the Federal Insecticide, Fungicide, and Rodenticide Act, false statements, and mail fraud. On August 27, 2014, the court sentenced Murray to 24 months' incarceration, followed by one year of supervised release, and also ordered him to pay a \$7,500 fine. The court sentenced Bio-Tech Management to pay a \$50,000 fine and to complete a three-year term of probation.

— Between November 2011 and February 2012, John Mills, the owner of a New York real estate holding company, and chief supervisor Terrence Allen directed the unlawful removal of thermal system insulation or "pipe wrap" that contained asbestos from several buildings owned by Mills and occupied by various tenants. Asbestos is a known carcinogen and a hazardous pollutant subject to regulation under the Clean Air Act. Mills and Allen directed a maintenance employee to remove the pipe wrap without warning him that the material contained asbestos or providing him with adequate personal protective equipment. This material was then transported in open bags in the uncovered bed of a truck and stored in a U-Haul-style box truck owned by Mills and a shed maintained by the City of Malone's Department of Public Works in an effort to conceal the material from authorities.

Mills and Allen pleaded guilty to conspiracy to violate the Comprehensive Environmental Response, Compensation, and Liability Act and substantive violations of that statute for the illegal removal, handling, and disposal of asbestos. On September 8, 2014, the court sentenced both men to serve 21 months' incarceration, followed by two years' supervised release. The court also ordered Mills to pay a \$25,000 fine.

— Tonawanda Coke Corporation operated a merchant by-product coke facility in Tonawanda, New York. Coke is used in the steel-mill and foundry industries as an additive in the steel-

making process. An investigation of the facility uncovered a number of intentional environmental criminal violations. First, the company had operated an unpermitted coke oven gas emission source at its facility. Gas emissions from this illegal source contained several chemical compounds, including benzene, a known carcinogen that is subject to regulation as a hazardous air pollutant under the Clean Air Act.

Second, Tonawanda Coke Corporation was subject to a Clean Air Act permit that required it to install and maintain baffles in its quench towers to reduce the amount of particulate matter that escapes into the atmosphere during coke processing. The company had operated its towers for years without baffles. Finally, the company illegally stored and disposed of waste coal tar sludge without safeguards to prevent release into the environment, in violation of the Resource Conservation and Recovery Act, for approximately 19 years. Prior to an EPA inspection in April 2009, Mark Kamholz, the environmental manager at the facility, instructed another employee to conceal violations from inspectors. Kamholz also was responsible for conduct giving rise to the Clean Air Act and Resource Conservation and Recovery Act violations.

After a five-week trial, Tonawanda Coke Corporation was convicted of eleven Clean Air Act violations that took place over a five-year period, and three Resource Conservation and Recovery Act violations that took place over a 19-year period. Kamholz was found guilty of eleven Clean Air Act violations, three Resource Conservation and Recovery Act violations, and obstruction of justice. In March 2014, the court sentenced the company to pay a \$12.5 million fine and \$12.2 million in community service. The court also placed the company on a five-year term of probation, during which it is to pay its community service and fine. This money will fund an epidemiological study and an air and soil study to help determine the extent of health and environmental impacts of the coke facility on the Tonawanda community. The court sentenced Kamholz to one year and a day in jail, one year supervised release, a \$20,000 fine, and 100 hours of community service.

— **Harcros Chemicals Inc.**, a Kansas chemical manufacturing facility, manufactured and sold surfactants, emulsifiers, custom organics, and other chemical-based products. It also operated approximately eight laboratories for the development and testing of new chemicals. In May 2006, Harcros employees created an inventory of more than 200 chemicals in containers that were no longer in use with the intent to dispose of about half of those materials. A December 2008 inspection by local regulators revealed that most of the substances listed were still on site. A number of these chemicals were considered extremely hazardous in nature and their production dated back to the 1960s.

On September 25, 2014, Harcros Chemicals pleaded guilty to a Resource Conservation and Recovery Act violation for the unlawful storage of hazardous wastes. The court sentenced the company to pay a \$1.5 million fine and complete a two-year term of probation.



*Chemical Waste Drum, Wikipedia photo*

## Fighting Pollution from Ocean-Going Vessels

In the late 1990's, the Division began its Vessel Pollution Initiative to address intentional acts of pollution from ocean-going vessels. At the end of fiscal year 2014, criminal penalties imposed in these vessel pollution cases totaled more than \$344 million in fines and more than 27 years of confinement.

— During a November 2012 inspection of the M/T Bow Lind, a petroleum/chemical tanker ship, U.S. Coast Guard investigators discovered that the vessel had discharged oily bilge water directly into the sea on multiple occasions while in international waters. Chief Engineer Ramil Leuterio had directed crew members to bypass pollution prevention equipment and then concealed the illegal discharges by making misleading entries, and omissions, in the vessel's oil record book. Ship owner Odfjell Asia II Pte Ltd. and Leuterio pleaded guilty to violations of the Act to Prevent Pollution from Ships. On May 14, 2014, the court sentenced Leuterio to serve three months' incarceration, and ordered it to pay a \$900,000 fine and \$300,000 community service payment and to implement an environmental compliance plan.



*Oil Tanker, DOJ photo*

In December 2013, Matthaios Fafalios, Chief Engineer aboard the M/V Trident Navigator, ordered a crew member to construct a bypass in order to illegally discharge oily bilge waste overboard. Several metric tons of waste were discharged, circumventing the ship's oil-water separator and oil content monitor. The discharges were not recorded in the oil record book, as required under applicable regulations. Fafalios confiscated a crew member's cell phone that contained a photograph of the bypass and deleted the picture.



*Oil Tanker, DOJ photo*

On January 18, 2014, U.S. Coast Guard personnel boarded the ship while it was anchored in the Mississippi River near New Orleans, Louisiana. A tip from a crewmember resulted in the discovery of the bypass. Fafalios was uncooperative and further obstructed the Coast Guard investigation by instructing crewmembers to falsely deny knowledge of the bypass. Fafalios was charged with failing to maintain an accurate oil record book, obstruction of justice, and witness tampering. In December 2014, a jury convicted Fafalios on all three counts. Ship operator Marine Managers Ltd. pleaded guilty to a violation of the Act to Prevent Pollution from Ships and to obstruction of justice. On October 2, 2014, the court ordered the company to pay an \$800,000 fine, to make a \$100,000 community service payment, and to implement an environmental compliance plan.

— From October 2011 through September 2012, Ioannis Prokakis, and Antonios Boumpoutelos, Chief Engineer and Second Engineer aboard the vessel M/V Thetis, routinely ordered unlawful overboard discharges of sludge and bilge wastes, then concealed the conduct by directing others

to falsify the ship's oil record book and hide bypass piping that was used to make the discharges. The defendants, which included the two crew members and Diana Shipping Services S.A., the ship operator, were charged with and convicted at trial of conspiracy, a violation of the Act to Prevent Pollution from Ships, obstruction of justice, and falsification of records. On December 5, 2013, Prokakis and Boumpoutelos were sentenced to serve one-year terms of probation. The company was ordered to pay a \$1.1 million fine, to implement an environmental compliance plan, and to complete a 3.5-year term of probation.

## Protecting Wildlife Through Enforcement

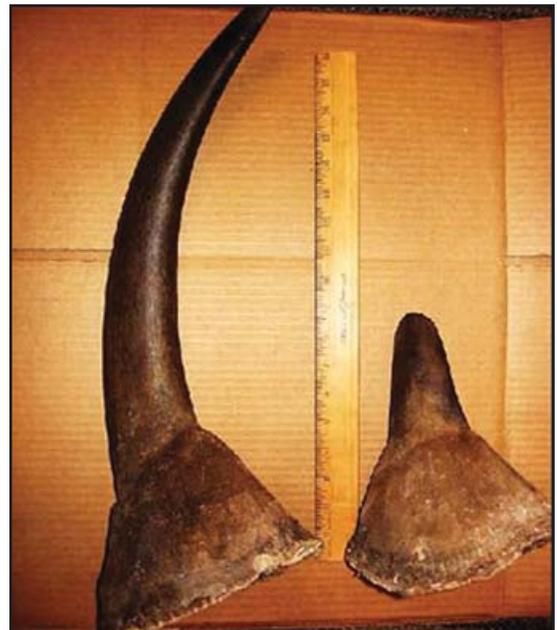
Federal criminal enforcement of wildlife protection statutes is a critical factor in deterring the illegal killing and commercialization of wildlife, fish, and plants, and augments the wildlife protection efforts of states, tribes, and foreign governments. Criminal prosecutions for these violations focus on both individual and corporate perpetrators, and result in fines, imprisonment, community service, and restitution to help mitigate the harm caused by the violations, as well as forfeiture of the illicit profits and instrumentalities used to commit the crimes.

### Operation Crash

— “Operation Crash” is an ongoing nationwide effort led by the U.S. Fish and Wildlife Service and ENRD in conjunction with U.S. Attorneys’ Offices to investigate and prosecute those involved in the black market trade of rhinoceros horns and other protected species. (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 2014.

— Zhifei Li, the owner of Overseas Treasure Finding in Shandong, China, was in the business of selling rhino horns to factories where they would be carved into fake antiques and then resold. Horns that Li acquired were smuggled across international borders. The horns were hidden by a variety of means, including by wrapping them in duct tape, hiding them in porcelain vases that were falsely described on customs and shipping documents, and labeling them as porcelain vases or handicrafts. The pieces leftover from the carving process were sold for alleged “medicinal” purposes.

Li admitted that he was the “boss” of three antique dealers in the United States whom he paid to help obtain wildlife items and smuggle to him through Hong Kong. Rhino carvings valued as much as \$242,500 were sold to Li’s customers in China. Shortly after arriving in the United States in January 2013, Li was arrested on federal charges in New Jersey. Prior to his arrest, he had purchased two endangered black rhinoceros horns from an undercover U.S. Fish and Wildlife Service agent in a Miami Beach hotel room for \$59,000.



*Rhino Horns, DOJ photo*



**Rhino Horns , DOJ photo**

Li pleaded guilty to conspiracy to smuggle and to violate the Lacey Act, six smuggling violations, one Lacey Act trafficking violation, and two counts of making false wildlife documents. Li admitted to being the organizer of an illegal wildlife smuggling conspiracy in which 30 raw rhinoceros horns (worth approximately \$3 million) were smuggled from the United States to China. On May 27, 2014, the court sentenced Li to serve 70 months' incarceration. He also will forfeit \$3.5 million in proceeds from his criminal activity, as well as several Asian artifacts.

— In 2010, Michael Slattery traveled from England to Texas to acquire black rhinoceros horns. Slattery and others used a day laborer with a Texas driver's license as a straw buyer to purchase two horns from an auction house in Austin. Slattery and his co-conspirators then traveled to New York where they presented a fraudulent Endangered Species Act bill of sale and sold those two horns, and two others, for \$50,000. Slattery pleaded guilty to conspiracy to violate the Lacey Act. On January 10, 2014, the court

sentenced him to serve 14 months' incarceration, pay a \$10,000 fine, and forfeit \$50,000 of proceeds from his illegal trade in rhinoceros horns.

### **Protecting Fisheries**

— Charles Wertz was a Long Island, New York, fisherman who fished for fluke from a federally licensed fishing vessel, the F/V Norseman, which he operated with his father. Wertz's father, a fish dealer and the holder of a federal fisheries dealer permit, owned and operated C&C Ocean Fishery Ltd. Charles Wertz also worked as a company employee.

The National Oceanic and Atmospheric Administration's regulations require federally licensed vessels like the Norseman to file Fishing Vessel Trip Reports with the federal government. The first person or entity to purchase fish from a federally licensed fishing vessel, such as C&C Ocean Fishery, is called a fish dealer. Regulations require that fish dealers submit Fishing Vessel Trip Reports setting forth the type and amount of fish that they purchase. This information is used by the agency in its ongoing effort to manage annual harvests to ensure that America's fisheries remain healthy and sustainable. Incorrect or missing data skews statistical catch models and can have a detrimental effect on the livelihood of the fishing community by disrupting the figures used in allocating fishing quotas.

Between May 2009 and December 2011, Wertz and C&C Ocean Fishery overharvested approximately 86,000 pounds of fluke with an estimated value of almost \$200,000. In an effort to conceal their activities, they submitted falsified documentation to the National Oceanic and Atmospheric Administration. Wertz and C&C Ocean Fishery pleaded guilty to wire fraud and falsification of records. On November 22, 2013, the court sentenced Wertz to serve one year and a day of incarceration, to pay a \$5,000 fine and \$99,800 in restitution, and to perform 100 hours of community service. The court sentenced the company to pay a \$275,000 fine and held it jointly and severally liable for the restitution. The court also ordered the defendants to relinquish their federal fishing permits, to divest themselves of any interest in the F/V Norseman, and to dissolve the company.

— On June 26, 2014, David Braley and John Whitworth were sentenced for their involvement in the illegal harvesting of Gulf reef fish along the Alabama and northern Florida Gulf Coasts in 2012 and 2013. The court sentenced Braley to serve a total of 63 months' incarceration: 30 months for a violation of the Lacey Act and a 63-month concurrent sentence for retaliation against a witness who had provided information in connection with the case (Braley had threatened physical violence against the witness through Facebook postings). The court further ordered Braley to pay \$3,700 in restitution to the owner of the vessel he used to illegally catch and sell the fish and \$319 to the National Marine Fisheries Service (which is three percent of the \$10,660 market value of his documented illegal catch). The court sentenced Whitworth to complete a three-year term of probation and pay \$14,050 in restitution. In addition, a total of eight defendants pleaded guilty to Lacey Act violations in connection with this illegal fishing scheme. James Martin, who participated in the criminal activities with Braley and Whitworth, had earlier been sentenced to serve five months' incarceration, followed by five months' home confinement, as a special condition of three years' supervised release.

### **Safeguarding Protected Species**

— Robroy MacInnes and Robert Keszey co-owned a well-known reptile dealership, Glades Herp Farm Inc., based in Florida. Keszey formerly hosted the Discovery Channel show "Swamp Brothers." From 2006 through 2008, the men collected protected snakes from the wild in Pennsylvania and New Jersey, purchased protected eastern timber rattlesnakes (which had been unlawfully collected from the wild in violation of New York law), and transported threatened eastern indigo snakes and eastern timber rattlesnakes between Florida and Pennsylvania.



*Eastern Timber Rattlesnake, Wikipedia photo*

The two men were charged with Lacey Act violations and conspiracy. In November 2013, MacInnes and Keszey were tried and found guilty of conspiracy to traffic in protected reptiles. MacInnes also was convicted of trafficking in protected timber rattlesnakes in violation of the Lacey Act. The evidence at trial showed that the snakes were destined for sale at reptile shows in Europe, where a single timber rattlesnake can sell for \$800. Snakes that were not sold in Europe were sold through the defendants' business in the United States. The eastern indigos were intended for domestic sale, where a single snake may fetch \$1,000. In addition to trafficking in illegal animals, the two men attempted to persuade a witness not to provide the government with information regarding their illegal dealings. On December 5, 2014, the court sentenced MacInnes to serve 18 months' incarceration and to pay a \$4,000 fine. It sentenced Keszey to serve 12 months' incarceration and to pay a \$2,000 fine.

— Christopher Loncarich outfitted and guided hunts for mountain lions and bobcats in the Book Cliffs Mountains, which span the Colorado-Utah border. The hunting season for these cats runs from November to March, when snow is likely to be on the ground. Typically, dogs are used to



*Mountain Lion, Wikipedia photo*

discover a cat's tracks in the snow. They follow the cat until they corner it, enabling the hunter to kill it. Between 2007 and 2010, Loncarich and his assistant guides trapped the cats in cages prior to hunts and released them when the client was nearby. They resorted to shooting the cats in the paws or legs or placing leghold traps on them to keep the cats from moving. Despite knowing that many of these hunters did not have proper tags or licenses to take the animals in Utah, the defendants helped them bring the cats back to Colorado and provided false seals for the hides. Loncarich sold mountain lion hunts for between \$3,500 and \$7,500 and bobcat hunts for between \$700 and \$1,500.

Loncarich pleaded guilty to a Lacey Act conspiracy charge for illegally capturing and maiming mountain lions and bobcats. On November 20, 2014, the court sentenced him to serve 27 months' incarceration. It also banned him from hunting or trapping any wildlife for three years following his release.

— Andrew Zaruskas purchased approximately 33 narwhal tusks over nearly six years from two Canadian co-defendants. The co-defendants purchased the narwhal tusks in Canada and brought them into the United States illegally by concealing them under their truck or under a utility trailer. Narwhals are listed as "threatened" under the Endangered Species Act and are covered by the international Convention on International Trade in Endangered Species of Wild Flora and Fauna. It is illegal to import parts of a narwhal into the United States without a permit and without declaring the parts at the time of importation to U.S. Customs and Border Protection and the U.S. Fish and Wildlife Service.

On February 14, 2014, a federal jury in Bangor, Maine, convicted Andrew Zaruskas for conspiracy, smuggling violations for buying and illegally importing narwhal tusks into the United States, and money laundering violations associated with the illegal importations. The market value of the teeth and tusks illegally imported by Zaruskas was between \$120,000 and \$200,000. The court sentenced Zaruskas to serve 33 months in prison and ordered him to forfeit \$85,089, six narwhal tusks, and one narwhal skull. In addition, the court ordered Zaruskas to pay a fine of \$7,500.

### **Protecting Migratory Birds**

— On November 22, 2013, Duke Energy Renewables, Inc., was sentenced after pleading guilty to violating the Migratory Bird Treaty Act in connection with the deaths of protected birds, including golden eagles, at two of the company's wind projects in Wyoming. The company will pay fines, restitution, and community service payments totaling \$1 million, complete a five-year term of probation, and spend an additional \$600,000 each year during probation to implement and support an environmental compliance plan aimed at preventing bird deaths at the company's four commercial wind projects. The company also will be required to apply

for an eagle take permit from the U.S. Fish and Wildlife Service, which, if granted, will provide a framework for minimizing and mitigating the deaths of golden eagles at the wind projects.

The charges stem from the deaths of 14 golden eagles and 149 other protected birds, including hawks, blackbirds, larks, wrens, and sparrows, at two of the company's Wyoming wind project locations between 2009 and 2013. These two projects are comprised of 176 large wind turbines that sit on private agricultural land. Duke Energy failed to take all reasonable efforts to build the projects in a manner that would avoid the risk of



*Golden Eagle, Wikipedia photo*

avian deaths by collision with turbine blades, despite repeated warnings from officials. A \$400,000 fine will be directed to the North American Wetlands Conservation Fund. The company also will pay \$100,000 in restitution to the State of Wyoming, and make a \$160,000 community service payment to the National Fish and Wildlife Foundation. The community service payments will fund projects aimed at preserving golden eagles and increasing the understanding of ways to minimize and monitor interactions between eagles and commercial wind power facilities, as well as enhancing eagle rehabilitation and conservation efforts in Wyoming. The company also will contribute \$340,000 to a conservation fund for the purchase of land, or conservation easements on land, in Wyoming containing high-use golden eagle habitat, which will be preserved and managed for the benefit of that species.

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# PROTECTING VITAL FEDERAL PROGRAMS AND INTERESTS

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The Division defends client agencies' regulations, rules, and decisions to allow these agencies to fulfill their missions under the nation's environmental and natural resources laws, thereby preserving vital federal programs and interests and protecting the public fisc. The Division also responds to congressional and public inquiries, reviews federal agency rulemakings, 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 a stake in the outcome.

## Protecting and Promoting the Development of Transportation Infrastructure

— In *Honolulu Traffic.com v. Federal Transit Administration* (D. Haw.), ENRD successfully defended the efforts of the City of Honolulu, its transit agency, and the U.S. Department of Transportation against a challenge intended to halt the City of Honolulu's proposed rapid rail project. The project was designed to link the western part of O`ahu with downtown Honolulu. The district court had earlier identified limited areas in which the agencies' environmental analysis needed improvement. ENRD defeated the plaintiffs' arguments that the agencies had not properly complied with the district court's earlier decision. The district court therefore lifted its limited injunction against some of the project activities and allowed the project to go forward unimpeded. The plaintiffs have abandoned further legal challenges. The project will provide substantial transportation benefits to disadvantaged minority communities seeking easier access to downtown Honolulu.

— In *Detroit International Bridge Co. v. U. S. Coast Guard* (D.D.C.), the Division successfully defeated a motion for preliminary injunction and obtained dismissal of one of the plaintiffs' central claims in this long-running dispute. The plaintiffs own the existing international bridge between Detroit, Michigan, and Windsor, Ontario, a key border crossing carrying nearly 25 percent of all commerce between Canada and the United States. The plaintiffs are seeking to add a new span to their existing bridge, and sought a navigation permit from the U.S. Coast Guard. 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



*Skyline Drive, Virginia, Wikipedia photo*



*Flight 93 Memorial PA, NPS photo*

region. The Coast Guard determined that the plaintiffs had failed to satisfy the regulatory requirements for a navigation permit for their new span.

The plaintiffs brought this suit to challenge the Coast Guard's interpretation of its regulations with respect to the plaintiffs' navigation permit and to challenge the State Department's and U.S. Department of Transportation's approvals of the New International Trade Crossing. The plaintiffs sought a preliminary injunction to prevent the Coast Guard from issuing a navigation permit for the New International Trade Crossing as well. The Division defeated the preliminary injunction motion, allowing the Coast Guard to issue the navigation permit for the new international bridge. In addition, the court upheld the Coast Guard's interpretation of its regulation as applied to the plaintiffs' application for a navigation permit, and dismissed that claim. The Division is continuing to vigorously defend the remaining claims in the litigation.

— In *Citizens for Appropriate Rural Roads v. Foxx* (S.D. Ind.), the Division and the United States Attorney's Office for the Southern District of Indiana worked closely with counsel for the Indiana Department of Transportation to defend the construction of Interstate-69 (I-69) between Indianapolis and Evansville, Indiana. The plaintiffs challenged construction of this part of I-69 under the National Environmental Policy Act (NEPA), the Endangered



*I-69 just outside Indianapolis, wikipedia photo*

Species Act, the Clean Air Act, Section 4(f) of the Department of Transportation Act, which requires highways to avoid historic sites if feasible, and transportation planning regulations. Congress proposed I-69 as a North American Free Trade Agreement road between Canada and Mexico. The 142-mile stretch of the highway approved by the U.S. Department of Transportation is the longest new-terrain, federal interstate since Congress passed NEPA in 1969.

In March 2014, the court granted summary judgment in favor of the agencies. The project will shorten travel time by twenty-seven minutes between Indianapolis and Evansville; save over \$1.1 billion in driver time and vehicle operating costs; save truckers 4,500 hours per day; prevent 40,000 crash-related injuries over 20 years; create 4,600 permanent jobs; and provide 37,000 people thirty-minute access to major urban areas, medical facilities, educational institutions, and job opportunities. Among other efforts to decrease impacts from the highway project on the endangered Indiana bat, the Indiana Department of Transportation bought the third- and fourth-largest hibernacula from private owners to ensure their protection in the future.

— In *515/555 Flower Associates, LLC v. Federal Transit Administration*; *Today's IV, Inc. v. Federal Transit Administration*; *Japanese Village LLC v. Federal Transit Administration* (C.D. Cal.), the Division worked closely with the Los Angeles County Metropolitan Transpor-

tation Authority to defend the Regional Connector project. That 1.9-mile, underground light rail will connect the spokes of the current Metro Gold Line, Blue Line, and Exposition Line in the historic core of downtown Los Angeles. It will allow one-seat rides twenty-five miles east-to-west and fifty miles north-to-south across Los Angeles. In May 2014, the Division largely prevailed on cross-motions for summary judgment and obtained a remedy that allowed construction to proceed.

## Defending Public Works Projects

— In *Florida Wildlife Federation v. U.S. Army Corps of Engineers* (N.D. Fla.), the Division defeated a challenge to the U.S. Army Corps of Engineers' operation of water control structures affecting the flow of water from Lake Okeechobee to the Caloosahatchee River. The district court found that the Corps' actions were "to maintain navigation" and thus that the federal government's sovereign immunity barred the suit.

— In *City of Rock Island & Village of Milan, Illinois v. United States* (C.D. Ill.), municipalities filed a lawsuit under the Clean Water Act and Safe Drinking Water Act challenging the U.S. Army Corps of Engineers' alleged failure to maintain the Mill Creek, South Slough Flood Control Project in Rock Island County, Illinois. In September 2014, the court issued a decision granting our motion to dismiss the complaint for lack of standing under Article III of the United States Constitution. Specifically, the court found that the municipalities' allegations of injury-in-fact were not sufficiently concrete or imminent, nor caused by the Corps, because an attenuated chain of several contingencies beyond the Corps' control would need to take place before the alleged harms occur.

## Acquiring Property for Public Purposes

To ensure justice under the Fifth Amendment, ENRD works to see that all landowners receive just compensation and that taxpayers pay no more than market value when federal agencies acquire private property for public use. Whenever possible, ENRD works with federal agencies to resolve matters without having to resort to condemnation.

— ENRD exercised the power of eminent domain to acquire land outside Shanksville, Pennsylvania, where United Airlines Flight 93 crashed on September 11, 2001. The land was acquired to construct the Flight 93 National Memorial to honor the victims of this national tragedy. The case, *United States v. 275.81 Acres of Land in Stonycreek Township* (W.D. Pa.), was filed on behalf of the U.S. Department of the Interior's National Park Service after the owner of the site refused purchase offers from the federal government and the nonprofit organization Families of Flight 93. The landowner initially demanded \$30,895,000, then sought \$25,000,000 in the week-long trial during the government sequester and shutdown at the beginning of the fiscal year. With stellar motions practice, discovery, and trial work, the trial team won a final award of \$1,535,000, which was adopted by the district court on March 26, 2014. Judgment was entered on June 10, 2014.

With this success, ENRD enabled the U.S. Department of the Interior to preserve property needed for a memorial in tribute to victims of terrorist attacks on September 11, 2001, and ensured the amount paid for the land was just, not only to the former landowner, but also to the taxpayers who must bear the cost. The trial team attended the thirteenth anniversary

observance of September 11, 2001, as the invited guests of the Friends of the Flight 93 National Memorial, in partnership with the Families of Flight 93 and the National Park Service. As a result of their tremendous effort and success, the trial team was awarded one of the Department's highest honors, the John Marshall Award for Trial of Litigation.

— The Division also resolved multiple condemnations in the United States District Court for the Eastern District of Washington filed on behalf of the Department of Energy's Bonneville Power Administration for construction of the Big Eddy-Knight Transmission Line in rural Klickitat County, Washington. Originally filed in late 2012, these dozen cases acquired narrow strip easements of 5 to 35 acres across non-irrigated farmland. Some parent tracts also included ranching and residential uses. This year, ENRD persuaded the district court to appoint a land commission to determine just compensation in all cases and ensure fair and transparent due process, uniform treatment of all affected landowners, and efficient and consistent resolution of all claims. The appointment of a commission and its assurance of consistent awards contributed to the resolution of several cases, as ENRD and the landowners developed a settlement framework that awarded similar compensation for similarly situated properties. ENRD successfully settled 8 cases this fiscal year (three more cases were settled at the beginning of fiscal year 2015, leaving just one case for trial in 2015). These settlements provided closure to the affected landowners while saving hundreds of thousands of dollars for the public fisc.

— Jointly with the U.S. Attorney's Office in Miami, ENRD successfully settled *United States v. 137,779 Rentable Square Feet with 636 Parking Spaces in Miami, Florida, and G.K.K., a Florida General Partnership, et al.* (S.D. Fla.), a condemnation stemming from a multimillion-dollar dispute over the Federal Bureau of Investigation's (FBI) lease of its Miami field office. The General Services Administration had leased a custom-built building for FBI use since 1986, but was unable to extend the lease after June 2010. The building owner sought a new long-term lease, while the General Services Administration required a short-term lease as it planned to move the FBI to a new, federally owned complex in late 2014.

Settling the lawsuit allowed the FBI to stay in the old building until the new federal facility was ready for use, while saving \$3.1 million. The settlement also provided the General Services Administration with flexibility to holdover for up to 9 months, if needed. After the close of this fiscal year, the FBI moved to its new field office in December 2014 as planned.

— In fiscal year 2014, ENRD's valuation and litigation advice assisted the General Services Administration in resolving at least 4 other potential complex, expensive leasehold cases with valuations in dispute that were conservatively measured at approximately \$80 million. These efforts saved resources and better served the interests of both client agencies and landowners.

## Protecting United States' Property Interests

Last year, we continued our ongoing litigation efforts to defend the United States against claims seeking to quiet title to alleged rights-of-way for public highways on federal lands in the State of Utah. These cases present a significant threat of interference with federal land managers' efforts to manage lands for wilderness and other purposes.

— In past litigation, *Southern Utah Wilderness Alliance v. National Park Service* (D. Utah), the Division successfully defended the National Park Service's decision to prohibit four-wheel-drive vehicles on 8.5 miles of Salt Creek Road in the backcountry of Canyonlands National Park in

Utah. Subsequently, in *San Juan County v. United States* (D. Utah), San Juan County and the State of Utah filed suit seeking to quiet title to a putative right-of-way for a “public highway” on Salt Creek Road under Revised Statute 2477 (R.S. 2477).



*Canyonlands National Park Utah,, NPS photo*

Last year, the Tenth Circuit issued an opinion affirming a favorable decision by the district court. The court rejected the County’s and State’s argument that they can carry their burden to show “continuous use as a public thoroughfare” by merely showing use uninterrupted by any overt act, rather than establishing any particular frequency of use during the required ten-year period. Instead, the court reaffirmed a line of earlier decisions that found that intermittent or occasional use, or use for “proprietary interests,” by hunters, fishermen, shepherds, farmers, or miners, or even regular use for cattle grazing primarily by a single user, is insufficient to establish a right-of-way. The Tenth Circuit also found that the district court appropriately considered the lack of evidence of any discernible road during the 10-year period as probative of whether a public thoroughfare existed.

— In *Kane County & the State of Utah v. United States* (D. Utah), Kane County sought quiet title to 15 alleged R.S. 2477 rights-of-way on public land managed by the Bureau of Land Management. The State of Utah intervened. The district court found that Kane County had proved that it owned rights-of-way on 12 of the 15 roads at issue. Last year, the Tenth Circuit Court of Appeals issued a largely favorable published decision, affirming in part, reversing in part, and remanding the district court decision.

The Tenth Circuit, for example, agreed with our contention that for several of the roads, the plaintiffs had failed to establish jurisdiction under the Quiet Title Act by demonstrating the existence of a “disputed title to real property in which the United States claims an interest.” The court rejected the plaintiffs’ contention that they need only show a “cloud on title.” Rather, “a plaintiff must show that the United States has either expressly disputed title or taken action that implicitly disputes it.” Reversing the district court, the court of appeals found, among other things, that jurisdiction was not established by certain management plan maps that were merely ambiguous as to the status of the roads.

The court of appeals also agreed with our argument that the district court erred in adjudicating the scope of several rights-of-way by setting widths. The district court determined that particular widths were “reasonable and necessary” to accommodate activities not established as pre-1976 uses or potential future road improvements or realignments. These scope determinations were remanded to the district court.

The Tenth Circuit's decision was not completely favorable. For example, on a jurisdictional issue raised by amici over the United States' objection, the court of appeals ruled that the issuance of a Wilderness Study Area designation for an area encompassing several of the roads did not suffice to trigger the statute of limitations under the Quiet Title Act. The court reasoned that the designation did not assert exclusive federal control over the area and that R.S. 2477 rights-of-way can "peaceably coexist" with the rights of the Bureau of Land Management in a Wilderness Study Area. However, on balance, this Tenth Circuit decision is expected to be very helpful in our ongoing litigation of over 12,000 right-of-way claims on federal land in Utah filed by Utah counties and the State in 2011 and 2012.

## Protecting the Public Fisc

— In *Stueve Brothers Farms v. United States*, the Federal Circuit Court of Appeals held that plaintiff Stueve Brothers failed to state a proper claim for relief in alleging a physical taking of its property. The court ruled that a complaint that alleged no present physical invasion, but only sought just compensation for a future burden that might be imposed by an almost-completed federal floodway expansion was insufficient to state a claim. The court relied on two Supreme Court cases from 1939 (*United States v. Sponenbarger and Danforth v. United States*), which held that apprehension of flooding from a federal project does not constitute a Fifth Amendment taking. The Federal Circuit confirmed that flooding "actually experienced" is a prerequisite to the type of physical takings claim the plaintiff proposed. The court also ruled that neither the United States' alleged delay in acquiring flowage easements over the portion of the plaintiff's property that may be burdened by future flooding, nor the United States' alleged cooperation with California municipalities to rezone that same portion of the plaintiffs' property, stated viable claims for "de facto," "constructive" or "hybrid" takings.

— New York City's High Line is a public park built on an historic freight rail line elevated above the streets on Manhattan's West Side. In *West Chelsea Buildings v. United States*, the Federal Circuit rejected claims by landowners who owned property adjacent to and underneath the High Line that the United States had unconstitutionally deprived them of their development rights when it authorized the conversion of the freight line from rail to public trail use under the Rails-to-Trails Act. Prior to the conversion, however, the City of New York, as part of an agreement with the railroad and property owners, passed a rezoning amendment for the area surrounding the High Line and designated it a "Special District." This enabled the plaintiffs to transfer development rights from the High Line corridor to other areas within the Special District. The City required owners who transferred their development rights, including the plaintiffs, to sign a covenant not to sue agreements with the City, in which the plaintiffs "agree[d] not to sue . . . the City or the United States."

Six years after receiving valuable development rights in exchange for a promise not to seek compensation from the United States, the plaintiffs filed a suit seeking compensation from the United States. The Court of Federal Claims found that the claims were barred by the agreement and that under New York law, the United States was an intended third-party beneficiary entitled to invoke the covenant not to sue as a defense to plaintiffs' suit. The Supreme Court later denied the plaintiffs' petition asking the Supreme Court to review the Federal Circuit decision affirming the Court of Federal Claims.



NYC High Line Park, Wikipedia photo

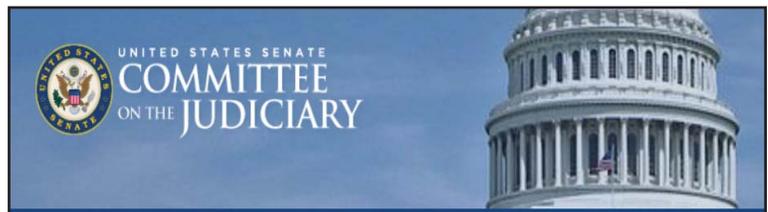
## Responding to Congressional Proposals for Environmental and Natural Resources Legislation and Related Matters

The Division responds to a variety of legislative proposals and congressional requests, prepares Division witnesses to prepare before congressional committees, and drafts legislative proposals, including proposals implementing settlements of litigation handled by the Division. In fiscal year 2014, we

continued our important work in these areas, including by providing assistance in connection with the Department’s preparations for Assistant Attorney General John Cruden’s nomination hearing before the Senate Judiciary Committee in February 2014.

## 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 2014, the Division completed the processing of almost a hundred responses to outstanding requests, and ended the year with only two backlogged requests and zero backlogged consultations. We closed 9 of the 10 oldest pending requests from fiscal year 2013, as well as the sole outstanding request for consultation from another federal agency as to how it should respond to a FOIA request.



COTJ photo

The Division continues to explore the use of new technology to expedite FOIA processing, increase proactive disclosures, and reach out to requesters to ensure efficient processing of their requests. ENRD also has worked to increase FOIA training opportunities for ENRD. In late October, we engaged the Department’s Office of Information Policy to provide ENRD’s FOIA staff with additional guidance. In January, we led a general training and discussion for FOIA contacts across the Division.

## Reviewing Administrative Rulemakings

The Division also serves as part of the Department’s interagency review team for federal rulemakings. The Division reviewed a substantial number of rules in fiscal year 2014.

## Enforcing Environmental Law through International Capacity Building and Other Activities

The Division actively implements a wide-ranging program of international activities, frequently in collaboration with partners from other federal agencies. The Division's international activities advance the goal of protecting and promoting effective environmental enforcement and support important Administration and Department objectives:

- We successfully prosecute transnational environmental and natural resources crimes that involve foreign evidence or foreign assistance, or that rely on the violation of underlying foreign statutes.
- We provide critical training for law enforcement partners in other countries to ensure that they may work effectively with us in investigating and prosecuting transnational environmental crimes.
- We participate in the development and implementation of trade and investment agreements, treaties, international environmental agreements, and domestic implementing legislation in order to ensure that they protect and promote effective environmental enforcement.
- We also help to develop and facilitate international partnerships and networks that promote effective prosecution of transnational environmental crimes.

In carrying out these objectives in fiscal year 2014, ENRD attorneys implemented capacity building workshops and spoke at conferences and meetings in Belgium, Brazil, China, Costa Rica, Ecuador, Germany, Kenya, Mexico, Netherlands, Oman, Panama, Peru, Philippines, Russia, Senegal, Ukraine, and the United Kingdom. ENRD also participated in trade negotiations, conferences, and meetings in Washington, D.C., with officials representing governments and non-governmental organizations from several other countries.

Division attorneys spoke at and participated in a number of conferences and meetings to promote the Administration's effort to combat wildlife trafficking. The Chief of the Law and Policy Section was a member of the United States delegation to the Strategic and Economic Dialogue with China and participated in a meeting with Chinese officials to discuss responses to illegal trade in wildlife products. A Division attorney participated in a meeting in London sponsored by the Prince of Wales International Sustainability Unit to discuss money laundering in connection with wildlife trafficking. Another attorney spoke about the Lacey Act at an environmental adjudication workshop for Central American judges in Panama and at a meeting of the Central America Wildlife Enforcement Network in Costa Rica. And ENRD hosted a delegation of officials from 13 sub-Saharan African countries and discussed the Division's work prosecuting wildlife trafficking cases.

ENRD also continued speaking to domestic and international audiences about the Lacey Act's provisions prohibiting trade in illegally harvested timber and providing training on prosecuting illegal logging cases. ENRD attorneys spoke to law enforcement officials in Russia, Peru, Brazil, and Senegal about the Lacey Act and prosecution of cases involving trafficking in illegal wood products. The Division also implemented two training workshops for Brazilian prosecutors on investigating and prosecuting illegal logging cases and spoke about the Lacey Act at meetings

in Mexico and Ecuador for trade, government, and nongovernmental organization representatives. The Division also participated in meetings with authorities



FWS photo

from European Union countries implementing their own legislation prohibiting trade in illegal wood products to discuss enforcement strategies. And a Division attorney participated in the United States delegation to two meetings of the Asia Pacific Economic Cooperation Experts Group on Illegal Logging and Associated Trade in Qingdao and Beijing, China.

ENRD participates in negotiations, led by the Office of the U.S. Trade Representative, of the environment chapter of the Trans-Pacific Partnership Trade Agreement with 11 countries in Asia and the Americas, and the Transatlantic Trade and Investment Partnership Agreement with the European Union. The United States is seeking to incorporate conservation provisions into these trade agreements to deter trafficking in illegally taken flora and fauna. The Division also took part in the first meetings of the U.S.-Colombia Environmental Affairs Council and Environmental Cooperation Commission under the free trade agreement with Colombia. And a Division attorney participated in the United States delegation to a bilateral forum in Muscat, Oman, under the U.S.-Oman Free Trade Agreement.

An ENRD attorney provided training at an environmental crimes seminar at the European Academy of Law in Trier, Germany. Division attorneys also continued to be actively involved in the INTERPOL Wildlife Crime, Fisheries Crime, Timber Crime, and Pollution Crime Working Groups, participating in meetings of those groups in Nairobi, Kenya. And then-Acting Assistant Attorney General Bob Dreher delivered videotaped remarks to the Second Asian Judges Symposium on the Environment hosted by the Asian Development Bank in Manila, Philippines.

## 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. Our amicus briefs primarily serve to provide information and viewpoints that may be helpful to the judges tasked with resolving cases, including by explaining how the resolution of particular legal questions could impact important federal programs. By providing such information and viewpoints, the amicus briefs also serve to protect the interests of the United States.

— For example, ENRD filed amicus briefs in two cases concerning the application of the Clean Water Act section 402(k) “permit shield” defense. In the first case, *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, the Ninth Circuit considered a district court’s finding that the owners and operators of a coal loading facility in Seward, Alaska, were not liable for non-stormwater discharges of coal into Resurrection Bay. The district court found that the owners and operators qualified for the permit shield defense by virtue of their coverage under an

EPA general permit for stormwater discharges from industrial facilities. Applying the leading case of *Piney Run Preservation Association v. County Commissioners of Carroll County* (4th Cir.), the district court found that the discharges in question (although non-stormwater) were not expressly prohibited by the general permit, had been adequately disclosed to EPA, and were also reasonably anticipated by EPA to occur.

ENRD filed a brief in the Ninth Circuit as amicus curiae arguing that the discharges were prohibited by the terms of the general permit and that, even if they were not, the district court misapplied the permit shield test from Piney Run. In September 2014, the panel unanimously held that “[t]he plain terms of the General Permit prohibit defendants’ non-stormwater discharge of coal.” The panel did not reach the Piney Run permit shield issue.

— In the second case, *Southern Appalachian Mountain Stewards v. A & G Coal Corp.*, the Fourth Circuit requested an amicus brief from the United States in an appeal of a district court order finding that the defendant could not invoke the permit shield defense. The district court reached this conclusion because the defendant’s discharges of selenium were not within the scope of its individual Clean Water Act permit (issued by Virginia) and had not been disclosed to the permitting authority. ENRD filed a brief arguing that the permit shield defense did not apply. In July 2014, the Fourth Circuit agreed that the applicable permitting procedures required the applicant to test for selenium in its discharges and provide data on selenium discharges to Virginia, and that A&G Coal had not done so. Applying its previous Piney Run decision, the Fourth Circuit concluded that, as the permit shield defense only encompassed those pollutants disclosed to the regulator and A&G Coal disclosed no selenium-related information, the defense was inapplicable.

### **Reviewing Citizen Suit Complaints and Settlements**

The Division also conducts the Department’s review of citizen suit complaints and consent judgments under the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery 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. When served with complaints, ENRD offers assistance to counsel for the parties. The Division also reviews consent judgments to ensure that they comply with the requirements of the relevant statute and are consistent with the statute’s purposes.

— An example of the citizen suit settlements that we reviewed is the consent decree entered in *Waste Action Project v. Draper Valley Holdings, LLC* in July 2014. A nonprofit organization filed this citizen suit in the United States District Court for the Western District of Washington against the owner of a poultry processing facility to address alleged violations of the Clean Water Act. The settlement, among other things, required the company to pay an outside professional to conduct a training program for the operators of the company’s wastewater treatment devices. The settlement also required the company to pay \$400,000 for supplemental environmental projects designed to improve water quality in the Lower Skagit River watershed. Per our request, the recipient of funds for these projects agreed to report to us, the court, and the parties regarding how funds are spent.

# PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

The Division makes a significant contribution to national security while ensuring robust compliance with the country's environmental and natural resources laws. Increasingly, ENRD is responsible for defending a variety of agency actions that support the security of the United States. The Division promotes safe disposal of nuclear waste and obsolete chemical weapons. It also defends against challenges to critical training programs that ensure military preparedness. In addition, the Division exercises the federal government's power of eminent domain to acquire the lands needed to fulfill critical military and homeland security functions. We also defend challenges to important renewable energy programs.

## Supporting the Protection of U.S. Food and Animal Agriculture

ENRD exercises the Attorney General's responsibility to oversee review of title for every voluntary acquisition of property by the federal government before public money is spent. The Division resolved 43 title matters this year, ensuring the federal government acquired good and marketable title from the rightful owners.

— In a complex matter for the Department of Homeland Security, the Division issued a final title opinion this year confirming the acquisition of land and easements for construction of the new National Bio and Agro-Defense Facility in Manhattan, Kansas. This high-security, state-of-the-art biocontainment facility will be used for the study of foreign animal, emerging, and zoonotic diseases (contagious diseases spread by animals to humans, such as foot-and-mouth disease, Hendra virus, and Nipah virus). The Bio-Safety Level-4 facility will replace the aging Level-3 Plum Island Animal Disease Center in New York and expand the United States' capability to research and develop vaccines and treatments for disease outbreaks.



*NBAF construction site, Wikipedia photo*



*Combat Raiding Craft from the well deck of the USS Bonhomme Richard, USMC photo*



*C-5M Super Galaxy arrives at Dover Air Force Base, Del, Wikipedia photo*

— Also this year, ENRD received 13 new title matters related to direct acquisitions worth more than \$6 million and donated lands worth tens of millions of dollars.

## Supporting the Strategic Border Initiative and Securing the Nation's Borders

ENRD continues to litigate land acquisition cases to secure the nation's borders on behalf of U.S. Customs and Border Protection, as part of the expansive southwest border fence project.

— Major cases this year included condemnation of three parcels owned by the State of California. Discovery and expert efforts focused on one lead case for which the United States' appraiser valued the land at \$2.44 million, while California's expert real estate appraiser valued the property interest taken at over \$15 million. The second and third cases had amounts in dispute approaching \$2 million. The Division successfully settled all claims in these three actions for \$5.95 million. This settlement is extremely favorable to the United States for several reasons, including because it provides the client agency with budgetary finality and flexibility to acquire additional infrastructure to secure the border.

## Promoting National Security and Military Readiness

— Since 2007, we have defended three lawsuits challenging the Navy's efforts to modernize its facilities at the "Broadway Complex" on the waterfront in downtown San Diego, California. Last year, we successfully defended the latest in this series of lawsuits, *California Coastal Commission v. Department of the Navy* (S.D. Cal.), in which a California state agency alleged that the Navy's failure to complete a "supplemental consistency determination" for the Broadway Complex violated the Coastal Zone Management Act. The district court granted



*SURTASS, Wikipedia photo*

our motion for summary judgment. Ruling that "[n]ew circumstances are not significant for [Coastal Zone Management Act] purposes unless they cause adverse environmental consequences to coastal uses or resources," the court found that none of the alleged changes to the project or changes in the downtown area were sufficiently substantial to require a supplemental consistency determination.

— In *Natural Resources Defense Council v. Blank* (N.D. Cal.), the plaintiffs filed suit alleging that the National Marine Fisheries Service and the Navy violated the National

Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act by authorizing the deployment of an antisubmarine surveillance system known as the Surveillance Towed Array Sensor System Low Frequency Active. The plaintiffs alleged that deployment of the antisubmarine surveillance system, particularly during concentrated training exercises, harms thousands of marine mammals, including endangered and threatened species.

The surveillance system is critical to the Navy’s long-range submarine detection capabilities, as it provides United States forces with time to react to and defend against potential undersea threats. At the conclusion of this litigation, ENRD prevented the entry of any injunction and was successful in disposing of the overwhelming majority of the case. The one small area in which we were unsuccessful was easily rectified by the Navy without interrupting their training exercises.

## Defending the United States’ Energy Agenda

The Division obtained favorable decisions in challenges to several energy projects this year, including renewables like wind and solar facilities, and oil and coal leases.

— Importantly, in *Western Lands Project v. Bureau of Land Management* (S.D. Cal.), ENRD defeated a challenge to the Bureau of Land Management’s decision to establish a comprehensive solar energy program in Arizona, California, Colorado, Nevada, New Mexico, and Utah. The Departments of the Interior and Energy prepared an environmental impact statement to evaluate on a programmatic scale the potential environmental impacts of utility-scale solar energy development on public lands in the six southwestern states. In a decision issued in June 2014, the district court held that the environmental impact statement fully complied with the requirements of the National Environmental Policy Act. Solar energy remains a key element of the nation’s renewable energy strategy.

— ENRD delivered similar success in a case involving an alternative energy project in *Defenders of Wildlife v. Jewell* (C.D. Cal.). In this case, the plaintiff challenged the Bureau of Land Management’s decision to grant a right-of-way to First Solar for the construction of two utility-scale solar projects on public lands located 40 miles south of Las Vegas along the California-Nevada border. The plaintiff moved for a temporary restraining order and preliminary injunction. Following briefing and a hearing, the court denied the plaintiff’s motion, allowing the solar project to move forward.



Location of Cape Wind in Massachusetts, Wikipedia photo

— This year, ENRD successfully defended against challenges to federal approval of the offshore Cape Wind Energy Facility in Nantucket Sound—the nation’s first offshore wind facility. In four separately filed cases in the United States District Court for the District of Columbia, the plaintiffs alleged substantive and procedural violations of multiple statutes. The district court issued an opinion granting summary judgment in favor of the United States on all but two claims. With respect to the two claims for which our defense was unsuccessful, we convinced the court to

remand the agency decision for further consideration without issuing an injunction. The cases are *Public Employees for Environmental Responsibility v. Beaudreau*; *Town of Barnstable v.*

*Salazar; Alliance to Protect Nantucket Sound v. Salazar; and Wampanoag Tribe of Gay Head v. Beaudreau.*

— In *Protect Our Communities v. U.S. Fish & Wildlife Service* (S.D. Cal.), and *Protect Our Communities v. Salazar* (S.D. Cal.), the plaintiffs challenged federal decisions and environmental analyses concerning the construction and operation of the Ocotillo Wind Energy Facility located in southern California. The plaintiffs alleged violations of the Endangered Species Act, Migratory Bird Treaty Act, and the National Environmental Policy Act. After briefing and argument, the court upheld the relevant federal decisions and analyses in all respects. The project has now been constructed and is online. The facility consists of 112 wind turbines and generates up to 315 megawatts of electricity.

— This year, in *Oceana v. Bureau of Ocean Energy Management* (D.D.C.), ENRD defeated a challenge to the first lease sale for oil and gas resources located in the Outer Continental Shelf in the Central Gulf of Mexico since the 2010 Deepwater Horizon oil spill. In rejecting the plaintiffs' challenges to Lease Sale 216/222, the district court found that the U.S. Department of the Interior's environmental analysis properly incorporated new data from the 2010 Deepwater Horizon oil spill, considered the potential environmental effects of deepwater drilling, and considered the potential impacts of a hypothetical future catastrophic spill. The court also found that, in dealing with unavailable information, the Department of the Interior had satisfied the requirements of applicable federal regulations by explaining the extent to which waiting to obtain the missing information would delay implementation of the proposed lease sale.

— ENRD successfully defended against emergency relief aimed at stopping or slowing the construction of two important oil pipelines, the Flanagan South Pipeline and the Gulf Coast Pipeline. In *Sierra Club v. Bostick* (D.D.C.), and *Sierra Club v. Bostick* (10th Cir.), the plaintiffs argued, among other things, that the U.S. Army Corps of Engineers had violated the Clean Water Act and National Environmental Policy Act when it approved numerous, but geographically limited, water crossings for the pipelines. Ultimately, ENRD obtained favorable rulings on the merits in both cases. The Gulf Coast Pipeline is now complete and operational. In the litigation concerning the Flanagan South Pipeline, the D.C. Circuit heard oral argument on April 9, 2015.

— The Powder River Basin—a large geologic feature located in northeastern Wyoming and southeastern Montana—contains the largest deposits of low-sulfur subbituminous coal in the world. This year, in *WildEarth Guardians v. Salazar* (D.D.C.), the Division defended a challenge to the Bureau of Land Management's decision to offer for leasing two tracts of public land in the Powder River Basin, the 1,579-acre "Belle Ayr North" tract and the 777-acre "Caballo West" tract. The United States District Court for the District of Columbia held that the environmental impact statement prepared by the agency adequately considered the potential effects of the agency's decision on climate change and ambient air quality. On appeal, the D.C. Circuit affirmed, and highlighted the fact that the Bureau of Land Management had quantified the greenhouse gas emissions that would occur as a result of coal mining on the land and from the future combustion of the mined coal. It also held that the Bureau of Land Management appropriately relied on an analysis of emissions of nitrogen oxides (which form ozone in the ambient air) from coal mining operations in evaluating the potential impacts of its decision on ambient air levels of ozone.





*A tribal dancer from the Omaha Tribe, Wikipedia photo*



*Flag of the United States Bureau of Indian Affairs, Wikimedia photo*

— In *Michigan v. Bay Mills Indian Community*, the Supreme Court issued a 5-4 decision rejecting an impassioned plea by the State of Michigan to severely circumscribe the scope of tribal sovereign immunity. In 1993, Michigan entered into a gaming compact with the Bay Mills Indian Community pursuant to the Indian Gaming Regulatory Act. The compact authorized Bay Mills to conduct casino-style gaming activities on “Indian lands” located within the State’s borders. Bay Mills later opened a casino on land it had purchased through a congressionally established land trust, claiming this property qualified as Indian lands under the statute. Disagreeing with that proposition, Michigan sued the tribe, asserting that a provision of the statute waived the tribe’s sovereign immunity and authorized injunctive suits of the sort Michigan had filed.



*Bay Mills Indian Community, Wikipedia photo*

The district court issued an injunction, but the Sixth Circuit reversed. The court of appeals held that while the provision of the Indian Gaming Regulatory Act upon which Michigan relied authorized suits to enjoin gaming activity on Indian lands, Michigan had asserted that the lands in question were not Indian lands. A majority of the Supreme Court affirmed, holding that the waiver of sovereign immunity in the statute, as with all sovereign immunity waivers, must be narrowly construed. It also declined to create new law by judicially removing the tribe’s immunity for off-reservation commercial activity. The majority reiterated that the decision of whether to remove such immunity was for Congress, not the courts, to make. The United States filed amicus briefs in the Supreme Court supporting the Bay Mills Indian Community’s position.

— In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart* (7th Cir.), the Tribe sued the Village of Hobart seeking a declaration that it was not liable for stormwater assessments imposed by the Village of Hobart on land held in trust by the United States for the Oneida Tribe of Indians of Wisconsin. The Village of Hobart filed an answer denying that the Oneida Tribe of Indians of Wisconsin was entitled to such relief. It also filed a third-party complaint arguing that the United States was liable for the assessments because the Clean Water Act requires federal agencies with jurisdiction over “any property” to comply with local requirements respecting the abatement and control of pollution, including by paying reasonable service charges.

The district court granted summary judgment in favor of the Oneida Tribe of Indians of Wisconsin, concluding that the assessments were impermissible taxes on trust land. It also granted the United States’ motion to dismiss the amended third-party complaint, agreeing with ENRD’s argument that the Clean Water Act did not require the United States to pay the assessments. In fiscal year 2014, the Seventh Circuit affirmed, concluding that the Clean Water Act did not authorize the Village of Hobart to impose stormwater assessments on property held in trust for an Indian tribe and that the United States likewise was not liable for the assessments.

The Supreme Court subsequently denied the Village of Hobart's request that it review the Seventh Circuit's decision.

— In *Cayuga Indian Nation v. Seneca County, New York* (2d Cir.), the Cayuga Indian Nation asked the district court to enjoin a forfeiture proceeding initiated by Seneca County after the Cayuga Indian Tribe refused to pay property taxes for land it purchased that was located within its former reservation and also Seneca County. Seneca County asserted that as a result of the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*, the Cayuga Indian Nation could not assert sovereign authority over the land in question, and the land should be subject to forfeiture. The district court disagreed and issued a preliminary injunction. Seneca County appealed.

The United States filed an amicus brief in the Second Circuit supporting the Cayuga Indian Nation. The Second Circuit found *City of Sherrill* distinguishable and, relying on the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community*, found no waiver of tribal sovereign immunity that authorized Seneca County's forfeiture proceeding against the Cayuga Indian Nation. The court therefore affirmed the district court's decision to impose a preliminary injunction.

## Defending Tribal and Federal Interests in Water Adjudications

In fiscal year 2014, the Division successfully concluded a major, longstanding water rights case, achieved favorable results in other water rights adjudications, intervened in litigation to secure important water rights for tribes, and filed numerous briefs in state and federal courts. Water rights adjudications are determinations of the water rights of all water users and are held in state courts.

A substantial part of ENRD's work in this area focuses on protecting federal reserved water rights, which are created when the United States sets aside an Indian reservation or otherwise reserves public land for a particular purpose. For example, when the United States sets aside an Indian reservation, it impliedly reserves sufficient water to fulfill the purposes of the reservation.

— In 2014, ENRD successfully resolved federal reserved water rights claims for the Navajo Nation in the San Juan River Basin in New Mexico. These water rights had been contested in litigation for decades. In *New Mexico ex rel. State Engineer v. United States*, the state adjudication court approved, over the objection of numerous non-settling parties, a historic settlement reached by the United States, the Navajo Nation, and New Mexico. Congress had ratified the settlement in 2009 through the Northwestern New Mexico Rural Water Projects Act, and the Secretary of the Interior had signed the settlement in 2010. The settlement ensures that potable water will be available to the Navajo Nation and its members in northwestern New Mexico.

— In addition, the Division has worked closely with the U.S. Department of the Interior and other federal agencies to draft and negotiate global settlements regarding the fish, water, and hydropower resources of the Klamath River Basin in Oregon and California. These efforts initially led to two far-reaching agreements that were signed on February 18, 2010. The Klamath Basin Restoration Agreement seeks to reduce the potential for future conflicts over water use and rights in various ways, including by addressing the relative proportions of water available to various stakeholders, improving fish habitat, and purchasing and retiring farmland in the basin, thereby reducing irrigation demands. The Klamath Hydropower Settlement

Agreement, in turn, provides a framework for the stakeholders to collaborate on environmental and economic studies assessing the potential for the removal of four PacifiCorp dams on the Klamath River. The United States decided in 2012 to remove the dams, targeting them for complete removal by 2020. The two agreements contemplate that removal would be funded by PacifiCorp ratepayers and the State of California.

However, a key group of irrigators in southern Oregon did not join the two agreements. ENRD



*The Upper Klamath Basin today, Wikipedia photo*

prevailed against these irrigators in a series of cases in 2010-2013. Following these victories, the State, the Klamath Tribes, and the irrigators entered into the Upper Klamath Basin Comprehensive Agreement. This agreement establishes the water rights of the Klamath Tribes and includes collaborative programs to address water use and protect riparian conditions, as well as an economic development program for the Klamath Tribes. The overall effect of the three agreements will be to reduce water use in the Klamath River Basin and to increase populations of threatened and endangered fish species.

— In *State of Washington v.*

*Acquavella*, ENRD secured a significant victory in connection with a dispute over how to determine the amount of practically irrigable acreage (a measure for quantifying surface water rights) for land of the Yakima Tribe in the Ahtanum Creek Subbasin of the Yakima River Basin. The State of Washington and the non-Indian claimants in the adjudication sought to have the United States recalculate the amount of practically irrigable acreage based on more recent farming practices, dam technologies, and economics, all of which could have put the water rights of the Yakima Tribe at risk. The adjudication court ordered that the existing practically irrigable acreage analysis be accepted and considered in full, limiting the evidence upon which the opposition can rely in the adjudication. As a result, the State of Washington dropped its claim.

— ENRD intervened on behalf of the Agua Caliente Band of Cahuilla Indians in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, an important case in which the most significant legal issue is whether federal reserved water rights extend to groundwater. In addition to seeking to confirm a federal reserved right to groundwater on behalf of the Agua Caliente Band of Cahuilla Indians, the Division seeks to quantify the tribe's water rights and to enjoin local water authorities from continuing to overdraft the relevant aquifer or interfere in any other way with those rights. During the fiscal year, ENRD focused on the following issues and matters: historical Congressional Acts and Executive Orders; the establishment of the reservation; the tribe's historical use of groundwater; federal and state case law supporting the tribe's right to groundwater; state groundwater legislation; and a water agency's argument that the reservation was disestablished (i.e., abolished) through a subsequent congressional act.

— In Montana, which has undertaken a statewide adjudication of all water rights, ENRD accomplished a comprehensive settlement addressing all non-Indian waters rights claims on the 1855 Blackfeet Reservation. In support of the settlement, the Division produced extensive historical evidence that a reservation existed in 1855, that the non-Indians knew of it and of the potential consequences of settling on land within its boundaries, and that they therefore could not claim water rights based on their unlawful use of the land.

— An Idaho state water adjudication court issued a final decree in the Snake River Basin Adjudication, bringing to a close three decades of litigation in which ENRD secured water rights for tribes on the Nez Perce, Duck Valley, and Fort Hall Indian Reservations. The State of Idaho subsequently initiated an adjudication of water rights for northern Idaho. The Division filed extensive water right claims on behalf of the Coeur d’Alene Tribe in this adjudication.

## **Upholding Agency Authority to Acquire Land in Trust for Tribes**

The Division continued to actively defend the U.S. Department of the Interior’s authority to take land into trust for tribes pursuant to Section 5 of the Indian Reorganization Act.

— In *State of New York v. Jewell*, the United States District Court for the Northern District of New York granted the parties’ stipulation to dismiss a challenge to the Department of the Interior’s decision to acquire 13,000 acres of land in New York in trust for the Oneida Nation of New York. The court also approved a historic settlement between the Oneida Nation of New York, two counties, and the State over strenuous objections. In a companion case, *Town of Verona v. Jewell*, the court denied a motion for a preliminary injunction that sought to enjoin Interior from taking the land in trust. As a result, this past August, after over seven years of litigation, Interior took the land in trust for the Oneida Nation of New York. In approving the comprehensive settlement between the Oneida Nation of New York, the State of New York, and the two counties, the court brought to a close disputes dating back to the first days of this country.

In 2009, in *Carcieri v. Salazar*, the Supreme Court held the U.S. Department of the Interior’s authority under the Indian Reorganization Act to take land in trust for tribes “under federal jurisdiction” is limited to those tribes that were “under federal jurisdiction” when the Act was enacted in 1934. Because the Court did not define the term “under federal jurisdiction,” the decision created uncertainty regarding Interior’s trust acquisition authority, resulting in a backlog of applications. The Division has worked closely with Interior to develop and defend a framework for interpreting what “under federal jurisdiction” means in trust land acquisition cases. This year, the Division filed briefs in several cases supporting Interior’s interpretation of “under federal jurisdiction.”

— In *County of Amador v. Jewell* (E.D. Cal.), ENRD filed two detailed briefs in defending Interior’s decision to acquire land in trust for the landless Ione Band of Miwok Indians. Because the Ione Band intends to pursue gaming on the land, in addition to addressing Carcieri-based claims under the Indian Reorganization Act, our briefing also addressed Indian Gaming Regulatory Act claims.

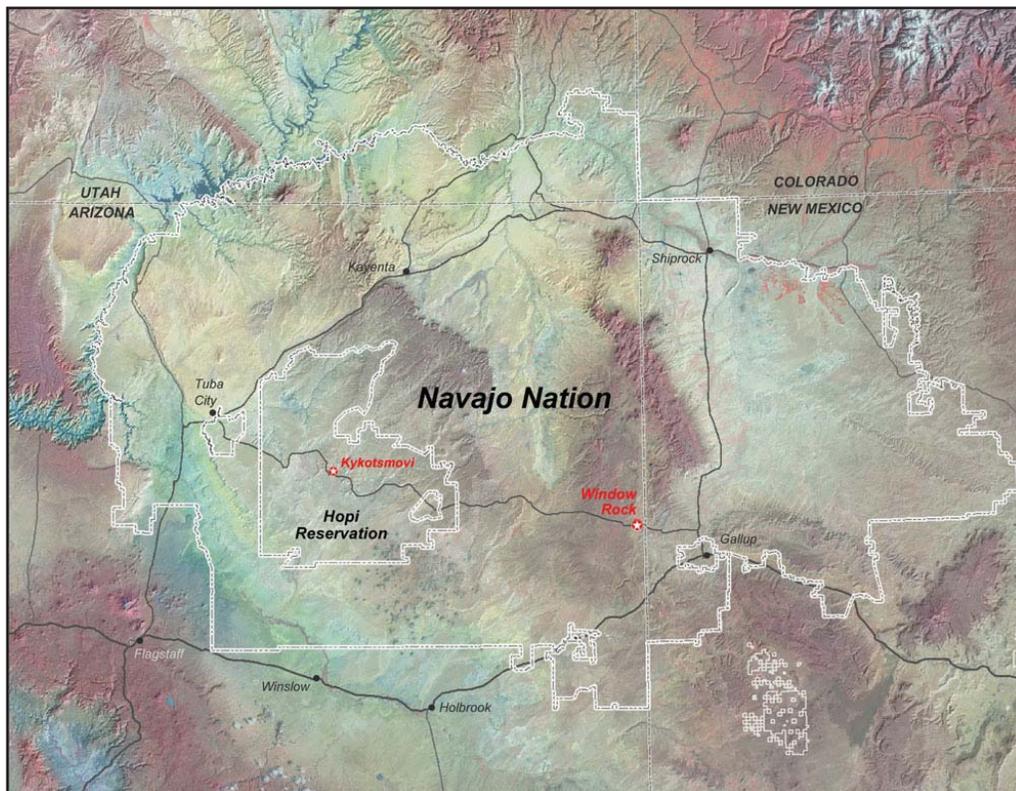
— In *No Casino in Plymouth v. Jewell* (E.D. Cal.), the Division defeated an unusual effort by citizen group plaintiffs challenging the same Interior decision to acquire land in trust for the

Ione Band of Miwok Indians. The plaintiffs sought to obtain judicial rejection of Interior’s justification for taking land into trust by way of a motion for judgment on the pleadings. The court agreed with our arguments that the plaintiffs’ motion was procedurally improper in the context of an administrative record-review case.

## Continued Progress in Resolving Tribal Trust Litigation

In these highly contentious and resource-intensive matters, tribes claim that the Departments of the Interior and Treasury have mismanaged tribal monetary and natural resources for decades and seek relief in the form of accountings and monetary damages. Over the last three years, ENRD has settled the claims of 80 tribes, resulting in the settlement of 56 lawsuits. Settlement of valid tribal trust claims is as important to our Division as our responsibility to protect the United States from meritless claims that the United States has breached its trust responsibilities to individual Indians or tribes.

— This year, ENRD resolved the largest breach of trust case ever filed by a tribe—*Navajo Nation v. United States*. The Navajo Nation litigation in the Court of Federal Claims involved claims dating back more than 50 years. Under the settlement agreement, the United States paid \$554 million to resolve all of the Navajo Nation’s claims regarding the management of their monetary and non-monetary trust resources. The agreement also paves the way for more cooperation between the United States and the Navajo Nation in the future.



Navajo Nation

EPA Map

— In another important tribal trust matter, ENRD reached a settlement with the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation. To resolve the Wind River Tribes' historic accounting and resource mismanagement claims, the United States agreed to pay them \$157 million, and the U.S. Department of the Interior entered into a memorandum of understanding addressing future management of the Wind River Indian Reservation's mineral estate.

— In *Flute v. United States* (D. Colo.), ENRD successfully moved to dismiss claims asserted against the United States by alleged descendants of victims of the Sand Creek Massacre of 1864.

The plaintiffs sought to bring a class action on behalf of all similarly situated descendants, alleging that the United States never made reparations (or made inadequate reparations) under treaties executed in the 1860s.

Invoking the Administrative Procedure Act and other legislation, the plaintiffs sought an accounting of the reparations. The court dismissed the suit, holding that none of the statutes identified by the plaintiffs waived the United States' sovereign immunity from the plaintiffs' suit.



*Sand Creek memorial plate, Wikipedia photo*

# SUPPORTING THE DIVISION'S STAFF

## Promoting Diversity at Work

ENRD's Diversity Committee participated in the Department's Diversity and Inclusion Dialogue Program (DIDP). 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. 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 Division continued its law clerk recruitment program and process for interviewing and evaluating candidates that will create opportunities for broadening the applicant pool and promoting diversity. Many of these law clerks go on to apply to the Attorney General Honors Program.

## Recognition of Division Staff

This year, client agencies continued to recognize the efforts of Division staff.

— Rocky Piaggione in the Environmental Crimes Section was awarded the Gold Medal for Exceptional Service by EPA for his work on *United States v. Tonawanda Coke Corporation*. Rocky also received the Director's Award from four regional state environmental associations for outstanding contributions in support of state environmental enforcement programs. This award, which is rarely given, is analogous to a lifetime achievement award. Rocky has done work with these associations over a period of many years, first as a state prosecutor, then as a Senior Counsel in the Environmental Crimes Section.

— Judy Harvey in the Law and Policy Section and Aaron Avila in the Appellate Section received Silver Medals for Superior Service from EPA's Office of Water for their part in an interagency team advising on clarifications to EPA's Industrial Stormwater Rule in light of the Ninth Circuit's decision in *Northwest Environmental Defense Center v. Brown*.



*ENRD Award Ceremony, DOJ photo*



*2014 Lands Open, Jeff Bank photo*

- Cara Mroczek in the Environmental Enforcement Section received a Silver Medal from EPA for her work in connection with *United States v. XTO Energy, Inc.*
- Cara Mroczek, John Sither, and Michael Zoeller in the Environmental Enforcement Section received a Bronze Medal from EPA for their work in connection with *United States v. RG Steel Wheeling, LLC.*
- Todd Gleason and Gary Donner in the Environmental Crimes Section each received a Bronze Medal from EPA for their efforts with respect to *United States v. DeSimone.*
- Cathy Rojko received a Bronze Medal from EPA Region 5 and an “Assistant Administrator Award for Regional Excellence in Enforcement,” both for her work on *United States v. H. Kramer and Co.* The case involved state and federal Clean Air Act claims relating to lead emissions at a copper smelting foundry in the Pilsen neighborhood in southwest Chicago. The defendant agreed to spend \$3 million on new state-of-the-art pollution controls for the foundry that will reduce lead emissions, pay a \$35,000 penalty, and provide \$40,000 to retrofit diesel school buses operating in the neighborhood and surrounding areas with controls to reduce pollutant emissions.
- Shennie Patel received a Bronze Medal from EPA for her work on *United States v. Pass.*
- Howard Stewart in the Environmental Crimes Section received an Achievement Award from EPA for his work on *United States v. CITGO Petroleum.*
- Leslie Allen received the Russell Train Sustainability Award from EPA for her work in connection with *United States v. Hamilton County, Ohio.*
- Christopher Hale in the Environmental Crimes Section received a plaque from the National Oceanic and Atmospheric Administration for his work on prosecutions involving the harassment of Pacific Coast whales.
- Patrick Duggan in the Environmental Crimes Section received a Certificate of Appreciation from the U.S. Fish and Wildlife Service for his work on *United States v. Robroy MacInnes.*
- James Nelson received an Award of Excellence from the Atlantic States Marine Fisheries Commission for his work on Operation Lookout, investigations related to Virginia Beach striped bass.
- The Land Acquisition Section trial team attended the thirteenth anniversary observance of the terrorist attacks of September 11, 2001, as the invited guests of the Friends of Flight 93 National Memorial, in partnership with the Families of Flight 93 and the U.S. Department of the Interior’s National Park Service.
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## **Adhering to Government Ethics and Professional Responsibility Standards**

The Law and Policy Section serves as the Division's government ethics and professional responsibility officer and counselor. 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 2014.

## **Strengthening Public Access to Information on ENRD's Litigation Priorities**

ENRD's Office of Information Management (OIM) worked with the Environmental Crimes Section, the Department's Justice Management Division, and the Department's Office of Public Affairs to develop a new public website for the President's National Strategy for Combating Wildlife Trafficking (announced on February 11, 2014). The site provides background on the initiative, including press releases and summaries of recent wildlife trafficking prosecutions addressing the following: the black market trade in rhinoceros horns; illegally imported protected black coral and South African leopard hides and skulls; African elephant ivory smuggling; and illegal importation of endangered species, whale teeth, and narwhal tusks. See <http://www.justice.gov/enrd/6329.htm>.

OIM worked with the Law and Policy Section to create a Freedom of Information (FOIA) Electronic Reading Room (also known as Frequently Requested Records and Other Publications) on ENRD's public website to lessen the burden of requests for information from the public. The site includes redacted versions of the Environmental Crimes Monthly Bulletins, which summarize recent developments in criminal environmental enforcement matters and help keep federal, state, and local environmental prosecutors and investigators informed about relevant pollution and wildlife cases.

OIM created a process and assigned resources for captioning videos for compliance with section 508 of the Rehabilitation Act on [Justice.gov/ENRD](http://Justice.gov/ENRD), as well as ENRD's intranet. The Office of Information Management created an internal section 508 website containing core background information and a form to trigger the section 508 captioning process. Through training, technical support, and this new section 508 website, ENRD's (OIM) is working to provide accessible information to the public via our Internet site and to our employees via our Intranet site.

## **Enhancing the Division's In-House Training Capacity**

The Office of Human Resources provided Division-wide training based on the needs of each of the sections. A variety of training was provided, including preretirement training and writing. To complement the Division's updated orientation program, the Office of Information Management and Office of Human Resources collaborated on a "New Employee Orientation" website with content mirroring most of the handouts provided to new employees on their first day of work. The website contains a critical overview of information on ENRD and the Department, and core policies on employee conduct, benefits, work life balance, information technology, and training. See [http://enrdnet.enrd.doj.gov/Human-Resources\\_23755.htm](http://enrdnet.enrd.doj.gov/Human-Resources_23755.htm). All ENRD employees are required to complete some type of mandatory training throughout the

year. ENRD's training website, [http://enrdnet.enrd.doj.gov/Training\\_16988.htm](http://enrdnet.enrd.doj.gov/Training_16988.htm), allows an individual to access a master list of required training requirements based on the type of position held, such as attorney, paralegal/support staff, or supervisor/manager.

## **Continuing to Meet Fiduciary Responsibilities under the Superfund Agreement**

ENRD's internal time reporting system was enhanced to allow attorneys and their managers to view data concerning the amount of employee time billed to Superfund during a given week and during the year to date. These enhancements greatly facilitate ENRD's monitoring of resource allocations, which is required under an interagency agreement with EPA.

## **Being a Good Steward of Taxpayer Dollars**

In fiscal year 2014, the Division effectively managed approximately \$230 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 74 percent of ENRD's operating budget in fiscal year 2014 was dedicated to personnel expenses. ENRD achieved in fiscal year 2014, and continues to pursue in fiscal year 2015, 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 with Expert Services**

The Division litigates highly technical and complex issues, including those related to environmental enforcement of statutes, land acquisition, handling of complicated and long-standing tribal community issues, and managing and defending the nation's natural resources. In 2014, the Division executed a record number of contract actions with a value of more than \$71.5 million. The 514 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. This was made possible through a welcomed increase in funding made available by the Department through the Fees and Expenses of Witnesses appropriation.

## **Providing Essential Litigation Support to the Division's Largest and Highest Profile Cases and Matters**

ENRD, through its Office of Litigation Support (OLS), continued to fund and provide the staffing, coordination, tools, and technical infrastructure needed to enable complex litigation support activities for the Deepwater Horizon litigation. Through the first two phases of litigation, including two separate trials, contractor staff utilized their own review software in providing litigation support for ENRD attorneys, including with respect to the processing, storage, and management of documents collected during discovery. However, in an effort to respond to attorney concerns with vendor document processing, and issues with the functionality of the vendor document management system, the decision was made to transfer relevant data necessary to support the next phase of the litigation (the third phase) to ENRD's own document management software, Relativity.

Over the course of several months, OLS successfully coordinated the seamless transfer from multiple third-party proprietary repositories, normalized disparities, and provided a unified hosted review environment for approximately 19 million documents comprising approximately 161 million images and totaling almost 34 terabytes of data, with all necessary steps completed by the close of fiscal year 2014. As a result of this transfer, OLS has saved and continues to save a substantial amount of money (previously paid in data storage fees to the vendor) and is in a better position to serve the case needs of the ENRD Deepwater team.

In another significant fiscal year 2014 cost-saving measure, OLS took over from the outside vendor the task of processing documents collected for the third phase of the Deepwater trial. Throughout the discovery and pretrial period, the OLS lab, with only limited assistance from outside vendors for non-standard file types, processed an additional 3.1 million documents comprising approximately 16.2 million images and 9 terabytes of data, all of which currently reside on ENRD's servers and in Relativity.

## **OLS Project User System (OPUS)**

OLS, in coordination with the ENRD eDiscovery Workgroup, introduced its OLS Project User System (OPUS) to the entire Division. OLS management and senior technical staff oversaw and guided the development and implementation of this custom and scalable software solution. OPUS has enabled streamlining processes, accelerated delivery schedules, standardized communication protocols, and augmented existing quality assurance mechanisms. Multiple dashboard views enable OLS management to track, manage, audit, and effectively balance workload, maximizing infrastructure and staff utilization across the full range of requested services. These services include all processing options for electronically stored information (including culling, filtering, "de-NISTing," deduplication on custodial or global level, troubleshooting and special handling of problem files), hosting and providing ongoing assistance to attorney project teams to facilitate positive and time effective document review experience, scanning, and support for all industry standard electronic data and document production formats.

Nearly 5,000 requests, comprising a wide range of data volume and complexity, were submitted and completed during the year (or over 20 requests per work day). OPUS gives ENRD attorneys a more consistent way to track incoming and outgoing electronic documents and confirm that decisions made and documented through discovery orders and stipulations are followed consistently. The application includes a number of features, such as forcing required fields on electronic forms, emailing different end users when specific conditions have been met in the workflow of an OLS request, and tracking tasks from submission to completion.

## **Working with Client Agencies**

OLS expanded its Electronically Stored Information Preservation and Collection program and actively engaged, and provided assistance to, ENRD case teams. Staff consulted on initial project scoping, evaluating possible custodian lists, case specific key data types, data sources, scope and definition of preservation mechanisms, and options and approaches to collection processes. OLS established liaisons with multiple agency points of contact from which ENRD case teams can request information for formulation of preservation and collection requests.

Staff also coordinated with client agency information technology personnel to ensure identification, preservation, and collection are performed in the manner requested. Client agencies were advised on the proper use of ENRD's Harvester collection software and other software, providing guidance and remote troubleshooting of technical issues. Following data collection, staff also evaluated log files and collected data to identify any issues prior to OLS lab processing. These efforts enabled OLS to assist ENRD trial teams in negotiating favorable outcomes in numerous meet and confer conferences. In addition, at the request of EPA, OLS participated in a thorough eDiscovery market research project to identify electronically stored information collection software that would address deficiencies in EPA's process for collecting email from its cloud storage environment. The result was a recommendation to upgrade EPA's platform to include native eDiscovery functionality.

## **Automating Work Processes**

ENRD's Service Center supported Division attorneys and support staff in fiscal year 2014 by processing more than 60,000 electronic court filings (twice the volume of 2013). ENRD's Service Center downloaded the electronic documents from court websites, saved a copy to the lead attorney's document management directory, coded each filing, and printed a paper copy for the official files. The Service Center also processed 300 scanning requests from section personnel, and reproduced almost 2 million pages of electronic documents to paper format.

## **Employing Innovative Technology Solutions for ENRD's Workforce**

In fiscal year 2014, ENRD achieved success in implementing several significant information technology upgrades that will benefit all employees and enhance the Division's ability to effectively carry out its work.

### **Upgraded ENRD Desktop Computers with New Hardware and Software**

The Division's Office of Information Technology (OIT) upgraded all ENRD desktop computers with new hardware including solid state hard drives and additional memory. In addition to the hardware upgrades, OIT refreshed the operating system and all applications on Division desktop computers. Employees experienced very little disruption because the upgrades were performed after hours. Productivity, security, and morale are all dependent upon ENRD keeping such information technology assets up to date and providing employees with updated applications.

### **Replaced All BlackBerry Devices with Apple iPhone Smartphones**

After much consideration and product evaluation, OIT replaced over 600 BlackBerry devices in ENRD with new Apple iPhones. Principal among the many reasons for this migration was to provide ENRD employees with a much more advanced smartphone platform with enhanced capabilities to improve users' productivity. Other considerations included questions about the long-term viability of the BlackBerry platform.

## **Upgraded Bandwidth in the Patrick Henry Building, Denver and San Francisco Locations**

OIT upgraded the JUTNet data circuits in the Patrick Henry Building, and the Denver and San Francisco locations, to provide significantly more bandwidth at these sites. As more of ENRD's work is processed electronically, increased network bandwidth has become a necessity. This upgrade provided significant improvements for many information technology services such as Internet access, email delivery, electronic court filings, video teleconferencing performance, and access to ENRD's Relativity data. OIT performed considerable market research for the upgrade, which resulted in reductions in the overall costs for both Denver and San Francisco, even after bandwidth was significantly increased.

## **Purchased Replacement Printers for All ENRD Sites**

OIT purchased new color laser printers to replace the existing printer inventory throughout all of ENRD's buildings. The existing printers had been in place for over 8 years and were starting to fail on a regular basis. Also, the legacy printers consisted of a mixture of black-and-white and color printers and different models, which complicated acquisition of supplies (different cartridges and other consumables) and maintenance (parts availability). To help improve ENRD's overall printing solution, and simplify maintenance and support, a single printer model was selected to replace all legacy printers.

## **Improved ENRD's Information Technology Continuity of Operations Plan (COOP) Capabilities**

OIT installed additional storage and a new virtual server platform in ENRD's COOP location, the Rockville Data Center. The new hardware will allow ENRD to further replicate data, applications, and virtual servers from Washington, D.C.-based buildings out to our COOP location. This upgrade included the backup to the COOP location of huge amounts of litigation support data. The replication not only provides the Division with protection from disaster events that may occur in Washington, D.C., but also provides the Division with a secondary backup location for all data that is stored on this large OLS storage resource.

## **Employed Innovative Collaborative Information-Sharing Technology for ENRD's Workforce**

ENRD now has five active intranet web-based forums for online discussion and information exchange among Division staff. ENRD's latest forum, the Climate Change Workgroup Commons, was created to serve as an online discussion for staff to converse about meetings, active litigation, climate adaptation, and other miscellaneous topics. Collectively, ENRD forums have over 3,000 postings and 1,300 topics where staff may access best practices.

## **Improving Travel for ENRD—Employing the Division's New Web-Based Travel Management System**

On July 9, 2014, the Office of the Comptroller completed the deployment of the Division's first ever travel management system designed to make travel arrangements and processing easier and more efficient. The rollout of "E2," a web-based, end-to-end travel management application, ended the resource intensive practice of handling paper forms for employees seeking approval to travel and for securing reimbursement for travel expenses. Since implementation of E2, we have processed 1,860 travel authorizing actions, 1,217 travel vouchers, trained 229 employees. We currently have 583 E2 users in the Division. 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 and introduces a much higher level of data integrity for the Division's travel-related transactions that could not have been achieved using the previous outdated and resource intensive travel system.

## **Supporting Records and Systems Management**

In support of recent Presidential and Departmental directives, ENRD's Office of Administrative Services created the Division's Records Management Training Plan. The plan provides the foundation to ensure Division personnel and contractors are provided the knowledge required to effectively and efficiently manage the Division's records. In addition, training material was created based on the learning objectives outlined in the training plan and implemented for the Division's new employee orientation, which for the first time includes records management training. The purpose of the orientation is to increase awareness of the Division's records management program and to provide new employees with an understanding of federal records.

## **Promoting Security**

To ensure the safety of Division personnel and facilities, in fiscal year 2014, ENRD held emergency evacuation drills and coordinated a number of COOP training and testing events. In April 2014, 78 employees from Washington, D.C., and five field offices participated in a telework exercise that tested the ability of the Division's computer systems to handle a large volume of remote users simultaneously. The Division also completed annual safety inspections of all ENRD offices (Washington, D.C., and field offices) in compliance with DOJ Safety Order 1779.2B.

## **Greening the Division**

The Division held its 11th annual Earth Day service celebration at Marvin Gaye Park in April 2014. This year's projects, which focused on the park's greening center, resulted in the park being able to provide more than 6,000 pounds of fresh produce to the local community. Staff from all sections of ENRD, as well as staff from the Justice Management Division, its Facilities and Administrative Services Staff, Tax Division, and the U.S. Department of the Interior's Office of the Solicitor participated in this year's event. Participants extended a gravel driveway through the greening center, assembled new picnic tables, distributed mulch and woodchips, weeded existing vegetable gardens, planted new horticultural beds, and cut the grass at the Greening Center. ENRD also continued to lead the Department in green building initiatives. The Division maintained its trend of lowering energy usage, with 2014 marking the seventh consecutive year that energy consumption has decreased. The Patrick Henry Building, 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. This year, the building management replaced the hot water heater with a more energy efficient unit and completed 75 percent of an upgrade to the energy management system controllers.

Finally, the Division saved staff time and money by having contractors in the records management warehouse in Landover, Maryland, shred and recycle over 700 boxes of paper in fiscal year 2014 using existing high volume shredding equipment.