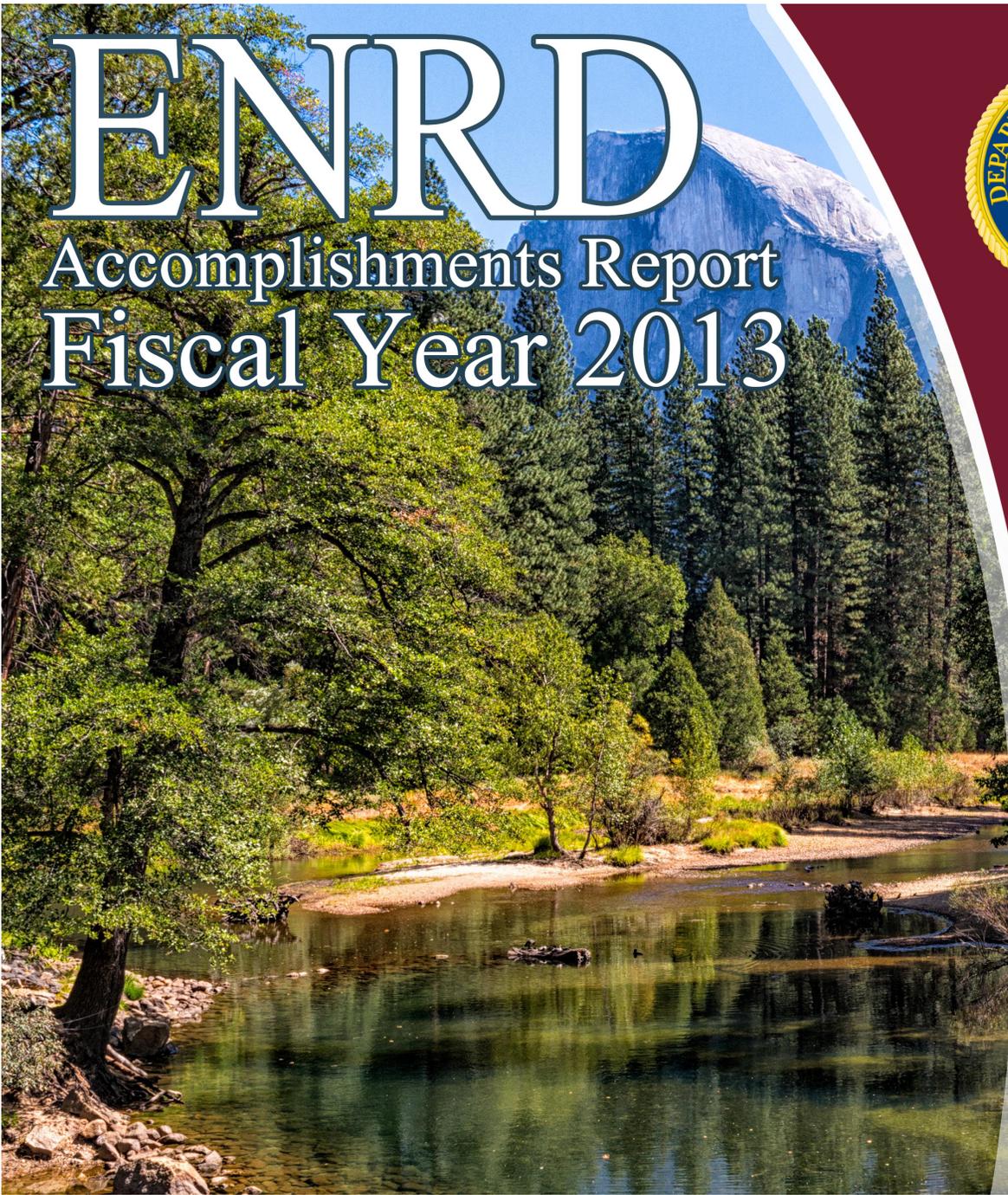


# ENRD

## Accomplishments Report Fiscal Year 2013



United States Department of Justice  
Environment & Natural Resources Division



# **SUMMARY OF DIVISION ACCOMPLISHMENTS**

## **FISCAL YEAR 2013**



*Yosemite National Park*

*Photo by Jeff Bank*

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*Yosemite National Park*

*Photo by Jeff Bank*



*Fox, Baltimore, Maryland*

*Photo by Jeff Bank*

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# FOREWORD

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**Acting Assistant Attorney  
General Robert G. Dreher**

I am pleased to present the *ENRD Accomplishments Report Fiscal Year 2013*. Last year, the Environment and Natural Resources Division (ENRD or the Division) continued a tradition of excellence in service to the United States, as the many cases and projects described in this report show. Every day, the Division works with client agencies, U.S. Attorneys' Offices, and state, local and tribal governments to enforce federal environmental, natural resources, and wildlife laws. It also defends federal agency actions and rules when they are challenged in the courts, working to keep the nation's air, water, and land free of pollution, promoting military preparedness and national security, and supporting other important client agency objectives. The Division also handles a broad array of important matters affecting Indian tribes and their members.

Across this work, ENRD strives to ensure that all Americans enjoy clean air, water, and land. Over the past five years, the Department has renewed its commitment to environmental justice, which is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental and natural resources laws, regulations, and policies. The Division has continued to take a leadership role in advancing the goals of environmental justice, as illustrated in a separate chapter of this report.

I am happy to report that in fiscal year 2013, the Division achieved outstanding litigation results. We secured over \$1.788 billion in civil and stipulated penalties, cost recoveries, natural resource damages, and other civil monetary relief, including almost \$637 million recovered for the Superfund. We obtained almost \$6.5 billion in corrective measures through court orders and settlements, which will go a long way toward protecting the nation's air, water, and other natural resources. We concluded 53 criminal cases against 87 defendants, obtaining nearly 65 years in confinement and over \$79 million in criminal fines, restitution, community service funds, and special assessments. Finally, by comparing claims made with the amounts ultimately imposed, we estimate that the handling of defensive and condemnation cases closed in fiscal year 2013 saved the United States more than \$6.8 billion.



*Deepwater Horizon Response*

*USCG Photo*

The Division's top civil enforcement priority remains the Deepwater Horizon oil spill. On April 20, 2010, an explosion and fire destroyed the Deepwater Horizon offshore drilling rig in the Gulf of Mexico and triggered a massive oil spill amounting to millions of barrels. The discharge continued for nearly 90 days. Eleven people aboard the rig lost their lives, and many others suffered injury. 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. ENRD is now three years into this hard-fought, high-tempo litigation against BP and the remaining defendants. We have continued to work closely with the Civil Division, the Department's senior leadership, other Departmental components, a host of federal client agencies, and the Gulf States. Billions of dollars are at stake in this litigation, the lion's share of which would go to restoring natural resource damages (under the Oil Pollution Act) or to environmental improvement and economic redevelopment in the Gulf States region (under the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2013 (the RESTORE Act)).

The Department tried the first phase of the U.S. case (addressing the cause of the disaster and liability) for nine weeks from February through April 2013, as part of a mass trial in which thousands of private plaintiffs also tried parts of their cases relating to liability and fault. We tried the second phase of the U.S. case (principally addressing how much oil was discharged into the Gulf of Mexico) over three weeks in September and October 2013. Both phases have been submitted to the district court for decision. The district court has scheduled the third phase of trial in this matter (addressing assessment of civil penalties) to begin in January 2015.

The discovery and case development requirements in this litigation have been unprecedented for ENRD and likely will remain so. More than 100 depositions have been taken and document production by the United States stands at some one hundred million pages. Thus far, the Department has secured over \$1 billion in civil penalties through Deepwater Horizon

settlements (with MOEX and Transocean), as well as far-reaching injunctive relief that should make Transocean's deepwater drilling safer in the Gulf of Mexico. As the Deepwater Horizon litigation progresses, the United States will take whatever steps are necessary to hold accountable those responsible for the spill.

Over the past year, the Division made important contributions to combating the effects of climate change. For example, we continued critical work to defend and enforce agency administrative actions addressing greenhouse gases that contribute to climate change. In January 2011, the Environmental Protection Agency's (EPA's) regulations governing motor vehicle emissions of greenhouse gases took effect, triggering not only mobile source regulation, but also regulation of the largest stationary sources in accordance with EPA's greenhouse gas tailoring rule. As of September 2012, following extensive Division briefing, the D.C. Circuit in *Coalition for Responsible Regulation v. EPA* upheld the agency's greenhouse gas-related regulatory actions in their entirety. Challengers filed nine separate petitions for writs of certiorari with the U.S. Supreme Court raising a number of issues. In July 2013, the Department's Office of the Solicitor General, working closely with Division and client agency attorneys, filed an opposition to the petitions for certiorari. On October 15, 2013, the Supreme Court granted certiorari on six of the petitions, which were consolidated and limited to a single issue: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." The Court denied the remaining three petitions, and rejected consideration of numerous additional issues raised by the petitions that were partially granted. In February 2014, the Supreme Court heard oral argument in the case.

In March 2013, the D.C. Circuit affirmed the district court's decision in *In re Polar Bear Endangered Species Act Listing*, thereby upholding the U.S. Fish and Wildlife Service's 2008 listing of the polar bear under the Endangered Species Act as a threatened species throughout its range. The listing decision was based primarily on the polar bears' dependence on Arctic sea ice for their survival, existing and projected reductions in the extent and quality of sea ice habitat due to global climate change, and the inadequacy of existing regulatory measures to preserve the species. The State of Alaska and various hunting groups challenged the listing, arguing that the Service acted arbitrarily and capriciously by using a 45-year period as the "foreseeable future" and by finding that the species is "likely" to be in danger of extinction throughout its range by mid-century. In a separate brief, the State of Alaska argued that the Service violated the Endangered Species Act by failing to provide an adequate written justification for its decision. The appeals court rejected all of plaintiffs' challenges to the listing decision.

In a settlement reached with the United States in September 2013, Safeway, the nation's second largest grocery store chain, agreed to pay a \$600,000 civil penalty and to implement a corporate-wide plan to significantly reduce its emissions of ozone-depleting substances from refrigeration equipment at over 650 of its stores nationwide, at an estimated cost of \$4.1 million. The settlement resolves allegations that Safeway violated the Clean Air Act by failing to promptly repair leaks of HCFC-22, a hydrochlorofluorocarbon that is a greenhouse gas and ozone-depleting substance used as a coolant in refrigerators, and failed to keep adequate records of the servicing of its refrigeration equipment. The measures that Safeway has committed to take in this settlement are expected to prevent over 100,000 pounds of future releases of ozone-depleting refrigerants that destroy the ozone layer. Additionally, HCFC-22 has a global warming potential that is 1,800 times more potent than carbon dioxide. Fixing these leaks, improving

compliance, and reducing HCFC-22 emissions will protect all Americans from the dangers of ozone depletion and reduce climate change. This first-of-its-kind settlement should also serve as a model for comprehensive solutions across a company.

The Department, principally through ENRD, has long been a leader in the fight against wildlife trafficking. Over the last year, the Department engaged fully in the Administration's effort to combat wildlife trafficking through its role as one of the three agency co-chairs of the Presidential Task Force on Wildlife Trafficking, established by President Obama's July 2013 *Executive Order—Combating Wildlife Trafficking*. In the past decade, wildlife trafficking has escalated into an international crisis, making it both a critical conservation concern and a threat to global security. Beyond decimating the world's iconic species, this illegal trade threatens international security. Transnational criminal organizations, including some terrorist networks, armed insurgent groups, and narcotics trafficking organizations, are increasingly drawn to wildlife trafficking due to the exorbitant proceeds from this illicit trade. These criminal groups breed corruption, undermine the peace and security of fragile regions, and destabilize communities



**Acting Assistant Attorney General Dreher at Wildlife Trafficking Event**

and their economies, thus undermining not just wildlife laws and international agreements, but the rule of law itself. I had the honor of serving as a Task Force co-chair (as the Attorney General's delegate) and working with the other co-chairs from the Departments of State and the Interior, and the other 14 Task Force agencies, to craft the *National Strategy for Combating Wildlife Trafficking*.

The *National Strategy* was signed by the President and issued on February 11, 2014. It emphasizes the need for a "whole of government" approach to combating this problem and identifies three key priority areas: (1) strengthening domestic and global enforcement; (2) reducing demand for illegally traded wildlife at home and

abroad; and (3) strengthening partnerships with foreign governments, international organizations, nongovernmental organizations, local communities, private industry, and others to combat illegal wildlife poaching and trade. The *National Strategy* provides a set of overarching principles to guide the U.S. response to the increasing global wildlife trafficking crisis.

The Division works with U.S. Attorneys' Offices around the country and federal agency partners (such as the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration) to combat wildlife trafficking under the Endangered Species Act and the Lacey Act, as well as statutes prohibiting smuggling, criminal conspiracy, and related crimes. We have had significant successes prosecuting smugglers and traffickers in elephant ivory, endangered rhino horns, South African leopard, Asian and African tortoises and reptiles, and many other forms of protected wildlife. In fiscal year 2013, a prominent example of the Division's robust prosecution of illegal wildlife trafficking was "Operation Crash," an ongoing multi-agency effort to detect, deter, and prosecute those engaged in the illegal killing of rhinoceroses and the illegal trafficking of endangered rhinoceros horns. This initiative has resulted in multiple convictions, significant jail time, penalties, and asset forfeiture.



**Black Rhinoceros**

**FWS/John and Karen Hollingsworth Photo**

While ensuring compliance with the nation's environmental and natural resources laws, ENRD makes important contributions to national security. One example of this work in fiscal year 2013 is the Division's successful handling of two separate district court challenges to the Navy's decision to build and operate a second explosives-handling wharf at Naval Base Kitsap, located in the Hood Canal of the Puget Sound Basin. The proposed wharf will ensure the continuing viability of the Navy's "Trident" class ballistic missile submarines developed during the Cold War to serve as a survivable retaliatory strike force in the event of a nuclear attack against the United States. In *Suquamish Tribe v. U.S. Army Corps of Eng'rs*, plaintiffs alleged that the proposed wharf unlawfully abrogates fishing rights secured to them by treaty and violates the Endangered Species Act. In *Ground Zero Center for Nonviolent Action v. Navy*, plaintiffs argued that the Navy violated the National Environmental Policy Act in approving construction of the wharf and sought to enjoin the construction. In January 2013, the district court denied plaintiffs' motions for preliminary injunction in both cases, and the Suquamish Tribe voluntarily dismissed its lawsuit shortly thereafter. Subsequently, the Division prevailed on the merits in the *Ground Zero* case.

This Administration seeks to promote American leadership in clean and responsible renewable energy development. The Division has defended challenges to permits and rights-of-way in more than 25 cases involving solar and wind projects located in California, Oregon, Tennessee, Delaware, Maine, Massachusetts, Ohio, and Vermont. Our successes in fiscal year 2013 included favorable rulings on summary judgment in cases involving the Ivanpah Solar Project, the Genesis Solar Project, the North Sky River Wind Project, the Ocotillo Wind Energy Project, the West Tennessee Solar Farm Project, and the Steens Mountain Wind Project. These victories have enabled substantial development of renewable energy resources across the country. The Division also has resolved the first criminal case against a wind power company whose operations killed numerous protected eagles when the company failed to make all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades, despite prior warnings about this issue from the U.S. Fish and Wildlife Service.

Protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights is an important part of ENRD's mission. The Division has been actively engaged with the Department of the Interior and Indian tribes to ensure protection of tribal interests such as tribal water rights; tribal hunting, fishing, and gathering rights; reservation boundaries; and tribal jurisdiction and sovereignty. Two cases from fiscal year 2013 are of particular note. In *Village of Pender v. Parker*, the Omaha Tribe of Nebraska adopted a beverage control ordinance applicable to retailers on its reservation. The Village of Pender, Nebraska, and Pender business owners sued tribal officials in federal district court in Nebraska to enjoin enforcement of the ordinance in Pender because a Congressional Act in 1882 allegedly diminished the boundaries of the reservation. In 2007, the district court ruled that plaintiffs had to exhaust their remedies in Omaha Tribal Court. There, we filed an *amicus* brief in a tribal court for the first time, and argued, based on a Solicitor's Opinion from the Department of the Interior, that the 1882 Act did not alter or diminish the reservation boundary. In February 2013, the tribal court held that the boundaries of the reservation were preserved following the 1882 Act. On return of the case to the federal district court in Nebraska, the United States was permitted to intervene in the case and the Division filed a motion for summary judgment, again arguing that the reservation boundary had not been changed by Congress. In February 2014, the district court agreed, entering judgment in favor of the Omaha Tribe and the United States. Plaintiffs have appealed the decision to the Eighth Circuit.

The other case is *United States v. Washington*, the latest chapter in longstanding litigation initiated in the 1970s to protect the treaty fishing rights of tribes in the Pacific Northwest. In the second phase of the case, the United States sought to address decline in the quality and quantity of fish habitat caused by development pressures in western Washington. In response to a Ninth Circuit decision holding that the state's treaty obligations "will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case," the United States and the tribes litigated the habitat question in the context of the narrow issue of culverts beneath state roads. Poorly constructed and maintained culverts impede passage of anadromous fish to spawning grounds and block the access of juvenile fish to the ocean. At the time of trial in 2009, fisheries scientists identified nearly 4.8 million square meters of stream habitat upstream of blocked culverts in Washington. In March 2013, following lengthy but unsuccessful settlement negotiations, the district court issued a permanent injunction requiring the state to inventory remaining fish-blocking culverts within six months and provide for fish passage at culverts with specified upstream habitat within 17 years. The United States is now vigorously defending this decision on appeal to the Ninth Circuit.

One of the critical tasks ENRD performs on a regular basis—and that often goes unrecognized—is giving counsel to client agencies facing difficult challenges. Our work with the Department of Energy at the Hanford Nuclear Site in the State of Washington is illustrative. Over the past year, a team of Division attorneys worked very closely with officials at the Department of Energy to develop a framework for moving forward with a long-term plan to treat the 56 million gallons of radioactive and chemical wastes generated as a result of U.S. government efforts to produce plutonium during the Cold War. These efforts have included sensitive discussions with officials from the States of Washington and Oregon, in anticipation of formal negotiations to modify a 2010 consent decree governing a significant part of the cleanup of the Hanford site. Although difficult negotiations and potential litigation may face us, ENRD's work on this high profile and profoundly important matter has aided the client immeasurably in moving toward a safe and sustainable completion of the clean-up mission at Hanford.

The Division's civil and criminal environmental enforcement efforts have immeasurably protected human health and the environment through significant reductions in emissions and discharges of harmful pollutants. From the many such cases described in this report, I would like to highlight two—the *Mazza* and *Tronox* cases. In October 2012, following a three-week jury trial, Dominick Mazza, his company, Mazza & Sons, Inc., and Cross Nicastro, were convicted of conspiracy, Clean Water Act, Superfund, and false statement violations. Defendants conspired to fill Nicastro's 28-acre property on the Mohawk River in upstate New York, over the course of five years, with pulverized construction and demolition debris that was processed at New Jersey solid waste management facilities and then transported to the property. Law enforcement officials uncovered the plot just months after defendants began the operation, when they had already dumped at least 400 truckloads of debris at the site. Much of the material that was dumped was placed in and around waters of the United States and some of the material was found to be contaminated with asbestos. The conspirators then concealed the illegal dumping by fabricating a New York State Department of Environmental Conservation (DEC) permit and forged the name of a DEC official on the fraudulent permit. In June 2013, Dominick Mazza was sentenced to 51 months in prison to be followed by three years of supervised release, and to pay a \$75,000 criminal fine and \$492,000 in restitution. Mazza & Sons, Inc., was sentenced to pay a \$100,000 criminal fine and \$494,000 in restitution and clean-up costs to EPA, and received five years of corporate probation. The court also ordered Mazza & Sons to fund and implement an environmental compliance plan administered by a

third-party auditor to prevent future environmental violations at their Tinton Falls, New Jersey, recycling operation. Cross Nicastro was sentenced to 33 months in prison and three years of supervised release and to pay \$492,494 in restitution and a \$25,000 criminal fine. This case shows how zealously the United States will prosecute those who violate environmental laws protecting the public and the environment from toxic substances like asbestos.

The Division files claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. From the beginning of fiscal year 2009 through the end of fiscal year 2013, we obtained agreements in 35 bankruptcy proceedings, under which debtors committed to spend an estimated \$1.678 billion to clean up hazardous waste sites, reimburse the Superfund over \$710 million plus an additional \$88 million in interest, and pay more than \$83 million in natural resource damages. Developments in an adversary proceeding arising out of a bankruptcy case, *Tronox, Inc. v. Anadarko Petroleum Corp.*, were particularly noteworthy in 2013. There, the United States and co-plaintiff Anadarko Litigation Trust won an award of between \$5.1 billion and \$14.1 billion against defendant “New” Kerr-McGee Corporation and certain related defendant companies, all of which are subsidiaries of the Anadarko Petroleum Corporation. In December 2013, the bankruptcy court in New York concluded that the historic Kerr-McGee Corporation (“Old” Kerr-McGee) fraudulently conveyed assets to New Kerr-McGee in 2005 to evade its debts, including its liability for environmental cleanup at toxic sites around the country. Pursuant to a plan of reorganization and other agreements, approximately 88% of the recovery in this lawsuit, net of trust expenses, will be distributed to various environmental trusts and to federal, state, and local environmental creditors for environmental cleanup of contaminated sites around the nation. Subsequently, on April 3, 2014, the parties entered into a proposed \$5.15 billion settlement of the amount of the award (\$4.4 billion of which is for environmental cleanup and claims), which is the largest recovery for the cleanup of environmental contamination in history. The U.S. Attorney’s Office for the Southern District of New York, working closely with Division attorneys and assisted by EPA, the U.S. Fish and Wildlife Service, the Bureau of Land Management, the National Oceanic and Atmospheric Administration, the U.S. Nuclear Regulatory Commission, the Forest Service, the Department of Defense, numerous state governments, and the Navajo Nation, handled the case.

I am extremely proud of the critically important work that the Division accomplished last year, and I encourage you to read this report. In closing, I also would like to say what a privilege it has been for me to serve as the Acting Assistant Attorney General over the past year. I am grateful for the opportunity to represent the interests of the United States and to work with the extraordinary employees of the Division in this capacity. The many successes reflected in this report are due to the expertise, dedication, and professionalism of the ENRD staff. Challenges and opportunities lie ahead, but the Division is well equipped to handle them.

Robert G. Dreher  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
April 22, 2014



**Big Sur, California**

**Photo by Jeff Bank**



**Sagamore Farm, Maryland**

**Photo by Jeff Bank**

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# OVERVIEW OF THIS REPORT

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In fiscal year 2013, the Environment and Natural Resources Division (the Division or ENRD) 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. The chapters describing those key accomplishments are: protecting our nation's air, land, and water; ensuring cleanup of oil and Superfund waste; promoting responsible stewardship of America's wildlife and natural resources; enforcing the nation's criminal pollution and wildlife laws; defending vital federal programs and interests; promoting national security and military preparedness; protecting tribal rights and resources and addressing tribal claims; and supporting the Division's staff.



*Earth Day 2013*



*2013 Awards Ceremony*

# PRESENTING THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

## ENRD LITIGATING SECTIONS

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



*ENRD Environmental Enforcement Section*

The Division has a main office in Washington, D.C., and field offices in: Denver, Colorado; San Francisco, California; and Sacramento, California. ENRD has a staff of over 600, more than 400 of whom are attorneys. In addition to the immediate Office of the Assistant Attorney General, the Division is organized into nine litigating sections and an Executive Office.

The Division has responsibility for cases involving more than 150 statutes and represents virtually every federal agency in courts across the United States and its territories and possessions. Our litigation docket contains more than 6,500 active cases and matters.

About one-half of ENRD's lawyers bring cases against those who violate the nation's civil and criminal pollution-control laws. Others defend environmental challenges to government programs and activities, and represent the United States in matters concerning the stewardship of the nation's natural resources and public lands. The Division is responsible for the acquisition of real property by eminent domain for the federal government and for cases arising under the wildlife and marine resources protection laws. In addition, ENRD litigates cases concerning Indian rights and claims.

## 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.

One of the Division's primary responsibilities is to enforce federal civil and criminal environmental laws such as the Clean Air Act (CAA), the Clean Water Act (CWA), the Oil Pollution Act (OPA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 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 Corps or USACE). The ENRD 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 dozens of statutes and treaties 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 most significant sub-tropical wetlands (the Everglades) and the nation's largest rain forest (the Tongass), to individual rangelands or wildlife refuges, to our nation's historic battlefields and monuments. Examples of ENRD's land and natural resources litigation include original actions before the U.S. Supreme Court to address interstate boundary and water allocation issues; suits over decisions affecting 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 represents all the land management agencies of the United States including, for instance, the U.S. Department of Agriculture's Forest Service (FS); the Department of the Interior's (Interior's or DOI's) many components such as the National Park Service, the Bureau of Land Management (BLM), and the Fish and Wildlife Service (FWS); the Corps; the Department of Transportation; and the Department of Defense and its components. 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 (ESA), which protects endangered and threatened animals and plants; the Marine Mammal Protection Act (MMPA), which protects animals such as whales, seals, and dolphins; and the Magnuson-Stevens Fishery Conservation and Management Act, which regulates increasingly depleted fishery resources. The Environmental Crimes Section also 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 illegally across state boundaries. The main federal agencies that ENRD represents in this area are FWS and the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS).

Division cases frequently involve allegations that a federal program or action violates constitutional provisions or environmental statutes. Examples include Fifth Amendment takings claims, in which landowners seek compensation based on the allegation that a government action has precluded development of their property, or 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. These cases also involve challenges to regulations promulgated to implement the nation's anti-pollution statutes, such as the CAA and CWA, or activities at federal facilities that are claimed to violate such statutes. The Division's main clients in this area include the Department of Defense and EPA. 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 projects such as national parks or the construction of federal buildings including courthouses, and for 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 action designed to protect tribal interests, and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. The rights and resources at issue include water rights, the ability to acquire reservation land, and hunting and fishing rights, among others. The Natural Resources Section also 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 the Bureau of Indian Affairs (BIA) in DOI.

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 (the Department'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 for 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. Other Law and Policy Section duties include serving as the Division’s ethics and professional responsibility officer and counselor, alternative dispute resolution counselor, and liaison with state and local governments. Attorneys in the Law and Policy Section also routinely assist in litigation with other Division sections and also coordinate the Division’s involvement in international legal matters, as well as the Division’s Freedom of Information Act and Privacy Act work.

The Executive Office is the operational management and administrative support section for ENRD, providing 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 traditional contractor-provided services and equipping employees to better serve themselves—the Executive Office is able to achieve significant annual cost savings for the American public.



*ENRD Appellate Section in the DOJ Courtyard*

## 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**



*EPA Photo*



*EPA Photo*

# REPORTING OUR 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 (also EJ). Attorney General Janet Reno represented the Department at the signing of this historic document 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 status, race, or ethnicity. Today, 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 into its work to



**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

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.

In fiscal year 2013, the Division continued to achieve meaningful environmental justice results.

This chapter is divided into two sections. First, we describe ENRD’s continued collaboration with other federal agencies and Departmental components. Second, we highlight the Division’s actions to further environmental justice through its own work and litigation docket.

## COLLABORATIVE WORK WITH OTHER FEDERAL AGENCIES AND DEPARTMENTAL COMPONENTS IN FISCAL YEAR 2013

### Actively Participating in the Interagency Working Group on Environmental Justice (EJ IWG)

The EJ IWG, which will celebrate its 20th anniversary this year, was established by Executive Order 12898. The EJ IWG’s creation highlights the importance of federal agencies working collaboratively to address environmental justice concerns. Chaired by EPA and the White House Council on Environmental Quality (CEQ), the EJ IWG is working to facilitate the active involvement of all federal agencies in implementing Executive Order 12898. As an active member of the EJ IWG, the Division has played a leadership role in ensuring that there is a coordinated federal response to environmental justice issues.

In August 2011, the EJ IWG was reinvigorated when the Department of Justice and 16 federal agencies and White House offices signed the *Memorandum of Understanding on Environmental Justice and Executive Order 12898* (MOU). The Division played an important leadership role in the conception and development of the MOU. Building on Executive Order 12898, the MOU represents the federal government’s renewed commitment to environmental justice. The MOU promotes interagency collaboration and public access to information about



DOJ Website

agency work on environmental justice, and specifically required each agency to publish an environmental justice strategy, to provide an opportunity for public input on those strategies, and to produce annual implementation progress reports. In addition to requiring annual reports, the MOU identifies four focus areas for the EJ IWG as

agencies implement their environmental justice strategies: (1) implementation of NEPA; (2) implementation of Title VI of the Civil Rights Act of 1964, as amended (Title VI); (3) addressing impacts from climate change; and (4) addressing impacts from commercial transportation and supporting infrastructure (often referred to as “goods movement”). The EJ IWG has formed committees for the NEPA, Title VI, and goods movement focus areas identified in the MOU.

### Implementing an Interagency Memorandum on Environmental Justice

The Department continues to fulfill its own obligations under the MOU and further the efforts of the EJ IWG.

—Through its Natural Resources Section (NRS), the Division actively participates in the EJ IWG’s NEPA Committee, which is dedicated to cross-agency education and coordination on the incorporation of environmental justice principles into NEPA decisionmaking. The committee seeks to enhance consideration of environmental justice in the NEPA process through the sharing of best practices, lessons learned, training, and other tools. The NEPA Committee has formed two subcommittees, the Education Subcommittee and the Community of Practice Subcommittee:

—The Natural Resources Section has taken a leadership role on the Education Subcommittee, with an NRS representative serving as co-chair of the subcommittee. The subcommittee has conducted a review of existing federal agency training materials on environmental justice and NEPA, and is using this assessment to develop a national training module focusing on effective EJ analysis in the NEPA process. This national training product will be used to train NEPA practitioners throughout the federal government.

—The Natural Resources Section also has participated regularly in the work of the Community of Practice Subcommittee. The subcommittee is presently compiling a set of best practices that offer effective approaches to considering environmental justice in NEPA reviews. During fiscal year 2013, NRS provided significant input into that document.

—Moving forward, the NEPA Committee will continue to advance the goals of environmental justice through increased understanding of challenges and opportunities, articulation of effective best practices, training on general and specific NEPA and environmental justice topics, and other measures. All together, these efforts will continue to provide federal officials, at all levels, with a foundational understanding of NEPA’s role in addressing EJ through assessment, consideration of alternatives, avoidance, and mitigation during the NEPA review process.

—ENRD’s Environmental Enforcement Section participates in the EJ IWG’S Title VI Committee, chaired by the Department’s Civil Rights Division. The committee acts as a resource to help agencies connect their civil rights enforcement responsibilities with their efforts to achieve environmental justice. In 2013, the committee surveyed agencies to determine the extent to which Title VI complaints have included environmental justice issues, and evaluated the relationship between Title VI and EJ. Moving forward, the committee plans to set up a webpage on the EJ IWG website that articulates the interrelationship between Title VI and EJ and identifies opportunities for interagency collaboration.

—As required by the MOU, in February 2013, the Department released the *2012 Implementation Progress Report on Environmental Justice*, its second annual report on the work and achievements of the Department in this area. The Division contributed significantly to the accomplishments included in the report.



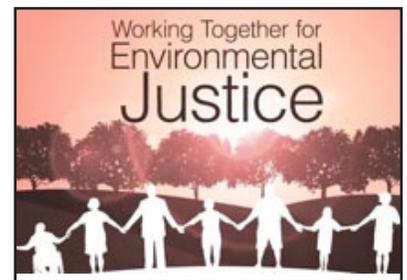
*EPA Photo*

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

The Division also continued to collaborate directly with other federal agencies to increase the dialogue on and awareness of environmental justice issues. The cross-agency group of career attorneys that ENRD, along with EPA's Office of General Counsel, organized in fiscal year 2011 to discuss legal issues that arise with respect to environmental justice, continued to be an important vehicle to increase communi-

cation and awareness. In fiscal year 2013, the group continued to serve as an important forum for open dialogue, continuing education, and informal counseling among the federal agencies on issues such as the intersection of environmental justice and Title VI.

We continued to assist other federal agencies in providing environmental justice training to their staff. For example, in April 2013, representatives from ENRD's NRS, Environmental Defense Section, Environmental Enforcement Section, and Office of the Assistant Attorney General, along with ENRD's Senior Level Environmental Justice Coordinator and the Department's Civil Rights Division, participated in a Department of Energy EJ training session.



*EPA Image*

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

The Division participates in the Regional IWG Committee (RIWG) established by the EJ IWG. The purpose of the RIWG is to facilitate coordinated regional federal activities that respond to communities at the local and regional level. In 2013, the RIWG finalized its concept, which includes its vision, goals, membership, organization, and key principles. The concept is designed to help guide the RIWG in the process of forming regional workgroups (designed around the EPA regional structure) and working with existing workgroups with the goal of better addressing issues, concerns, and recommendations that may result from public engagement at the local and regional levels, and to increase cooperation among federal agencies in support of Executive Order 12898. The committee's goals, in part, are to help respond to environmental justice issues or concerns in a more timely and unified manner, help build community capacity, and leverage resources of federal agencies with those at state, tribal, and local agencies, as well as individual communities, the private sector, and non-governmental organizations (NGOs) to address environmental justice issues. The committee is moving forward with identifying and selecting cross-government collaboration efforts to aid communities.

In addition to supporting the RIWG, in September 2013, the Division and several other federal agencies from the EJ IWG met with members of the Frontline Fellowship Program hosted by the Energy Action Coalition Environmental Justice Collective. The meeting was an opportunity for the fellows to discuss the environmental justice concerns they are working to address in their communities, and to discuss any resources federal agencies might have to assist them.

The Department will continue to work with the EJ IWG to conduct listening sessions with communities to evaluate, among other things, the effectiveness of agency environmental justice strategies and seek recommendations on how agency efforts can be improved. During these

sessions we gain valuable community feedback that often helps us improve how we integrate environmental justice principles into the work we do. We look forward to continuing our participation in them.

## **D**IVISION-SPECIFIC **FISCAL YEAR 2013 ENVIRONMENTAL JUSTICE ACHIEVEMENTS**

In fiscal year 2013, the Division maintained its commitment to ensuring that the principles of environmental justice are routinely considered in all that we do, as well as the work of its client agencies.

### **Conducting Outreach on Environmental Justice Issues**

We continue to engage in community outreach to ensure that the Division understands and is responding to community concerns. This has taken many forms, including community meetings and visits by senior ENRD officials, participation in EJ IWG listening sessions and community calls, participation in environmental justice conferences, and outreach in conjunction with cases in litigation. The Division and U.S. Attorneys' Offices have worked with other components in the Department, federal agency partners, and community representatives to organize direct outreach. For instance, the following are examples of outreach conducted to Indian tribes:

“We protect all communities—regardless of their race, ethnicity, or income—through strong enforcement, ensuring that the law is applied even-handedly and engaging communities in shaping remedies for violations of environmental laws.”

—Acting Assistant Attorney General Robert G. Dreher

—Officials from the Office of Tribal Justice, ENRD, and U.S. Attorneys' Offices met with representatives of tribes and tribal communities regarding environmental concerns, such as water rights and the effects of industrial activities on tribal lands and values. In fall 2013, Department officials met with tribes in the Columbia River region regarding environmental issues, including the effects of coal transportation on the Columbia River.

Acting Assistant Attorney General Robert Dreher, former Assistant Attorney General Ignacia Moreno, and other ENRD senior staff also took the opportunity to speak about environmental justice on a number of occasions. Examples include:

—Presenting November 28, 2012 videoconference remarks to the Attorney General Advisory Committee Environmental Issues Working Group;



*EPA Photo*

- Participating in the January 15, 2013 Transportation Research Board Annual Meeting panel on Trends in Title VI and Environmental Justice in Environmental Reviews;
- Participating in the February 8, 2013 ALI-ABA panel on NEPA and Environmental Justice;
- Holding a February 15, 2013 meeting with Environmental Justice Advocates;
- Presenting May 14, 2013 remarks to the Hispanic National Bar Association on Legislative Day; and
- Presenting December 2013 videotaped remarks for the Asian Development Bank Conference on U.S. Law, Wildlife Trafficking, and Environmental Justice.

The Division, partnering with EPA, also continued to foster a dialogue with corporate leaders regarding environmental justice. In February 2013, former Assistant Attorney General Ignacia Moreno along with Cynthia Giles, EPA’s Assistant Administrator for Enforcement and Compliance Assurance, convened a second session with representatives from the corporate community to discuss environmental justice in enforcement matters. The first session was held in July 2012. Both sessions provided a forum



*EPA Photo*

for a fruitful discussion to raise awareness within the corporate community of the importance of environmental justice and encourage consideration of environmental justice as a basic component of enforcement and compliance matters and corporate-community relations. It is important that the corporate community participate in the conversation on environmental justice. ENRD continues to seek appropriate opportunities to engage business stakeholders in constructive discussions that advance the goals of environmental justice.

## **Increasing Awareness Within ENRD**

The Division has continued to increase awareness and understanding of environmental justice issues among its attorneys and staff. For example, in 2013, ENRD’s Environmental Crimes Section (ECS) incorporated environmental justice training into the annual Environmental Crimes Seminar at the National Advocacy Center in Columbia, South Carolina. The training, attended by ENRD attorneys, EPA attorneys, FWS personnel, NOAA personnel, and 40 Assistant U.S. Attorneys from 28 U.S. Attorneys’ Offices, focused on identifying environmental justice issues in criminal cases.

The Environmental Crimes Section also provided training specifically for its staff. An October 2012 training session held for attorneys within the section focused on the history of environmental justice, key components of the section’s Environmental Justice Plan, and the responsibilities of prosecutors within the section when working on cases with environmental justice implications. A second training session in February 2013 was tailored to paralegals and legal assistants, and addressed administrative requirements for cases that raise environmental justice issues.

The section has taken further steps to integrate environmental justice principles into its work. During case management reviews, every open case within the section is reviewed to assess whether it has environmental justice implications. In addition, the template for ECS's prosecution memorandum was modified to include an "Affected Persons and Communities" section, which requires the prosecutor to assess whether there are individuals and/or communities that have been adversely affected by environmental violations and the impact that has on decisionmaking.

It also is important to consider environmental justice issues throughout the life of a case. The section's EJ Coordinator meets with representatives of EPA's criminal program on a monthly basis to discuss implementation of both the ECS Environmental Justice Plan and the EPA Office of Criminal Enforcement, Forensics, and Training EJ Plan. In addition, they consult each other as issues related to environmental justice arise in cases.

ENRD's defensive sections also have continued to integrate environmental justice principles into the defense of agency actions. For example, to ensure that all employees are familiar with environmental justice principles, NRS made a commitment to provide annual training for its staff on environmental justice. This has included section-wide training on NEPA and environmental justice at annual section meetings and smaller training opportunities. The section-wide training consisted of an overview of the section's Environmental Justice Plan, discussion of how to access relevant environmental justice resources, analysis of environmental justice case studies to help identify agency best practices with regard to environmental justice, and discussion of how courts approach environmental justice issues in litigation. Informal brown-bag sessions provided comparable training to legal interns and recent hires. Similar training activities have been undertaken by the Division's other sections.

In addition to training, the Division continued to look for other ways this year to institutionalize its commitment to the principles of environmental justice:

—Each of ENRD's nine sections has implemented a section-specific plan for integrating environmental justice considerations into its day-to-day work. The plans are currently undergoing review and will be updated, as necessary, from experience gained in putting those plans into action.

—The Department established the Indian Civil Litigation and Policy Working Group, co-chaired by Office of Tribal Justice Director Tracy Toulou, ENRD Deputy Assistant Attorney General Ethan Shenkman, and U.S. Attorney for the District of South Dakota Brendon Johnson. During monthly meetings, the group discusses environmental justice concerns with relevant Departmental components as warranted.

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

The Division's commitment to environmental justice is evidenced by its litigation results. The Environmental Enforcement and Environmental Crimes Sections seek to ensure that all communities enjoy the benefit of a fair and even-handed application of the nation's environmental and natural resources laws, and have a meaningful opportunity for input in the consideration of appropriate remedies for violations of those laws. The following cases concluded by

ENRD in fiscal year 2013, in coordination with the U.S. Attorneys' Offices and our agency partners, have furthered these goals of environmental justice:

—Helping to restore the important relationship between the environment and the Mohawk culture, society, and economy was a significant facet of the settlement in *United States v. Alcoa, Inc.* This was a case brought under CERCLA to recover damages for injuries to natural resources. The Natural Resource Trustees—the Saint Regis Mohawk Tribe, FWS, NOAA, and the State of New York—determined that hazardous substances were released for decades by three entities: two aluminum producers,



**Bank of the Raquette River**

**NOAA Photo**

Alcoa, Inc. (Alcoa West), and Reynolds Metals, Inc. (now Alcoa East); and the former General Motors Central Foundry Plant located adjacent to the Saint Regis Mohawk Tribe Reservation in Massena, New York. These hazardous substances adversely impacted natural resources within the surrounding environment and contaminated the Mohawk community of Akwesasne, degrading natural resources used for traditional cultural practices.

The \$18.5 million from this settlement was combined with \$1.8 million in restoration funds from the 2011 GM bankruptcy settlement to provide about \$20.3 million to restore natural and cultural resources and human uses of natural resources, such as recreational fishing. From this amount, the tribe will receive about \$8.4 million to support traditional cultural practices, including an apprenticeship program to promote Mohawk language and traditional teachings. A portion of the funds also will support cultural institutions including youth outdoor education programs and horticultural programs for medicine, healing, and nutrition. More than \$10 million will be spent on ecological restoration projects, including restoration or enhancement of wetlands, stream banks, native grasslands, bird nesting and roosting habitat, fish habitat and fish passage, and acquisition of unique habitat under threat of development. These projects also may benefit cultural practices that depend on these restored natural resources. Finally, Alcoa will spend approximately \$2 million to develop and upgrade two boat launches on the Raquette River and to construct three new launches on the Grasse River to improve fishing and boating access in the Massena area.

—*In the Matter of: Former Lawrence Metals Site* was a CERCLA settlement in which ENRD facilitated EPA's entering into an agreement with a private developer and a municipal Economic Development Board that will result in the cleanup and redevelopment of a contaminated site in a former commercial and industrial area of Chelsea, Massachusetts. The property is located in a community with environmental justice concerns and is part of a larger revitalization project in that community. Pursuant to the agreement, the developer will contribute \$1.65 million toward cleaning up the site. The Division and EPA worked closely with the City of Chelsea to resolve this matter in a way that benefited the community and enabled contaminated and blighted property to be put back to productive use.

—The City of Chattanooga agreed in *United States v. City of Chattanooga* to pay a civil penalty and make improvements to its sewer systems to resolve CWA violations, including eliminating unauthorized overflows of untreated raw sewage, estimated by the city to cost approximately \$250 million. Approximately 60% of these sewer overflows occur in areas with large lower-income or minority populations. Chattanooga was able to prioritize the vast majority of its proposed early action injunctive relief to these areas.

In addition, Chattanooga agreed to perform a stream restoration supplemental environmental project (SEP) at a cost of \$800,000 in an area identified by EPA as having EJ concerns. (A SEP is an environmentally beneficial project that a defendant agrees to undertake in settlement of a civil penalty action that has a sufficient nexus to the alleged violation(s), but that the defendant is not otherwise legally required to perform.) The SEP will restore the stream and stabilize the banks of a tributary of the South Chickamauga Creek and eliminate a significant source of sediment and solids to the creek. Pursuant to the settlement, Chattanooga also will perform green infrastructure demonstration projects in the historic downtown Highland Park neighborhood (another area where EPA identified EJ concerns) to, among other things, improve water quality in the Dobbs Branch Stream, which flows into Chattanooga Creek.

Prior to finalizing the terms of the settlement approved by the court on April 24, 2013, Chattanooga, along with EPA and the Tennessee Department of Environment and Conservation (TDEC), conducted a public outreach campaign. Chattanooga held two public meetings in different parts of the city. Chattanooga advertised the public meetings in its monthly newsletter, *Common Ground*, which is published by Chattanooga’s Department of Neighborhood Services and Community Development. Chattanooga notified community and environmental justice leaders in the area of these meetings from a list jointly prepared by Chattanooga, the Tennessee Clean Water Network, TDEC, and EPA. Both meetings were well attended, and the Mayor of Chattanooga attended and participated in the first meeting.



Sewer Overflow EPA Image

—The settlement approved by the court in *United States v. City of Jackson, Mississippi*, resolved violations of the CWA in connection with sewer overflows from the city’s waste treatment system. During the negotiations, the United States and the State of Mississippi worked together to compile a list of contacts in the local community who had been involved in environmental justice matters and conducted outreach to those individuals regarding the potential remedies to address the violations. Based in part on feedback from the community, the city, as part of the settlement, will prioritize injunctive relief at its Savanna Street Wastewater Treatment Plant as well as certain areas with environmental justice concerns that had historically experienced a large number of sewer overflows. In addition, the city will spend

“Chattanooga residents will enjoy public health and environmental benefits for years to come as a result of the improvements required by this settlement agreement. The agreement prioritizes neighborhood sewer rehabilitation projects and utilizes innovative stormwater controls in the urban core, reducing sewer overflows and overall reducing threats to public health posed by untreated sewage.”

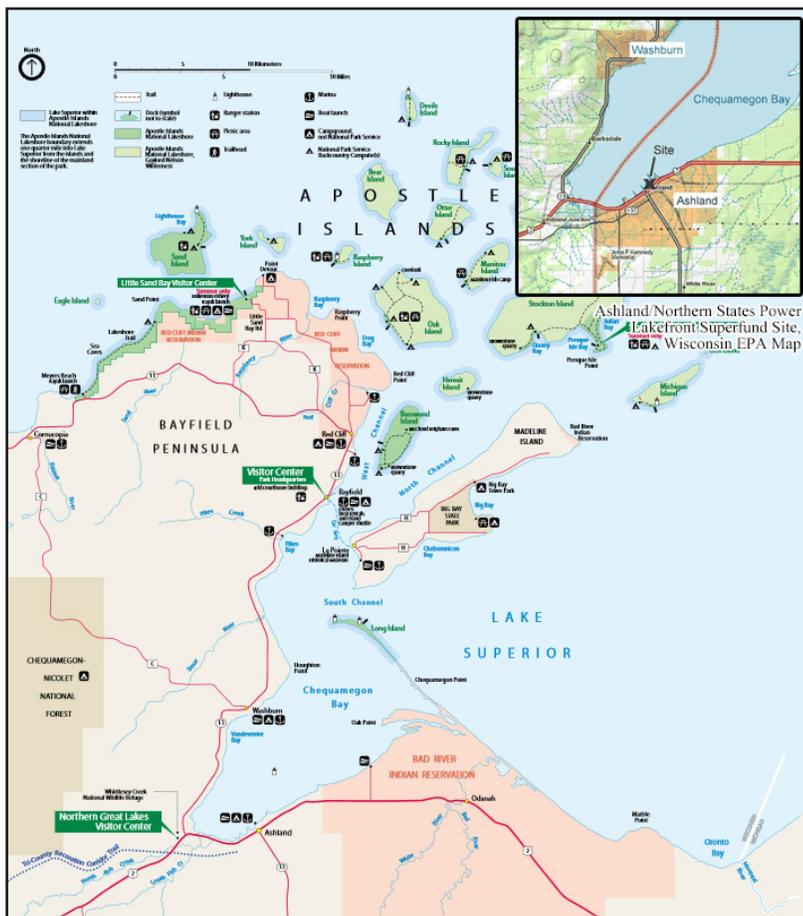
—Former Assistant Attorney General Ignacia S. Moreno, *United States v. Chattanooga* Press Release

approximately \$875,000 as a SEP to fix defective or leaking private laterals (the connection from a home to the city's sewer system) in low-income communities served by the city's sewer system.

—The settlement approved by the court in *United States v. Town of Timmonsville, South Carolina*, will help provide needed relief to the residents of Timmonsville, South Carolina. Timmonsville is a small town in Florence County, South Carolina, with a predominately minority and low-income population. Although Timmonsville was supposed to provide water and sewer service to approximately 2,500 residential, commercial, and industrial entities in the surrounding area, the town was chronically out of compliance with the Safe Drinking Water Act and CWA. The town's utilities were in a deplorable state of repair and the town was unable to take steps necessary to bring its utilities into compliance. The condition of Timmonsville's utilities posed a significant risk to public health. As part of the settlement, the nearby City of Florence agreed to assume control of Timmonsville's sewer and drinking water utilities and to perform work necessary to bring the utilities into compliance with the Safe Drinking Water Act and CWA. Due to Timmonsville's poor financial condition, a civil penalty was not imposed.

—The Fort Belknap Indian Community (FBIC) and the Prairie Mountains Utility (utility) own and operate six public water systems within the boundaries of the Fort Belknap Indian Reservation. The utility, a tribally owned entity, is responsible for providing solid waste disposal, drinking water, and wastewater treatment services to communities located within

the reservation boundaries. The reservation, which is located 40 miles south of the Canadian border in eastern Montana, has high unemployment rates and is a low-income community. The settlement approved by the court in *United States v. Fort Belknap Indian Cmty.* resolves numerous Safe Drinking Water Act violations by the FBIC and the utility that posed serious risks to human health. The settlement requires FBIC and the utility to make structural changes to their respective organizations to minimize systemic management failures that were the root cause of many of the Safe Drinking Water Act violations. In addition, there are system-specific requirements in the settlement for repair and optimization of the various drinking water systems.



**Area Around the Ashland/Northern States Power Lakefront Superfund Site, Wisconsin EPA Map**

—The settlement in *United States v. Northern States Power Co.* will result in a partial cleanup and a

natural resource damages (NRD) recovery at the Ashland/Northern States Power Lakefront Superfund Site in northwestern Wisconsin. The site sits on the shores of Chequamegon Bay in Lake Superior and was home to a number of manufacturing businesses during the 20th century, including a manufactured gas plant. Contaminants from the on-land portion of the site migrated into the bay and damaged high-quality feeding, spawning, and nursery habitat for fish, including walleye, smelt, sturgeon, and multiple species of trout and salmon. The Bad River and Red Cliff Indian Reservations are located on either side of the City of Ashland and abut Chequamegon Bay or other portions of Lake Superior. Both tribes have traditionally fished in Lake Superior and inland streams and rivers.

Under the settlement, Northern States Power, a successor to the owner of the manufactured gas plant, agreed to perform the on-land portion of the site cleanup and transfer land to the Natural Resource Trustees to redress natural resource injuries at the site. In reaching the settlement, the Department led negotiations for the trustees, who included the State of Wisconsin and the Bad River and Red Cliff Indian Tribes. The Department worked with the tribes to determine what elements of an NRD recovery would be most beneficial to them. The tribes identified lands within reservation boundaries along water bodies feeding the bay that were owned by outside entities. Transferring those lands to the tribes is expected to improve management of the rivers and improve habitat for the trust resources, while also fulfilling the independent tribal goal of gaining ownership of land within reservation boundaries. Once the preferred relief was identified by the tribes, the Department negotiated a final settlement that requires Northern States Power to transfer 400 acres within the Bad River Reservation to the Bad River Tribe. This includes an area known as the “Falls,” a series of ledges in the Bad River that provide important spawning areas. The settlement also calls for the Wisconsin Department of Natural Resources to transfer 114 acres within the Red Cliff Reservation to the Red Cliff Tribe.

—In *United States v. Geneva Energy, L.L.C.*, the district court in Illinois approved a consent decree in April 2013 resolving, on an ability-to-pay basis, claims against Geneva Energy for numerous CAA violations resulting from its ownership and operation of a tire-burning electric generating facility near Chicago, Illinois. Geneva Energy will pay no civil penalty but, among other things, was required to permanently shut down the facility, which has been largely idle since August 2011. The settlement also resolved allegations of CAA violations described in a notice of violation/finding of violation issued by EPA to NAES, Inc., which operated the facility for a limited time. Under the settlement, NAES will pay \$185,000 to resolve its alleged liability.

The City of Ford Heights, where the facility was located, has one of the lowest per capita incomes in the United States, an over 95% minority population, extensive urban blight, and several industries which employ few local residents. As revealed at the environmental justice community outreach session that the Division and EPA held for this matter in 2010, the facility was well known for its CAA violations. In 2006 and 2010, citizen groups filed with EPA two separate complaints under Title VI of the Civil Rights Act of 1964 against Illinois EPA related to that agency’s issuance of the facility’s air permits. Complainants argued that the facility’s operations had a disproportionately adverse effect on the Ford Heights community and the permit terms were too lenient. The terms of the settlement (particularly requiring the facility’s permanent shut down) will assist in addressing those Title VI complaints. Prior to the court’s approval of the settlement, ENRD sent letters to all the participants in the 2010 community outreach session.

—ENRD reached a settlement in *United States v. Gateway Energy & Coke Co.* that resolves claims relating to two Midwestern coking facilities, one of which (the Gateway Facility) is located in Granite City, Illinois, close to St. Louis. According to an analysis of census data performed by EPA, Granite City is an environmental justice area of concern. The consent decree requires defendants, among other things, to perform a lead abatement hazard reduction SEP in residences in the area surrounding the Gateway Facility. The SEP will entail abating lead hazards in owner-occupied residences whose occupants are unable to afford such lead abatement work, with priority given to families with young children or pregnant women. The SEP must be completed within two years of entry of the settlement. The settlement also requires Gateway Energy to install \$100 million in equipment that will route hot coking gases to a pollution control device, install a continuous emissions monitor for sulfur dioxide and bypass vents, and pay a \$1.995 million civil penalty.

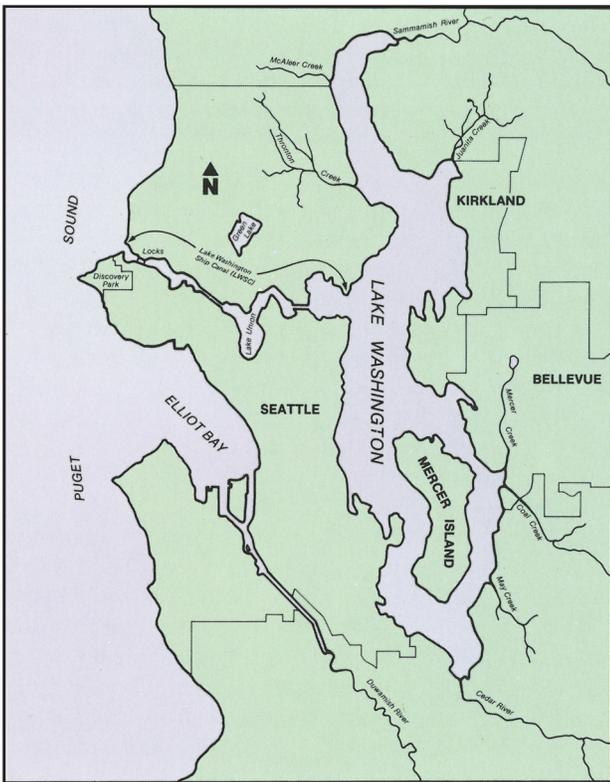
“This settlement is good news for communities in Illinois and Ohio, who will benefit from these substantial reductions in harmful air pollution and enjoy cleaner, healthier air to breathe for many years to come. It also reflects our continuing commitment to protecting the people and environment of the United States through the vigorous enforcement of the Clean Air Act.”

—Acting Assistant Attorney General Robert G. Dreher, *United States v. Gateway Energy & Coke Co.* Press Release

—In *In re the Matter of Carter Carburetor Site, St. Louis, Missouri*, ENRD approved an EPA administrative settlement agreement under CERCLA requiring ACF Industries, L.L.C., to perform the majority of a \$26.5 million removal action for the Carter Carburetor Site in North St. Louis, Missouri. The site is a former gasoline and diesel carburetor manufacturing plant that operated from 1915 to 1984. The 10-acre complex of buildings and structures is located

within a predominately minority and low-income community where investigators have found unacceptable levels of polychlorinated biphenyls (PCBs), trichloroethylene, and asbestos. The contaminated site, which also is within close proximity to several schools and a ball park, and directly across the street from a Boys and Girls Club, has increased the risk of human exposure to the toxins. Due to the site’s proximity to these facilities and its location in a predominately lower-income and minority community, environmental justice concerns were identified and EPA conducted community outreach. The Division worked quickly to approve the settlement so that this important cleanup work could proceed.

—The court approved a CWA settlement in *United States v. King County, Washington*, requiring King County to: (1) construct and implement a series of storage tanks or pipes and treatment facilities, as set forth in its approved Long Term Control Plan (LTCP); (2) develop and implement a system-wide operation program to maximize the treatment and storage of wet weather flow; and (3)



Map of Seattle Waterways

develop and implement a joint plan with the City of Seattle that optimizes the capacity of both entities' sewer systems and coordinates the operations of future combined sewer overflow (CSO) projects. This injunctive relief is aimed at controlling the county's ongoing sewer overflows from its wastewater treatment and collection system and improving water quality in Puget Sound, Elliott Bay, Lake Washington, the Duwamish River, and other waterbodies in the Seattle area used by local communities with environmental justice concerns. Specifically, the Puyallup, Tulalip, Suquamish, Muckleshoot, and Duwamish Tribes have fishing rights and interests in Puget Sound, Lake Washington, the Duwamish River, and local waterbodies that are impacted by the county's discharges of raw sewage. The Duwamish River, an impaired waterbody that receives large volumes of raw sewage from the county's CSOs, is a source of subsistence fishing for low-income residents of the area, as well as recent immigrant populations. The county has been coordinating and will continue to coordinate with and seek feedback from these entities as it implements its LTCP pursuant to its Public Participation Plan. In addition, the county has agreed to arrange its construction schedule so that the CSO control projects along the Duwamish River will be prioritized for completion so as to benefit the tribes and communities with environmental justice concerns by reducing the CSO discharges into the river where they fish and live. Following implementation of its LTCP, the county will have captured 94% of its CSO discharges during storm events and reduced overflows from each of the county's permitted CSO outfalls to no more than one overflow per year. The estimated cost of the injunctive relief is \$860 million (in 2010 dollars).

—The United States alleged in *United States v. Knight* that, in the wake of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, Connie Knight victimized vulnerable communities by impersonating a high-ranking Occupational Safety and Health Administration (OSHA) instructor and inspector to defraud unsuspecting victims. Using false federal credentials, she persuaded community members, most of whom were from the Southeast Asian fishing community, that she could provide them training to handle hazardous materials. Instead, Knight produced false training certificates and phony cardiopulmonary resuscitation/first aid certification cards. During the late summer of 2010, most of the shrimp fishing along the Louisiana coast was closed due to the oil spill. Members of the Southeast Asian community who were dependent on shrimping for their income were desperate for alternate sources of income. Many were not fluent in written or spoken English. Knight saw this opportunity and came up with her scheme. She charged each of her victims, but failed to provide them the training they would need to obtain employment. The false certifications also potentially put her victims and the public at risk. After being indicted, Knight pleaded guilty to three felony counts and one misdemeanor count of creating false identification documents and impersonating a federal official. She was sentenced on May 16, 2013, to 57 months of incarceration and to pay her victims restitution in the amount of \$25,300. The case was jointly prosecuted by the Division and the U.S. Attorney's Office for the Eastern District of Louisiana.

—In *United States v. Citgo Petroleum Corp.*, CITGO Petroleum Corporation (CITGO Petroleum) and CITGO Refining and Chemicals Company (CITGO Refining) operated two open top tanks at the company's refinery in Corpus Christi, Texas, each the size of a football field and filled with oily wastewater, without installing the proper emission controls. The tanks were used as oil-water separators, but were not equipped to prevent the emissions of chemicals into the air. The companies knew years before the two tanks went into operation that the tanks were required to have emission control equipment. During an unannounced inspection in March 2002, environmental inspectors found approximately 4.5 million gallons of oil in the two open top tanks exposed to the atmosphere. The refinery is surrounded by two residential



**Citgo Tank in Corpus Christi, Texas**

communities with significant minority populations. These communities were exposed to benzene and other emissions from the plant over a number of years. Adult and child residents complained about odor and acute adverse health effects such as difficulty breathing, coughing, sore throats, and eye irritation.

On June 27, 2007, a jury convicted CITGO Petroleum and CITGO Refining of two CAA violations. CITGO Refining also was convicted of violating the Migratory Bird Treaty Act (MBTA). Since that time, ENRD has engaged in outreach to members of the affected community, which included three community meetings/listening sessions to learn about how members of the community had been affected by CITGO's illegal benzene emissions and prepare to address the court at sentencing. After the district court refused to recognize any of the members of the community as victims of CITGO's conduct, the victims through pro bono counsel petitioned for and obtained a writ of mandamus from the Fifth Circuit. Since then, ENRD has presented 90 victims to testify to the district court about the acute health effects, injuries, and financial impacts they suffered as a consequence of CITGO's criminal conduct. On February 5, 2014, CITGO Petroleum and CITGO Refining were each sentenced to pay \$1 million for their violations of the CAA. CITGO Refining was ordered to pay an additional \$45,000 for the MBTA conviction. The court has not yet ruled on victim restitution.

In fiscal year 2013, ENRD's Indian Resources Section also handled other environmental matters that benefited Indian tribes. For example:

—ENRD intervened in litigation brought by the Penobscot Nation (the Nation) in Maine, *Penobscot Nation v. Mills*. The controversy concerns whether the Nation's reservation includes the Main Stem of the Penobscot River. The reservation consists in large part of a number of islands located in the Main Stem, a portion of the Penobscot River beginning north of Bangor at Indian Island. The State of Maine indicated in 2012 that it believed the Nation has no jurisdictional authority over the waters of the Penobscot River and suggested that if the Nation disagreed, the matter be resolved in the appropriate forum. The Nation filed a lawsuit to protect the right of tribal members to exercise sustenance fishing rights in the river and to protect its authority to regulate the taking of wildlife and game on those portions of the river falling within its reservation. A holding that the Main Stem falls within the reservation means that Penobscot Nation members may engage in sustenance fishing in the Main Stem free of state regulation and that the Nation may regulate hunting, trapping, and the taking of wildlife (water fowl) in the Main Stem.

—ENRD filed a motion for summary judgment in *Smith v. Parker*, a case that concerns the reservation boundaries of the Omaha Tribe of Nebraska. The issue in the litigation is whether

an 1882 Act of Congress diminished the tribe's reservation boundaries, or simply offered non-Indians the opportunity to purchase land within the reservation. ENRD filed an *amicus* brief when the case was pending in tribal court, and in its summary judgment motion in federal district court again took the position that the act did not result in diminishment. EPA has long taken the position that the area in dispute remains within the reservation boundaries, but permits it has issued have been challenged. EPA has indicated its intention to issue other permits, but those permits can be issued only if the facility is determined to be located within a reservation or otherwise within Indian country. A favorable determination will affirm the ability of EPA to issue needed permits and ensure protection of the environment on reservation lands.

More than half of ENRD's work consists of defending the environmental or natural resources actions of federal agencies. The Division has worked to incorporate EJ principles into the 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 decisionmaking, ENRD implements Executive Order 12898 proactively by looking for ways to address concerns of environmental justice communities outside of the traditional litigation context. Two recent examples of this aspect of ENRD's environmental justice efforts are described below:

—As we reported last year, in *Honolulu Traffic.com v. Federal Transit Admin.*, ENRD worked successfully with City and County of Honolulu transportation agencies to defend a major rail transit project linking western O`ahu with downtown Honolulu. In addition to easing severe traffic congestion and alleviating air pollution, the project will provide significant transit benefits to minority and disadvantaged communities in western O`ahu. The Division is currently defending the agencies' compliance with the district court's limited remand order.

—In the cases of *Crenshaw Subway Coal. v. Los Angeles County Metro. Transp. Auth.*; *515/555 Flower Assoc., L.L.C. v. Federal Transit Admin.*; *Today's IV, Inc. v. FTA*; *Japanese Village L.L.C. v. FTA*; *Beverly Hills Unified School Dist. v. FTA*; and *The City of Beverly Hills v. FTA*, ENRD is collaborating closely 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 greatly expand light rail transit into the minority and low-income Crenshaw community in south Los Angeles, while providing easier access to Los Angeles International Airport and decreasing traffic congestion in and around communities throughout the Los Angeles basin.



*Oregon Coastline*

*Photo by Jeff Bank*



*Near Mount Tamalpais, California*

*Photo by Jeff Bank*

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

## Obtaining Company-Wide Relief for Environmental Violations

Company-wide case settlements benefit everyone. 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 settlement of important technological upgrades on an efficient scale. Communities located near the facilities covered by these settlements benefit from pollutant reduction and, where appropriate, environmentally beneficial projects.

In fiscal year 2013, the Division reached an important company-wide settlement with Safeway, the nation's second-largest grocery store chain. (The district court approved the settlement in November 2013.) In *United States v. Safeway, Inc.*, the company agreed to significantly reduce emissions of ozone-depleting substances from refrigeration equipment at its 659 stores nationwide, at an estimated cost of approximately \$4.1 million. Safeway also agreed to pay a \$600,000 civil penalty. The measures to which Safeway has committed are expected to prevent the release of over 100,000 pounds of refrigerants that destroy the ozone layer.

The settlement resolved allegations that Safeway violated the CAA by failing to promptly repair leaks of HCFC-22, a hydrochlorofluorocarbon used as a coolant in refrigerators. HCFC-22 is both a greenhouse gas and an ozone-depleting substance. (As a greenhouse gas, HCFC-22 is up to 1,800 times more potent than carbon dioxide.) The settlement also resolves allegations that Safeway failed to keep adequate records of the servicing of its refrigeration equipment. Safeway will implement a corporate-wide refrigerant compliance management system to comply with stratospheric ozone regulations. The company will

**"T**his first-of-its-kind settlement will benefit all Americans by cutting emissions of ozone-depleting substances across Safeway's national supermarket chain. It can serve as a model for comprehensive solutions that improve industry compliance with the nation's Clean Air Act."

—Acting Assistant Attorney General Robert G. Dreher,  
*United States v. Safeway, Inc.*, Press Release

reduce its corporate-wide average leak rate from 25% in 2012 to 18% or below in 2015. It also will reduce the aggregate refrigerant emissions at its highest-emission stores by 10% each year for three years.

## Reducing Air Pollution from Power Plants

Twenty-six settlements with operators of coal-fired electric power generating plants as of September 30, 2013, will result in reductions of over 2.3 million tons of sulfur dioxide and nitrogen oxide, once the more than \$15 billion in required pollution controls are fully functioning.



Nelson Dewey Power Plant, Wisconsin

USGS Photo

The Division has continued to litigate civil claims under the CAA against operators of coal-fired electric power generating plants. Violations in these cases arise from companies engaging in major life-extension projects on aging facilities without installing required state-of-the-art pollution controls, resulting in excess air pollution that has degraded forests, damaged waterways, contaminated reservoirs, and adversely affected the health of our citizens, especially the elderly, the young, and asthma sufferers. These plants emit sulfur dioxide (SO<sub>2</sub>), nitrogen oxide (NO<sub>x</sub>), and particulate matter (PM). Sulfur dioxide and NO<sub>x</sub> contribute to ground-level ozone, or smog, and acid rain. Both also can irritate the lungs and aggravate pre-existing heart or lung conditions. Nitrogen oxides and PM can cause serious respiratory illnesses and aggravate asthma. Particulate

matter contains microscopic particles that can travel deep into the lungs and cause difficulty breathing and decreased lung function. Through fiscal year 2013, 26 of these matters have settled on terms that will result in reductions of over 2.3 million tons of SO<sub>2</sub> and NO<sub>x</sub> each year, once the more than \$15 billion in required pollution controls are fully functioning.

In fiscal year 2013, the Division obtained four settlements under this initiative.

—In *United States v. Wisconsin Power & Light Co.*, the operator company and its co-defendant current and former owners must invest more than \$1 billion in pollution control technology, pay a civil penalty of \$2.45 million, and spend a total of \$8.5 million on environmental mitigation projects to resolve alleged violations of the CAA. This settlement, approved by the district court in Wisconsin in June 2013, covers all seven coal-fired boilers at the Columbia, Edgewater, and Nelson Dewey Power Plants. Under the settlement, defendants must install new pollution control technology on the three largest units, continuously operate the new and existing pollution controls, and comply with stringent pollutant emission rates and annual tonnage limitations. The settlement also requires Wisconsin Power & Light and co-defendant Wisconsin



Weston Generating Station, Wisconsin

Photo Courtesy of Royalbroil

Public Service Corporation to permanently retire, refuel, or repower four additional coal-fired units at the Edgewater and Nelson Dewey Plants. The actions taken to comply with this settlement will result in annual reductions of SO<sub>2</sub>, NO<sub>x</sub>, and PM of approximately 54,000 tons from 2011 emission levels.

The settlement also requires defendants to spend \$8.5 million on projects that will benefit the environment and human health in communities located near the facilities, including \$260,500 to the U.S. Forest Service and \$260,500 to the National Park Service, for projects to address damage resulting from the

company's excess emissions. The remaining \$7.479 million will be spent on a combination of projects, including up to \$2.1 million on land acquisition and restoration; up to \$5 million on a long-term major solar photovoltaic power purchase agreement or a solar panel installation project; and up to \$2 million on renewable energy resource enhancements for existing wind farms and hydroelectric facilities.

—In *United States v. Dominion Energy, Inc.*, Dominion Energy agreed to invest \$325 million in pollution control equipment, pay a \$3.4 million civil penalty, and spend approximately \$9.8 million on environmental mitigation projects to resolve CAA violations. The settlement, which was approved by the district court in Illinois in July 2013, will result in reductions of SO<sub>2</sub>, NO<sub>x</sub>, and PM by more than 70,000 tons per year, across three of the utility's coal-fired power plants located in Kincaid, Illinois; State Line, Indiana; and Somerset, Massachusetts. Under the settlement, the company must install or upgrade pollution control technology on two plants, and permanently retire a third; operate the new and existing pollution controls continuously; and comply with stringent emission rates and annual tonnage limitations.

The settlement also requires Dominion to spend \$9.75 million on projects that will benefit the environment and human health in communities located near the Dominion facilities. A total of \$9 million will be spent on such projects as: 1) wood-stove changeouts, including \$2 million for changeouts in southeastern Massachusetts, Rhode Island, and eastern Connecticut; 2) switcher locomotive idle reduction for Chicago rail yards; 3) land acquisition and restoration near the Indiana Dunes National Lakeshore; 4) energy-efficiency and geothermal or solar projects for local schools and food banks; and 5) clean-diesel engine retrofits for municipalities and school districts. (During a wood-stove changeout campaign, consumers typically receive financial incentives (rebates) to replace older appliances with non wood-burning equipment, pellet stoves, or EPA-certified wood stoves.) The company also must pay a total of \$750,000 to the U.S. Forest Service and the National Park Service, for projects to address the damage resulting from Dominion's excess emissions.

—Under the settlement in *United States v. Wisconsin Pub. Serv. Corp.*, the utility will invest approximately \$300 million in pollution control technology, pay a civil penalty of \$1.2 million, and spend \$6 million on environmental mitigation projects to resolve violations of the CAA. The settlement, which covers all eight coal-fired boilers at the utility's two power plants—the Pulliam Plant in Green Bay, Wisconsin, and the Weston Plant in Rothschild, Wisconsin—requires

Wisconsin Public Service to install new pollution control technology on one of its largest units, continuously operate the new and existing pollution controls, and comply with stringent emission rates and annual tonnage limitations. The settlement also requires Wisconsin Public Service to permanently retire, refuel, or repower four additional coal-fired units at the Pulliam and Weston Plants. The actions taken by Wisconsin Public Service to comply with this settlement will result in annual reductions of SO<sub>2</sub>, NO<sub>x</sub>, and PM by approximately 15,000 tons from 2010 emission levels.

Wisconsin Public Service also will spend \$6 million on projects that will benefit the environment and human health in communities located near the utility's facilities. The utility must pay \$250,000 to both the U.S. Forest Service and the National Park Service, for projects to address damage resulting from its excess emissions. Up to \$4 million will be spent on a renewable energy resource enhancement project, up to \$1.2 million on a wood-stove changeout project, and up to \$300,000 on a community digester project to convert food and/or animal waste to biogas or electricity. Wisconsin Public Service also may fund a compressed natural gas or hybrid fleet conversion project, or a solar panel installation project. The settlement was approved on March 7, 2013, by the district court in Wisconsin.



Green Bay, Wisconsin

Photo Courtesy of Chris Rand

—In *United States v. Louisiana Generating*, Louisiana Generating, a company owned by NRG Energy, Inc., agreed to a settlement regarding its Big Cajun II coal-fired power plant in New Roads, Louisiana, that will eliminate over 27,300 tons of harmful emissions of SO<sub>2</sub> and NO<sub>x</sub> per year by 2025. The settlement, which was approved by the district court in Louisiana in March 2013, requires the company to spend approximately \$250 million to reduce air pollution and to pay a civil fine of \$3.5 million and spend \$10.5 million on environmental mitigation projects. Louisiana Generating will achieve the emission reductions through a combination of new pollution controls, natural gas conversion, and annual emission caps at all three units at the Big Cajun II Plant. The State of Louisiana joined in the settlement and will receive one-half of the \$3.5 million civil penalty.

## Addressing Air Pollution from Oil Refineries and Chemical Plants

### Reduction in Pollution from Flares

Improperly operated industrial flares, which are used to burn off 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 negotiated two innovative consent decrees in fiscal year 2013.

—The settlement in *United States v. Shell Oil Co.* resolved alleged violations of the CAA at a large refinery and chemical plant in Deer Park, Texas. The 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. Shell Oil 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. Of this, 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 is required to take various actions to improve flaring operations—minimize flaring by recovering and recycling waste gases (flare gas recovery, in which the gas may then be reused by Shell as a fuel or product), comply with limitations on how much waste gas can be burned in a flare (flare caps), and install and operate instruments and monitoring systems to ensure that gases that are sent to flares are burned with 98% efficiency. Shell’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 SO<sub>2</sub>, VOCs, including benzene, and other hazardous air pollutants by an estimated 4,550 tons or more per year. These controls also will reduce emission of greenhouse gases by approximately 260,000 tons per year.

In addition to reducing pollution from flares, Shell 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 second settlement was *United States v. CountryMark Refining and Logistics, L.L.C.* CountryMark agreed to spend \$18 million on new pollution controls, perform environmental projects totaling more than \$180,000, and pay a \$167,000 civil penalty to resolve alleged CAA violations at its refinery in Mount Vernon, Indiana. The settlement requires new and upgraded pollution controls, more stringent emission limits, and aggressive leak-detection-and-repair practices to reduce emissions from refinery equipment and processing units. It also requires new controls on the refinery’s flaring devices. The settlement will ensure proper combustion efficiency for any gases that are sent to a flare and also will cap the total amount of waste gases that can be sent to a flare at the refinery. Once fully implemented, the pollution controls required by the settlement will reduce emission of air pollution by an estimated 1,000 tons or more per year.



Mount Vernon, Indiana

The State of Indiana actively participated in the settlement with CountryMark and has received over \$110,000 to fund a SEP to remove asbestos-containing material from an old grain elevator in downtown Mount Vernon. The settlement also requires CountryMark to provide at least \$70,000 in funding for a SEP that will install diesel-retrofit and/or idle-reduction technologies on school buses and/or other publicly owned vehicles located within 50 miles of the refinery.

### **Refinery Initiative**

The Division's petroleum refinery enforcement initiative has produced settlements or other court orders that have addressed more than 90% of the nation's refining capacity, and will reduce air pollutants by more than 360,000 tons per year. Among the reduced air pollutants are SO<sub>2</sub>, NO<sub>x</sub>, and VOCs. 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 SEPs.

Two additional settlements were obtained under this initiative during fiscal year 2013. One was the settlement with CountryMark, discussed above. In addition to requiring flare controls, that settlement also covered the kinds of issues addressed in the refinery initiative: emissions from FCCUs (fluidized catalytic cracking units), heaters and boilers, sulfur recover units, benzene-containing equipment, poor leak-control procedures, etc.

The other refinery initiative settlement was *United States v. Big West Oil, L.L.C.* Big West Oil agreed to pay a \$175,000 penalty and to spend approximately \$18 million to install emission controls at its refinery in North Salt Lake, Utah. The company also will invest \$253,000 to improve the monitoring and management of potential releases of hydrofluoric acid at the facility. When fully implemented, the controls and requirements under the agreement will reduce emissions of SO<sub>2</sub> by approximately 158 tons per year, NO<sub>x</sub> by approximately 32 tons per year, and PM by approximately 36 tons per year. Additional reductions of volatile and hazardous pollutants also are expected as a result of compliance with leak-detection-and-repair requirements.

The settlement requires Big West Oil to install a state-of-the-art flue-gas filter system to control emissions of PM and to place ultra-low NO<sub>x</sub> burners on four heaters and boilers. The company also will undertake measures to reduce SO<sub>2</sub> emissions from the refinery by, among other things, restricting hydrogen sulfide (H<sub>2</sub>S) in fuel gas and installing and operating a caustic scrubber system at the sulfur recovery plant. Additionally, Big West Oil has agreed to make numerous upgrades to its leak-detection-and-repair program, including the installation of low-leak valves, and to enhance its waste operations to minimize or eliminate fugitive benzene emissions.

### **Reducing Air Pollution at Other Facilities**

As part of its national initiative to reduce air pollution from major industries, the Division concluded three settlements with cement manufacturing companies and two settlements with glass manufacturers.

## Cement Initiative

These cases typically involve allegations that a company unlawfully made modifications at a plant that resulted in significant net increases in emissions of SO<sub>2</sub>, NO<sub>x</sub>, or PM.

—In *United States v. Ash Grove Cement Co.*, Ash Grove agreed to pay a \$2.5 million penalty and invest approximately \$30 million in pollution control technology at its nine Portland cement manufacturing plants to resolve alleged violations of the CAA. The agreement, which was approved by the district court in Kansas, will reduce annual emissions of SO<sub>2</sub> and NO<sub>x</sub> by more than 17,000 tons each year. The plants covered by the agreement are in Foreman, Arkansas; Inkom, Idaho; Chanute, Kansas; Clancy, Montana; Louisville, Nebraska; Durkee, Oregon; Leamington, Utah; Seattle, Washington; and Midlothian, Texas. The Puget Sound Clean Air Agency and all of the states with Ash Grove plants, with the exception of Texas, joined the United States in the settlement.



Ash Grove Cement Manufacturing Plant in Seattle, WA  
Photo Courtesy of Joe Mabel

The settlement requires Ash Grove to meet stringent emission limits and install and continuously operate modern technology to reduce SO<sub>2</sub>, NO<sub>x</sub>, and PM. Ash Grove will reduce NO<sub>x</sub> at nine kilns, some of which will have the lowest emission limits applicable to a retrofitted control system in the country. In addition, modern pollution controls must be installed on every kiln to reduce PM emissions, and on several kilns to reduce SO<sub>2</sub> emissions. At its Texas facility, Ash Grove will shut down two older, inefficient kilns, and replace a third with a cleaner, newly reconstructed kiln.

To mitigate the effects of past excess emissions, Ash Grove will spend \$750,000 on a project to replace old diesel truck engines at its facilities in Kansas, Arkansas, and Texas. The project is estimated to reduce smog-forming NO<sub>x</sub> by approximately 27 tons per year.

—The United States alleged in *United States v. Holcim (US), Inc.*, that Holcim modified a cement plant in Hagerstown, Maryland, without obtaining the required permit or installing the required pollution control equipment. Under the settlement, the company agreed to meet strict emission limits by installing one of two kinds of advanced pollution controls (estimated to cost approximately \$20 or \$85 million, respectively), or retire the kiln. To mitigate past emissions, Holcim will spend \$150,000 to replace a device powered by an old engine with modern equipment. Finally, Holcim paid a \$700,000 civil penalty.

—In *United States v. CEMEX, Inc.*, CEMEX, the owner and operator of a Portland cement manufacturing facility in Lyons, Colorado, agreed to operate advanced pollution controls on its kiln and pay a \$1 million civil penalty to resolve alleged violations of the CAA. The company will install “selective non-catalytic reduction” (SNCR) technology, which is expected to reduce emissions of NO<sub>x</sub> by approximately 870 to 1,200 tons per year. The initial capital cost for installing SNCR is approximately \$600,000 and the cost of injecting ammonia into the stack emissions stream, a necessary part of the process, is anticipated to be about \$1.5 million per year.

## Glass Initiative

—In *United States v. Owens-Brockway Glass Container, Inc.*, the nation’s largest glass container manufacturer agreed to install pollution control equipment to reduce harmful emissions of SO<sub>2</sub>, NO<sub>x</sub>, and PM by nearly 2,500 tons per year and to pay a \$1.45 million penalty to resolve alleged CAA violations at five of the company’s manufacturing plants. The pollution control equipment is estimated to cost \$37.5 million. Owens-Brockway also will spend an additional \$200,000 to mitigate excess emissions at its plant in Atlanta; and the company will work with the Georgia Retrofit Program to retrofit diesel school buses and other vehicles with emission controls or assist with the purchase of new propane, hybrid, or natural gas vehicles. The facilities covered by the settlement are located in Atlanta, Georgia; Clarion, Pennsylvania; Crenshaw, Pennsylvania; Muskogee, Oklahoma; and Waco, Texas. The Oklahoma Department of Environmental Quality also was a signatory to the consent decree.

“This agreement will significantly reduce the amount of air pollution, known to cause a variety of environmental and health problems, from the nation’s largest manufacturer of glass containers. The settlement, the latest in a series of agreements with the glass manufacturing sector, addresses major sources of pollution at facilities located in four states and will mean cleaner air for the people living in those communities.”

—Former Assistant Attorney General Ignacia S. Moreno, *United States v. Owens-Brockway Glass Container, Inc.*, Press Release

—The complaint in *United States v. Durand Glass Manufacturing Company, Inc.*, alleged that Durand constructed a new glass melting furnace at its facility in Millville, New Jersey, resulting in increased emissions of NO<sub>x</sub> and PM, without first obtaining pre-construction permits or installing the required pollution control equipment. In the settlement resolving the legal action, the company agreed to install emission controls on its three glass furnaces that will reduce emission of NO<sub>x</sub> by more than 173 tons per year and emission of PM by 23 tons per year. Durand also installed monitoring systems that will allow it to continuously measure its NO<sub>x</sub> emissions. The cost of the pollution control equipment is estimated to be \$9.1 million. To control NO<sub>x</sub>, the consent decree requires Durand to operate the first “selective catalytic reduction” (SCR) device installed on a tableware glass furnace in the United States. (SCR is a highly effective method of pollution control that uses heat and a catalyst to convert oxides of nitrogen into nitrogen and water.) Durand also paid a \$300,000 civil penalty. The State of New Jersey was an active partner in resolving this matter.

## Other Industries

In the settlement in *United States v. Honeywell Chemicals & Resins, L.L.C.*, Honeywell agreed to pay a \$3 million civil penalty and spend approximately \$66 million dollars to improve the air pollution control equipment at its plant in Hopewell, Virginia. To reduce emissions, Honeywell will install SCR at four production trains at the facility, conduct a third-party audit of benzene waste operations, and implement an enhanced leak-detection-and-repair program. Honeywell also will perform a mitigation project valued at approximately \$1 million at the facility. The settlement is expected to reduce annual emissions of NOx by about 6,260 tons and emissions

of benzene, other VOCs, and hazardous air pollutants by 100 tons. The State of Virginia joined the United States in bringing the matter.

### NONCOMPLIANCE IN UNITED STATES V. TYSON FOODS, INC.

—The Clean Air Act’s Risk Management Program (section 112(r)) requires owners and operators of facilities that exceed a threshold quantity of a regulated substance, such as anhydrous ammonia, to develop and implement a risk management plan that must be submitted to EPA. The 23 Tyson facilities named in the consent decree are subject to the regulations because the refrigeration systems at the facilities each contained more than 10,000 pounds of anhydrous ammonia. The facilities had a combined inventory of more than 1.7 million pounds of anhydrous ammonia.

—The gas was released during incidents at Tyson facilities in Kansas, Missouri, Iowa, and Nebraska, and resulted in multiple injuries, property damage, and one fatality.

—Anhydrous ammonia is a poisonous gas and considered an extremely hazardous substance under the Clean Air Act. Exposure to vapors can cause temporary blindness and eye damage, as well as irritation of the skin, mouth, throat, respiratory tract, and mucous membranes. Prolonged exposure to anhydrous ammonia vapor at high concentrations can lead to serious lung damage and even death.

—EPA Website

The CAA’s “Risk Management Program” requires facilities with sufficient quantities of regulated substances to develop and implement a risk management plan—a plan to minimize the risk of a chemical accident. The United States filed *United States v. Tyson Foods, Inc.*, after anhydrous ammonia was released from Tyson facilities in Kansas, Missouri, Iowa, and Nebraska. The

settlement requires Tyson to pay a \$3.95 million civil penalty, to have outside experts audit Tyson’s compliance with the Risk Management Program at all 23 of Tyson’s facilities in the four states, and to correct any violations discovered. Tyson also must test certain piping in its refrigeration systems at the 23 facilities to identify any problems that might have led to the releases of anhydrous ammonia, and to replace any non-compliant piping. As a SEP, Tyson will purchase \$300,000 worth of emergency response equipment for first responders in communities in which Tyson operates facilities where there are environmental justice concerns.

## Ensuring the Integrity of Municipal Wastewater Treatment Systems

These cases involve 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 and may cause beach closures as well as the issuance of public advisories against consumption of fish. Low-income and minority communities often live in older urban areas. Clean Water Act enforcement also protects national treasures like the Chesapeake Bay and the Great Lakes.

From January 2009 through September 2013, courts entered 49 settlements of cases nationwide to improve municipal wastewater and stormwater treatment and collection, requiring long-term control measures and other relief estimated to cost violators more than \$22.5 billion.

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 2013, courts entered 49 settlements in these cases, requiring long-term control measures and other relief estimated to cost violators more than \$22.5 billion.

Nine consent decrees with municipalities or regional sewer districts were entered in fiscal year 2013. Collectively, they provide for the expenditure of more than \$2.5 billion in improvements, the payment of more than \$1.1 million in civil penalties, and the performance of SEPs valued at approximately \$1.8 million. Four examples follow:

—*United States v. King County, Washington* and *United States v. City of Seattle*: The State of Washington was a co-plaintiff and partner in these settlements, also discussed in the previous chapter, in which King County and the City of Seattle agreed to invest in major upgrades to sewage and stormwater collection, piping, and treatment. The agreements, which resulted from extensive federal and state government cooperation, integrate green infrastructure into long-term planning for the management of the area's stormwater. Both agreements allow the city and county to use an integrated planning approach, which encourages communities to set their own clean-water-project priorities and invest in fixing the most pressing problems first. Seattle conveys its sewage to King County's system for treatment prior to discharge. As a result, the settlements require King County and Seattle to develop and implement a joint plan to improve system-wide operations and maintenance.

Under its settlement, King County will implement a long-term plan for controlling sewer overflows, reducing its raw sewage discharges by approximately 95 to 99%. Between 2006 and 2010, King County discharged approximately 900 million gallons of raw sewage to waters of the United States on an annual basis through discharges from its combined sewer system. The improvements and upgrades are expected to cost approximately \$860 million. In addition, King County will pay a civil penalty of \$400,000. The agreement allows the county to make use of green infrastructure projects, like green roofs, permeable pavements, and urban gardens, which help reduce the demands on local sewer and stormwater systems, at four of its sewer overflow control projects.

Between 2007 and 2010, Seattle discharged approximately 200 million gallons of raw sewage into area waterways on an annual basis. During this time period, the city also improperly

operated and maintained its sanitary sewer system, resulting in unauthorized discharges of raw sewage to public and private properties, including basement backups. Under its settlement, Seattle will develop and implement a long-term plan for better controlling sewer overflows and improve system-wide operations and maintenance. The city also will implement plans to control fats, oils, and greases, and to reduce debris being discharged by the system. In addition, the settlement provides Seattle with the opportunity to use an integrated-planning approach and to substitute green infrastructure at several of its sewer overflow control projects. By implementing these measures, Seattle will reduce its raw sewage discharges by approximately 99% at an estimated cost of \$600 million. The city will pay a civil penalty of \$350,000.

—*United States v. City of Chattanooga, Tennessee*: In this comprehensive CWA settlement, the city agreed to make improvements to its sewer systems, estimated by the city to cost \$250 million; eliminate unauthorized overflows of untreated raw sewage; implement a green infrastructure plan; perform an \$800,000 stream restoration project; and pay a \$476,400 civil penalty. The



*Downtown Chattanooga, Tennessee*

consent decree represented the combined efforts of the United States, the State of Tennessee, and the Tennessee Clean Water Network, a citizens' plaintiff in this action. The settlement also is noteworthy for its environmental justice elements, which are discussed in the previous chapter.

The decree will require Chattanooga to comprehensively assess and rehabilitate its entire sewer collection system to eliminate overflows of untreated raw sewage. The city must implement programs to ensure proper management, operation, and maintenance of its sewer systems; and install additional controls on the Chattanooga Creek combined sewer outfalls to ensure compliance with water quality standards.

—*United States v. City of Jackson, Mississippi*: The City of Jackson has agreed to make improvements to its sewer systems, at an estimated cost of \$400 million, to eliminate unauthorized overflows of untreated raw sewage and unauthorized bypasses of its largest wastewater treatment facility, the Savanna Street Wastewater Treatment Plant. The United States worked closely with the Mississippi Department of Environmental Quality in crafting the settlement, which also contains environmental justice-related provisions as noted in the previous chapter.

The decree requires Jackson to implement specific programs designed to ensure proper management, operation, and maintenance of its sewer systems. In order to address the problem of wet weather overflows of raw sewage from the sewer lines, Jackson will develop and implement a comprehensive sewer system assessment and rehabilitation program. The city also will develop and implement a comprehensive performance evaluation and a correction program to reduce the bypasses of the Savanna Street Wastewater Treatment Plant. The consent decree also requires Jackson to develop and implement management, operations, and maintenance programs, including a pump station operation and preventive maintenance program, a wastewater treatment plant operation and maintenance program, and a water quality monitoring program. Finally, Jackson must pay a civil penalty of \$437,916.

Consent decrees also were entered in five other matters: *United States v. City of Fitchburg, Massachusetts* (\$51 million in capital investments); *United States v. Sewer Auth. of the City of Scranton* (\$169 million); *United States v. Hampton Roads Sanitation Dist.* (\$60 million); *United States v. The Unified Government of Wyandotte County and the City of Kansas City, Kansas* (\$65 million); and *United States v. City of Gloucester, Massachusetts* (\$19.5 million).

## Protecting the Nation's Waters and Wetlands

This year, the Division also obtained several favorable settlements under its program to protect wetlands and other waters of the United States.

—In *United States v. New River Royalty, L.L.C.*, a civil enforcement action for timbering activities that resulted in unauthorized filling of stream channels connected to Pond Creek and the Big Muddy River in Illinois, the district court entered a consent decree in August 2013.

The consent decree provided for a civil penalty of \$820,000, and injunctive relief requiring compliance with stormwater regulations, implementation of a mitigation plan requiring in-stream stabilization and restoration, and creation of a riparian buffer zone.

—The Division brought a civil enforcement action against the Port of Tacoma and three of its contractors for the unpermitted discharge of dredge and fill material in six acres on the Blair-Hylebos Peninsula in



Port of Tacoma, Washington

Photo Courtesy of Scott Hingst

*United States v. Port of Tacoma.* In fiscal year 2013, we negotiated and lodged a consent decree under which defendants paid a \$500,000 civil penalty, and will perform wetlands restoration and provide for mitigation that EPA estimates costs \$3.05 million.

—In *Smith Farm Enterprises v. EPA*, petitioner filed a challenge in the Fourth Circuit to an administrative penalty assessed by EPA. The company had discharged fill material (wood chips) into wetlands in Chesapeake and Suffolk, Virginia, as part of its activities to clear and prepare a path for heavy excavation equipment used to excavate ditches, in an effort to drain and convert the wetlands into uplands. ENRD negotiated a consent decree under which petitioner placed a conservation easement on 331 acres of wetlands for their preservation, plugged the excavated ditches to restore the status quo hydrology on the site, paid a \$10,000 civil penalty, and dismissed their challenge.

—We also achieved a speedy and favorable resolution of *United States v. Dungy*. The case involved violations of the CWA in connection with farming activities in tributaries and wetlands adjacent to the Middle Fork of the Big Muddy River near Benton, Illinois. In April 2013, the court entered a consent decree that requires payment of a civil penalty in the amount of \$37,500, restoration of most of the affected area, and compensatory restoration of nearby wetland areas.

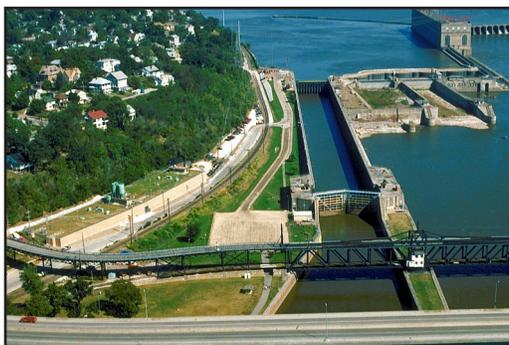
—In *United States v. Roquette America, Inc.*, Roquette settled alleged violations of its CWA discharge permit for its grain processing facility in Keokuk, Iowa. The company agreed to pay a \$4.1 million civil penalty and upgrade its wastewater treatment system at an estimated cost of more than \$17 million. The Iowa Department of Natural Resources

issued three administrative orders and eight notices of violation to Roquette beginning in 2000. Despite these orders and notices, Roquette continued to overload its wastewater treatment plant and failed to address the deficiencies at other portions of its facility. The Keokuk facility violated its CWA permit at least 1,174 times. On at least 30 occasions, the facility illegally discharged to storm drains, resulting in at least 250,000 gallons of industrial waste being released into Soap Creek and the Mississippi River. The settlement requires sewer improvements, wastewater treatment upgrades, and enhanced monitoring.

Roquette also will obtain annual third-party audits of its compliance with the CWA, its discharge permit, and the consent decree.

“Roquette’s actions resulted in over a thousand permit violations and allowed the discharge of untreated industrial waste into the Mississippi River and another Iowa waterway even after it was informed on numerous occasions it was violating its state permit and federal law. This settlement holds Roquette accountable for its multiple violations of the nation’s Clean Water Act and requires sewer improvements, wastewater treatment upgrades, enhanced monitoring, and independent compliance audits that will benefit public health and the environment for the people of Iowa for years to come.”

—Former Assistant Attorney General Ignacia S. Moreno, *United States v. Roquette America, Inc.*, Press Release



Mississippi River at Keokuk, Iowa

Corps Photo



*Work at the Federal Creosote Superfund Site*



*Work at the Lower Fox River and Green Bay Superfund Site*

# ENSURING CLEANUP OF OIL AND SUPERFUND WASTE

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

On April 20, 2010, explosion and fire destroyed the Deepwater Horizon offshore drilling rig in the Gulf of Mexico, triggering a massive oil spill of millions of barrels. The discharge continued for 87 days, at which time BP regained control of the well. Immediately, ENRD and the Department's Civil Division—along with local U.S. Attorneys' Offices, the Gulf States, and client agencies—launched a civil investigation into the matter. In December 2010, as part of a multidistrict litigation in the Eastern District of Louisiana, the United States brought suit against BP, Anadarko, MOEX, and Transocean for civil penalties under the CWA and a declaration of liability under OPA.



*Deepwater Horizon Response*

*USCG Photo*

On February 17, 2012, as reported last year, the Department announced an agreement with MOEX to settle its liability in the Deepwater Horizon oil spill explosion, fire, and oil spill. According to the terms of the settlement, MOEX agreed to pay \$70 million in civil penalties to resolve alleged violations of the CWA and spend at least \$20 million to facilitate land acquisition projects in several Gulf States that will preserve and protect in perpetuity habitat and resources important to water quality. Of the \$70 million in civil penalties, \$25 million goes to the States of Alabama, Florida, Louisiana, Mississippi, and Texas.



Deepwater Horizon Response

NOAA Photo

In January 2013, pursuant to the terms of a partial civil consent decree, the Transocean defendants (Transocean Ocean Holdings, L.L.C., Transocean Offshore Deepwater Drilling, Inc., Transocean Deepwater, Inc., and Triton Asset Leasing G.M.B.H.) agreed to pay \$1 billion to resolve federal CWA civil penalty claims, a record amount. The unprecedented civil penalty is subject to the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies

of the Gulf Coast States Act of 2012 (the RESTORE Act), which is discussed below. This civil resolution reserves all other claims, including those for NRD and cleanup costs. Under the partial civil settlement, the Transocean defendants also must observe various court-enforceable strictures in drilling operations, aimed at reducing the chances of another blowout and discharge of oil and at improving emergency response capabilities. Examples of these requirements include certifications of maintenance and repair of blowout preventers before each new drilling job, consideration of process safety risks, and personnel training related to oil spills and responses to other emergencies. These measures apply to all rigs operated or owned by the Transocean defendants in all U.S. waters and will be in place for at least five years.

Civil trial preparations continued in fiscal year 2013 against the remaining defendants. The district court has divided the case into phases. Phase one addresses the causation of and liability for the oil spill. Phase two concerns the quantification of the amount of oil discharged from the well to the ocean waters. The United States completed document production for both phases, producing some 100 million pages in documents. The trial of phase one took nine weeks from the end of February through April 2013 and involved several weeks of live testimony along

“The development and exploration of a domestic source of energy is vitally important, and it can and must be done in a responsible and sound manner. This unprecedented settlement under the Clean Water Act demonstrates that companies will be held fully accountable for their conduct and share responsibility for compliance with the laws that protect the public and the environment from harm. This settlement will provide immediate relief and benefits to the people of the five Gulf States, and requires Transocean to implement significant safety measures, as well as stringent auditing and monitoring to reduce the risk of any future disasters.”

—Former Assistant Attorney General Ignacia S. Moreno, *Transocean Plea and Agreement Announcement*

with voluminous evidentiary submissions. Phase two was tried over three weeks in September and October 2013. Post-trial briefing in phase one concluded in July 2013 and in phase two in January 2014. We await the court’s rulings in both phases.

## THE RESTORE ACT

—The Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012, or the RESTORE Act, was passed by Congress on June 29, 2012, and signed into law by President Obama on July 6, 2012.

—The RESTORE Act envisions a regional approach to restoring the long-term health of the valuable natural ecosystems and economy of the Gulf Coast region.

—The RESTORE Act dedicates 80% of any civil and administrative penalties paid under the Clean Water Act, after the date of enactment, by responsible parties in connection with the Deepwater Horizon oil spill to the Trust Fund for ecosystem restoration, economic recovery, and tourism promotion in the Gulf Coast region.

—This effort is in addition to the restoration of natural resources injured by the spill which will be accomplished through a separate Natural Resource Damage Assessment and restoration process pursuant to the Oil Pollution Act.

—The RESTORE Act defines where and how funds may be spent. The Act defines “Gulf Coast State” to mean any of the States of Alabama, Florida, Louisiana, Mississippi, and Texas, and includes the following areas within the “Gulf Coast region”: (1) in the Gulf Coast States, the coastal zones (including federal lands within the coastal zones) that border the Gulf of Mexico; (2) any adjacent land, water, and watersheds within 25 miles of the coastal zones; and (3) all federal waters in the Gulf of Mexico.

—In addition to establishing the Trust Fund, the RESTORE Act establishes the Gulf Coast Ecosystem Restoration Council as an independent entity in the federal government. The Council is charged with helping to restore the ecosystem and economy of the Gulf Coast region by developing and overseeing implementation of a Comprehensive Plan and carrying out other responsibilities.

—The Council is chaired by the Secretary of the U.S. Department of Commerce and includes the Governors of the States of Alabama, Florida, Louisiana, Mississippi and Texas and the Secretaries of the U.S. Departments of Agriculture, Army, Homeland Security and the Interior, and the Administrator of the U.S. Environmental Protection Agency.

—August 2013 Gulf Coast Ecosystem Restoration Council's *Initial Comprehensive Plan: Restoring the Gulf Coast's Ecosystem and Economy*

The RESTORE Act provides for 80% of any civil or administrative fines awarded in the ongoing enforcement action related to the Deepwater Horizon explosion, fire, and oil spill in the Gulf of Mexico to be paid into a special Gulf Coast Restoration Trust Fund. The statute authorizes the trust fund monies to be expended for Gulf environmental and economic restoration purposes, without further appropriation by Congress, and requires the Secretary of the Treasury to establish procedures related to the operation of the trust fund. The RESTORE Act also establishes the Gulf Coast Ecosystem Restoration Council, a federal entity comprised of senior-level representatives of the Department of the Interior, the Department of the Army, the Department of Commerce, EPA, the Department of Agriculture, and the U.S. Coast Guard, as well as representatives of the Governors of the States of Alabama, Florida, Louisiana, Mississippi, and Texas. The council is charged with developing a comprehensive plan “to restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region,” and may expend funds from the trust fund in accordance with this comprehensive plan. Although the Department is not an official member of the council, ENRD continues to assist other interested agencies in this process, with a particular focus on potential legal issues that may arise during implementation.

## Recovering Damages and Penalties for Other Oil Spills

The settlement in *United States v. Delta Fuels, Inc.*, resolved the Division’s civil action against Delta Fuels, Inc., and its parent company, Knight Enterprises, Inc., for violations of the CWA and OPA resulting from an oil spill at defendants’ oil tank farm in Toledo, Ohio. Defendants paid EPA a civil penalty of \$582,500, primarily for violations of the CWA, and reimbursed the Coast Guard for \$1,747,500 in response costs. Defendants also agreed to investigate and potentially repair or replace the tank farm’s secondary containment system; implement procedures regarding spill prevention and countermeasures; implement oil spill cleanup plans; establish an environmental management system; undertake response training; and implement

spill-notification procedures.



**Delta Fuels Tank Farm, Toledo, Ohio**

In *United States v. BP Products North America*, BP Products North America agreed to implement an enhanced oil spill response program and a comprehensive compliance audit at its oil terminals nationwide to settle this civil action resulting from the company’s failure to be adequately prepared to respond to a potential spill. The United States also collected a

In fiscal year 2013, the Division secured the commitment of responsible parties to clean up hazardous waste sites at costs estimated in excess of **\$1 billion**; and recovered over **\$633 million** in costs for the Superfund to finance future cleanups and more than **\$31 million** in natural resource damages.

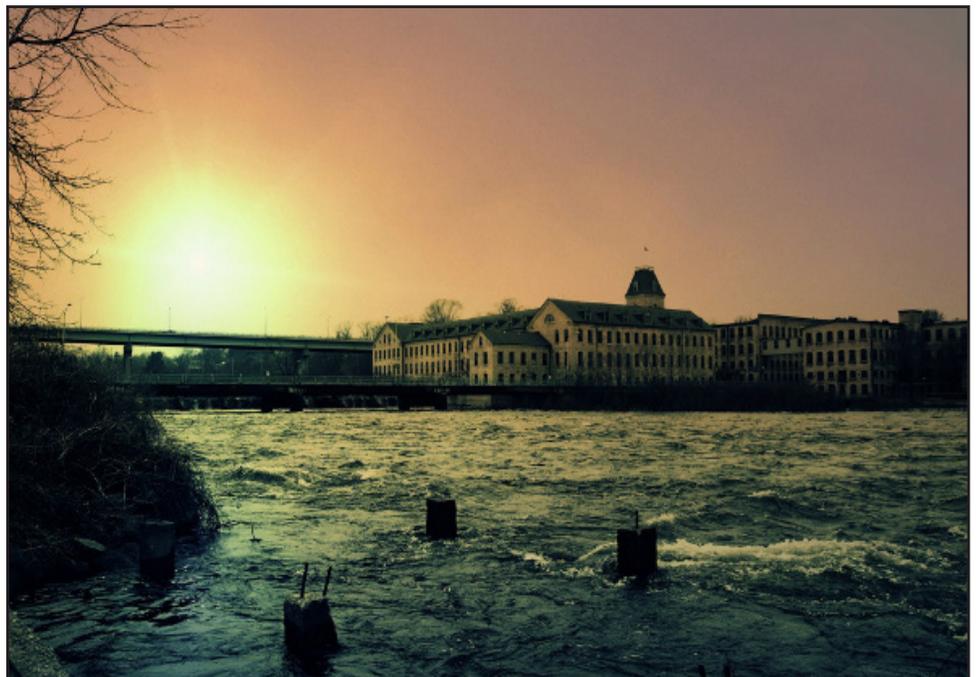
\$210,000 civil penalty, the largest to date for violations of oil-spill drill requirements not involving a discharge of oil.

Federal regulations require oil storage facilities to conduct drills and exercises in order to be prepared to respond to oil spills. EPA and the U.S. Coast Guard twice conducted unannounced response exercises at BP's Curtis Bay Terminal in Maryland. BP was required to demonstrate that it was prepared to respond to a discharge of fuel oil by deploying 1,000 feet of oil containment boom within one hour. On both occasions, the company did not complete the exercise in the allotted time and failed to adequately deploy the boom. BP also will implement a first-of-its-kind program of spill prevention measures at its 33 non-refinery petroleum products terminals across the country. In addition, BP has agreed as part of the settlement to an independent compliance audit of 12 of its marine and high-risk petroleum product terminal facilities.

## Conserving the Superfund by Securing Cleanups and Recovering Superfund Monies

The Division brings actions under CERCLA to require direct cleanup by responsible parties or to recover EPA's clean-up costs. In fiscal year 2013, we concluded a number of settlements requiring responsible parties to reimburse the United States for clean-up costs, to undertake the clean-up work themselves, or both. Examples include the following cases:

—As a result of the production and recycling of PCB-containing carbonless copy paper made by NCR Corporation from 1954 to 1971, approximately seven million cubic yards of PCB-contaminated sediment were



*Fox River, Wisconsin*

deposited at the bottom of the Fox River and Green Bay. To address this contamination, EPA listed the areas as the Lower Fox River and Green Bay Superfund Site and issued an administrative order requiring NCR and several paper recycling mill owners to clean up the PCBs by dredging the contaminated sediment or containing it under specially engineered underwater



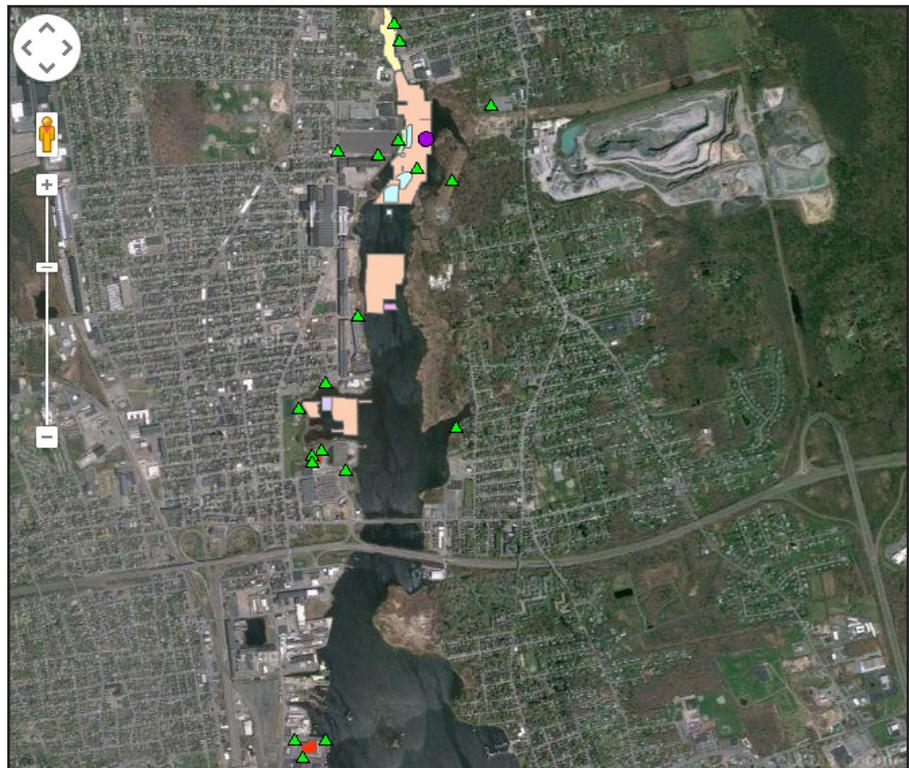
**Dewatered Fox River Sediment Being Loaded into Trucks for Transportation to the Landfill at a Specially Constructed Processing Facility in Green Bay, Wisconsin**

caps. In *United States v. NCR Corp.*, the United States and the State of Wisconsin sued to require the companies to comply with EPA’s clean-up order. The United States and the state conducted a three-week trial in December 2012. NCR argued that the harm at the Superfund site was “divisible” (a term of art) and that the company had already paid more than the cost of the cleanup of its part of the contamination. In May 2013, the district court in Wisconsin issued a decision rejecting the divisibility arguments and holding seven defendants jointly and severally liable for complying with EPA’s clean-up order. (“Joint and several liability” means that the government can require all of the companies

that received EPA’s order, or any one or group of them, to perform all or part of the remaining clean-up work.) Most importantly, the court’s order means that the cleanup will continue. The remaining clean-up work at the site is projected to cost at least \$360 million. The total cost of the clean-up work already done and remaining to be done, plus damages for injuries to natural resources, is expected to exceed \$1 billion.

—In *United States v. AVX Corp.*, the United States and the Commonwealth of Massachusetts reached a \$366 million settlement with AVX.

The money, the largest settlement at a single Superfund site, will be used in the cleanup of the New Bedford Harbor Superfund Site. From the 1940s to the 1970s, AVX’s corporate predecessor, Aerovox Corporation, owned and operated what was known as the Aerovox facility, an electrical capacitor manufacturing facility located on the western shore of New Bedford Harbor. The United States and the Commonwealth determined that Aerovox discharged hazardous substances, including PCBs, into the harbor, and that Aerovox’s facility was the primary source of PCBs released into the harbor. AVX previously paid over



**Clean-up Activities at the New Bedford Harbor Superfund Site**

**EPA Photo**

\$66 million for past and future response costs and NRD at the New Bedford Harbor Site as a result of a 1992 settlement with the United States and the Commonwealth. The governments reserved certain rights in that settlement through “reopener” provisions, which were exercised to bring about the \$366 million settlement. Sediments in the harbor are contaminated with PCBs, probable carcinogens resistant to biodegradation. Some of the dredged PCB-contaminated sediment will be disposed of at an off-site facility, some in a confined aquatic disposal cell in the Lower Harbor, and some in confined disposal facilities to be built along the shoreline. The settlement with AVX is expected to allow EPA to complete the cleanup of the New Bedford Harbor Superfund Site in approximately five to seven years, instead of the estimated 40 or more years it would have taken at pre-settlement funding levels. The Department of Justice, EPA, the Massachusetts Attorney General’s Office, and the Massachusetts Department of Environmental Protection worked closely together to reach the settlement.

—The settlement in *United States v. Honeywell Int’l* represented an important step in the cleanup of the Quanta Resources Superfund Site, which is located adjacent to the Hudson River in Edgewater, New Jersey. The agreement, which was executed with Honeywell International,



Quanta Resources Superfund Site, Edgewater, New Jersey EPA Photo

Inc., and 23 other parties, requires the design, construction, operation, and maintenance of EPA’s clean-up plan for contaminated soil and groundwater. The work is expected to take approximately two to three years and to cost approximately \$78 million. Currently, soil and groundwater at the site are contaminated with arsenic, lead, polycyclic aromatic hydrocarbons, and VOCs resulting from over 100 years of industrial activities in the area. EPA has divided the site cleanup into at least two phases. The 2013 consent decree funds the cleanup of contaminated soil and groundwater. Other areas—for example contaminated river sediments—will be handled separately.

## Securing Natural Resource Damages

Even after an oil spill or a release of hazardous substances has been cleaned up, injury to natural resources—wildlife, fish, air, land, water, groundwater, drinking water supplies, and the like—will often persist for years. As a result, several statutes authorize federal, state, and tribal trustees of natural resources to sue to collect NRD. Generally speaking, recoveries must be used to help restore, replace, or acquire the equivalent of the injured natural resources. In the settlement of *United States v. Mosaic Fertilizer, L.L.C.*, Mosaic agreed to enhance wetlands by removing invasive plant species, re-establishing historic tidal flows, and creating an oyster habitat. In addition, Mosaic agreed to place conservation easements over approximately 103.76 acres of habitat adjacent to the area affected by Mosaic’s releases. Mosaic’s phosphoric acid and fertilizer production facility in Riverview, Florida, had released acidic process water from the

gypsum stack at the facility during a hurricane. The United States and the Florida Department of Environmental Protection alleged that the release entered several swales on Mosaic's property and ultimately flowed into Hillsborough Bay and Tampa Bay. Mosaic estimated that the restoration projects could cost as much as \$5.1 million.

## Reaching Settlements with Federal Potentially Responsible Parties

In addition to actions against private parties, the Division settles claims for clean-up liability under CERCLA against federal agencies. In fiscal year 2013, these included such multimillion-dollar settlements as *Colorado v. United States* (Colorado School of Mines Research Institute in Golden, Colorado); *City of Salina v. United States* (former Schilling Air Force Base in Salina, Kansas); *City of Colton v. American Promotional Events* and *City of Rialto v. U.S. Dep't of Defense* (B.F. Goodrich Superfund Site in San Bernardino County, California); *In re Camp Lonely, Alaska* (unfiled) (Camp Lonely, a federal facility located on the Naval Petroleum Reserve, near the Beaufort Sea in Alaska).

## Enforcing Clean-up Obligations in Bankruptcy Cases

ENRD files claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. In fiscal year 2013, in the context of several bankruptcy proceedings, ENRD secured significant commitments of responsible parties to clean up hazardous waste sites, reimburse the Superfund, and pay damages for injuries to natural resources. One case, *Tronox, Inc. v. Anadarko Petroleum Corp.*, is particularly noteworthy.



Federal Creosote Superfund Site, Manville, New Jersey

EPA Photo

In *Tronox, Inc. v. Anadarko Petroleum Corp.*, the United States and co-plaintiff Anadarko Litigation Trust won an award of between \$5.1 billion and \$14.1 billion against defendant "New" Kerr-McGee Corporation and certain related defendant companies, all of which are subsidiaries of the Anadarko Petroleum Corporation. Subsequently, on April 3, 2014, the parties entered into a proposed \$5.15 billion settlement (\$4.4 billion of which is for environmental cleanup and claims), which is the largest recovery for the cleanup of environmental contamination in history.

The action was a fraudulent conveyance case in the bankruptcy of Tronox, Inc., and its subsidiaries in the United States Bankruptcy Court for the Southern District of New York. It was handled by the U.S. Attorney's Office for the Southern District of New York, working closely with Division attorneys, and assisted by EPA, FWS, BLM, NOAA, the U.S. Nuclear Regulatory Commission, the Forest Service, the Department of Defense, numerous state governments, and the Navajo Nation.

The court found that in 2005 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 toxic sites around the country. 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 Midwest and north-eastern and southern parts of the United States; 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 intention of evading these and other liabilities, Old Kerr-McGee created a new corporate entity—defendant New Kerr-McGee—and through a series of corporate transactions in 2005 and 2006, 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. 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 a trust) brought this lawsuit to require defendants to repay the value of the assets fraudulently conveyed from Old Kerr-McGee.

In its decision, the court found that Old Kerr-McGee transferred assets with the intention to hinder or delay creditors, in particular environmental creditors, and also transferred those assets for less than their fair value. This left Tronox insolvent and undercapitalized. The court concluded that the net proceeds of the fraudulent transfer were \$14,459,000,000; depending on a question of bankruptcy law still to be decided in further proceedings, this will result in a damages award of between \$5,150,490,000 and \$14,166,148,000.

In 2011, in connection with Tronox’s plan of reorganization, the estate paid approximately \$270 million to fund environmental response trusts created to own and clean up contaminated property and to federal and state agencies to fund cleanup. Additionally, pursuant to the plan of reorganization and agreements signed at that time, approximately 88% of the recovery in this lawsuit, net of trust expenses, will be distributed to the environmental trusts and to federal, state, and local environmental creditors for environmental cleanup of contaminated sites around the nation.

In addition to bringing new actions, the Division received payments in fiscal year 2013 from debtors as the result of settlement agreements obtained in bankruptcy proceedings in previous years, including over \$26 million from *In re Motors Liquidation Co.* (formerly General Motors) and over \$3.6 million from *In re Dana Corp.*

From the beginning of fiscal year 2009 through the end of fiscal year 2013, ENRD obtained agreements in **35 bankruptcy proceedings**, under which debtors committed to spend an estimated **\$1.678 billion** to clean up hazardous waste sites, reimburse the Superfund over **\$710 million plus \$88 million in interest**, and pay more than **\$83 million** in natural resource damages. Over that same time period, the United States also recovered an additional **\$244 million plus \$57 million in interest** for the Superfund and over an additional **\$101 million** in natural resource damages as a result of payment of claims settled in earlier years.



**Yosemite National Park**

**Photo by Jeff Bank**



**Acadia National Park**

**NPS Photo**

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

## Protecting National Park Interests

In *Drakes Bay Oyster Co. v. Salazar*, the Division successfully defended against a motion for preliminary injunction in both the district court and the Ninth Circuit against the Secretary of the Interior's decision to allow a special use permit to expire for an oyster farm operated by plaintiff, Drakes Bay, within Point Reyes National Seashore in California. In 1972, the United States purchased lands and waters from plaintiff's predecessor for inclusion within the Point Reyes National Seashore, a part of which is designated as wilderness under the Wilderness Act. The United States gave the predecessor a lease to continue operations for 40 years. In 2004, Drakes Bay bought the lease, knowing that it would expire in 2012. Plaintiff sought special legislation to allow the lease to continue beyond 2012, but the Secretary of the Interior interpreted the new legislation to grant him discretion to decide whether to extend the lease or let it expire. In November 2012, the Secretary chose to let the lease expire so the land and surrounding waters could be managed under the wilderness standards contemplated for the area. By allowing the permit to expire, the last commercial use within a tidal region of Point Reyes known as Drakes Estero was eliminated. As a result, Drakes Estero was converted from potential wilderness to designated wilderness, the only marine wilderness on the Pacific Coast outside of Alaska.

We secured relief from an adverse judgment which limited the number of commercial stock use permits that may be issued for Sequoia and Kings Canyon National Parks while the National Park Service completes its wilderness stewardship plan for the parks in *High Sierra Hikers Ass'n v. Dep't of the Interior*. The district court agreed with the U.S. argument that a supervening federal statute,

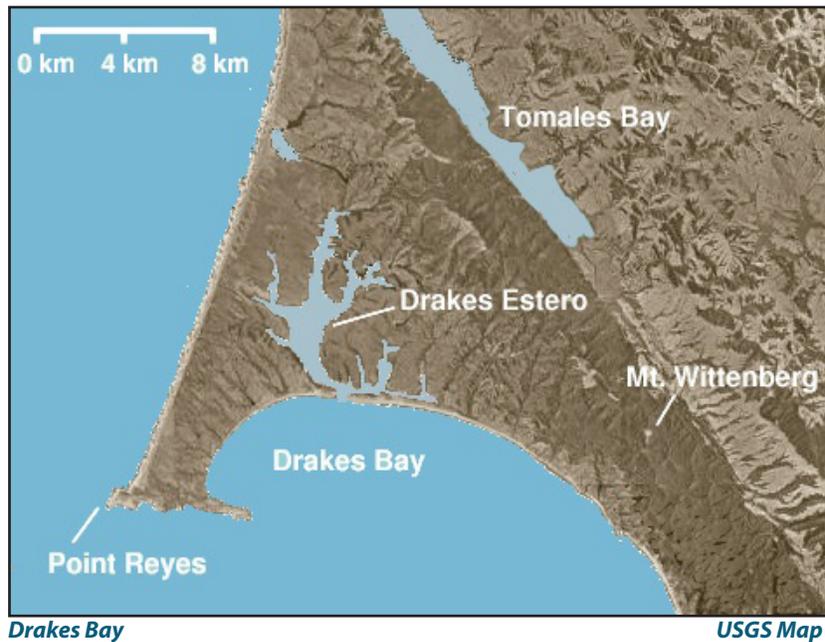


Point Reyes Beach, California

NPS Photo

the Sequoia and Kings Canyon National Parks Backcountry Access Act, gives the National Park Service full discretion to issue permits for the next three years while the agency completes the plan.

In *Grunewald v. Jarvis*, ENRD successfully defended the National Park Service’s decision to lethally remove excess deer from Rock Creek National Park against a challenge in District of Columbia District Court by local residents and an animal advocacy group.



## Facilitating Land Management Decisions Designed to Protect Federal Lands from Catastrophic Fire, Insects, Predators, and Drought

Federal land management agencies, including the Forest Service and BLM, have increasingly focused their efforts to manage public lands to ameliorate threats posed by wildfire, insects, predators, and drought. In 2013, the Division defended a number of these decisions.

In *Pacific Rivers Council v. United States Forest Service*, plaintiff brought a facial challenge under NEPA to a January 2004 Supplemental Environmental Impact Statement (the 2004 Framework). The Supreme Court granted the U.S. petition for a writ of certiorari to review two questions of justiciability: whether plaintiff had standing to bring its facial challenge without identifying a specific application of the 2004 Framework that threatens to harm plaintiff’s interests, and whether plaintiff’s facial claim is ripe. The Supreme Court also granted certiorari on the merits question of whether the Ninth Circuit erred in holding that in a programmatic NEPA document, all impacts of the decision must be analyzed “as soon as it is reasonably possible to do so.” In June 2013, plaintiffs moved to withdraw their case, conceding that the Ninth Circuit’s decision could be vacated. The Supreme

Court granted the motion and directed the court of appeals to vacate its decision. Vacatur of the decision preserves the U.S. position that Forest Service management decisions are appropriately subject to court review only when concrete impacts to litigants can be identified.



Wallowa-Whitman National Forest

FS Photo

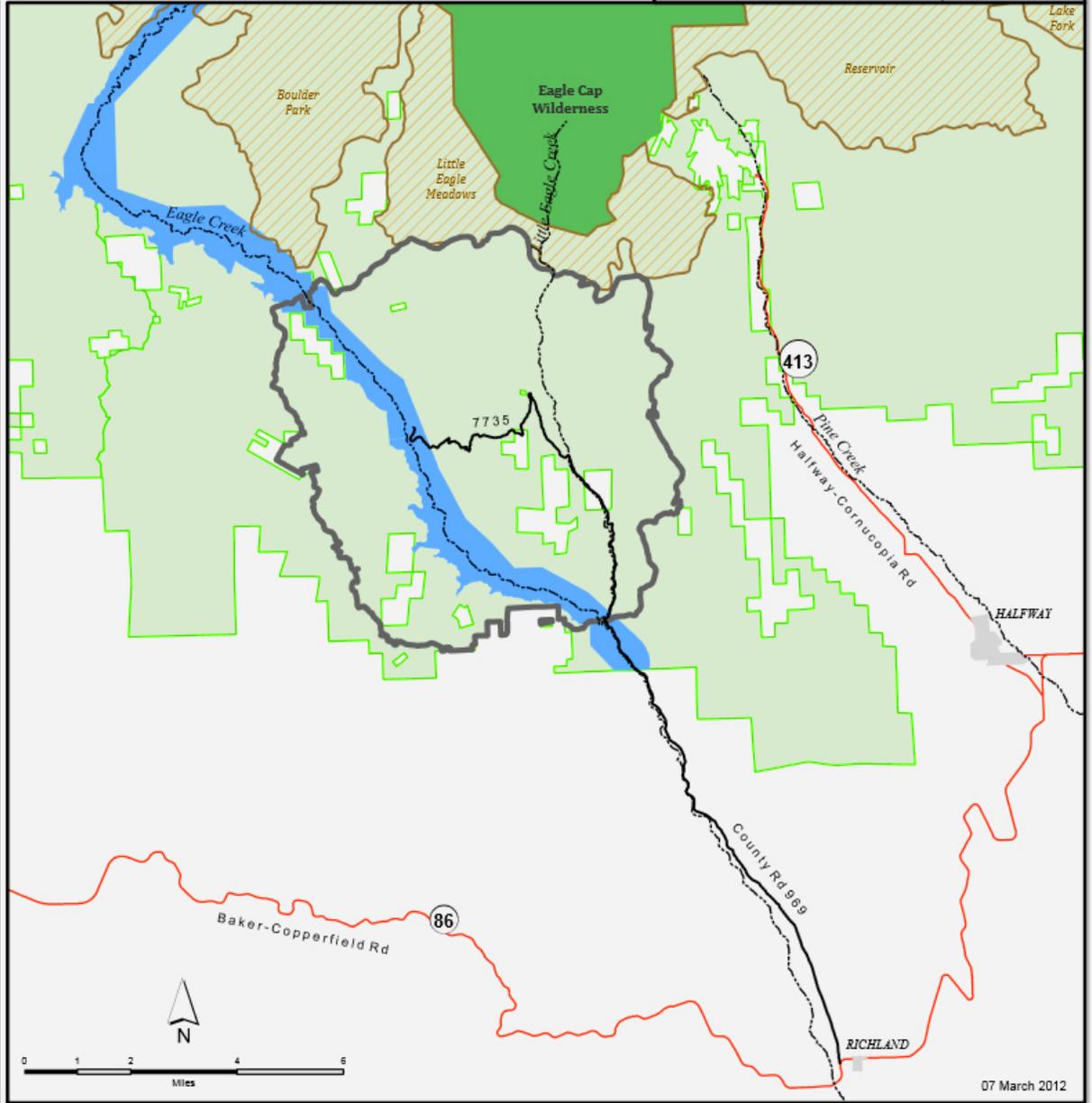
In *League of Wilderness Defenders v. Connaughton*, the Division successfully defended a challenge to the Snow Basin Vegetation Management Project on the Wallowa-Whitman National Forest. The project, which is the largest landscape-scale commercial timber project in

# SNOW BASIN PROJECT AREA

## Vicinity Map

-  Snow Basin Project Area
-  Main Streams
-  Main Project Access Road
-  Inventoried Roadless Area
-  Wild & Scenic River Corridor
-  Wilderness Area
-  Wallowa Whitman NF

### Northeast Oregon



FS Map

Oregon in recent years, covers over 28,500 acres and is designed to improve forest health. In July 2013, the district court in Oregon denied a preliminary injunction motion seeking to halt implementation of the project because plaintiffs could not establish a likelihood of success on the merits under NEPA and the ESA.

Plaintiffs in *Biodiversity Conservation Alliance v. U.S. Forest Service* challenged an amendment to the Black Hills Land and Resources Management Plan and nine site-specific projects approved pursuant to the amended forest plan. The amendment focuses on the agency's efforts at fighting a serious mountain pine beetle infestation. The group alleged violations of NEPA and the National Forest Management Act (NFMA), and contended that the amendment violated a 1999 administrative decision from the Chief of the Forest Service and a 2000 settlement agreement regarding forest plan revisions. The district court in Wyoming issued a favorable decision on all counts in November 2012, and simultaneously denied plaintiff's motion for a preliminary injunction. The court also denied the group's motion for reconsideration in April 2013. Importantly, the court's decisions affirmed the agency's interpretation of the "best available science" standard for forest planning, and species viability standards under the NFMA.



**Adult Mountain Pine Beetle FS Photo**



**Black Hills Tree Infected by the Mountain Pine Beetle**

**FS Photo**

In *Alliance for the Wild Rockies v. Weber*, ENRD successfully defended a challenge brought against a Forest Service project in Wyoming to promote forest health, restore western white pine stands, and reduce the risk of wildfire in the wildland urban interface. The district court held that the Forest Service appropriately considered whether extraordinary circumstances were present when relying on a categorical exclusion for the project under NEPA. The court also found that the Forest Service complied with the NFMA by properly applying standards with respect to timber management activities in riparian areas. Finally, the court held that the Forest Service reasonably determined that the project would not impact bull trout or Canada lynx, two species listed under the ESA.

*Center for Biological Diversity v. Forest Service* concerned a challenge to the Jacob Ryan Project on the Kaibab National Forest in Arizona. This case involved the interpretation of a region-wide forest plan amendment that affects several national forests. In January 2013, the district court ruled that the Forest Service is entitled to deference in its interpretation of the Forest Plan and upheld the Forest Service's decision on how to calculate vegetation structural stage and canopy cover under the NFMA. The court also found that the Forest Service complied with NEPA and that the environmental review did not need to specifically respond to opposing science under relevant case law.

The Division also successfully defended a number of cases involving the 2004 Sierra Nevada Forest Plan Amendment (the 2004 Framework)—a regional amendment to the forest plans for multiple national forests in the Sierra Nevada region. The case of *Sierra Forest Legacy v. Sherman* remained before the district court in California on the issue of the appropriate remedy for an error in the comparison of alternatives in the Supplemental Environmental Impact Statement. In April 2013, the court adopted the Forest Service's requested remedy and refused to vacate the 2004 Framework

decision or enjoin any existing or future projects issued pursuant to the 2004 Framework. The court concluded that the equities weighed against vacating the 2004 Framework because it is environmentally superior to a prior framework and reverting to the prior framework would have serious adverse impacts on the agency and the public. In addition to allowing critical forest management to continue on 11 national forests covering 11.5 million acres, this decision makes clear that vacatur is an equitable remedy subject to a balancing-of-the-harms analysis.

## Protecting Federal Land Management Authority with Regard to R.S. 2477

R.S. 2477 was originally enacted as section 8 of “An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes,” commonly called the Mining Act of 1866. The statute stated: “And be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” As a result, lands on which highways were constructed prior to removal from the public domain are encumbered by public highway rights-of-way. In 1976, through Federal Land Policy and Management (FLPMA) sections 701(a) and 706(a), Congress repealed R.S. 2477, but preserved “any valid” right-of-way “existing on the date of approval of this Act.” The United States is handling a number of cases presenting R.S. 2477 claims relative to western public lands.

Significantly, in fiscal year 2013, the Division negotiated a comprehensive case management proposal for dozens of cases filed by the State of Utah and its various counties seeking quiet title to more than 12,000 alleged R.S. 2477 rights-of-way across federal lands. Under the agreement, only four of the newly filed cases, in addition to three previously filed cases, will be actively litigated, allowing the United States to use limited litigation resources in protecting federal land management authority more efficiently. The remaining cases will be stayed for two years through February 28, 2015, during which time the parties may each complete up to 225 depositions in order to preserve the testimony of elderly or infirm witnesses whose testimony might otherwise be at a risk of loss. We subsequently secured approval of the agreement by all of the eight judges to whom the dozens of cases have been assigned.

ENRD successfully settled litigation by the State of Utah and one of its counties seeking to quiet title to alleged R.S. 2477 rights-of-way in the Deep Creek Mountains Wilderness Study Area on BLM land in Utah in *Juab County v. Bureau of Land Mgmt.* This settlement—the first to involve Utah state and county governments, environmental defendant-intervenors, and the United States—utilizes a consent decree to promote the United States’ ability to judicially enforce the state’s and county’s commitments concerning the affected roads.



Gila National Forest, Arizona  
FS/ Kari Greer Photo

In *Board of Comm’rs for Catron County v. United States*, a New Mexico county brought suit to quiet title to an alleged right-of-way under R.S. 2477 across federal public lands on the Gila National Forest, as well as private lands in the vicinity, and to compel the Forest Service to provide access to the alleged right-of-way across federal public lands. In March 2013, the court granted the U.S. motion to dismiss on all grounds. The court held that the county’s quiet title claim was barred by the Quiet Title Act’s 12-year statute of limitations. The court also held that ambiguities and missing information in the county’s

### The Idaho Panhandle National Forests are:

- Kaniksu (North),
- Coeur d’Alene (Middle), and
- St. Joe (South).

—FS Fact Sheet

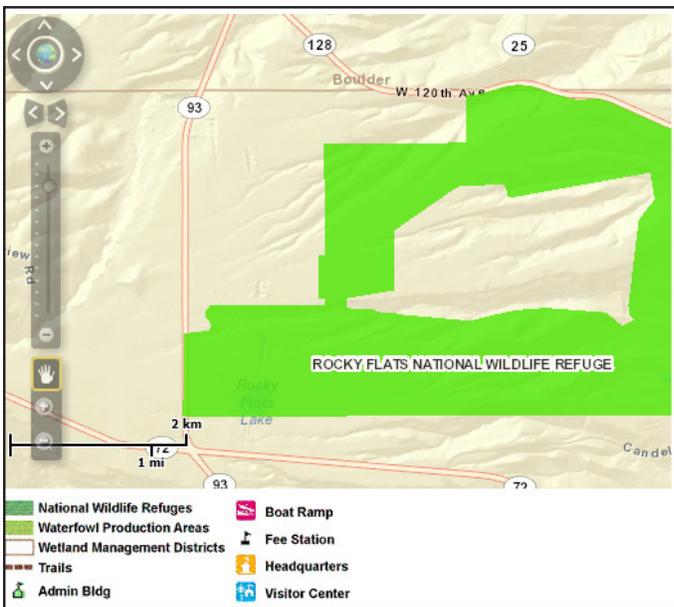


Coeur d’Alene River, Coeur d’Alene National Forest FS Photo

complaint failed to meet the jurisdictional requirement of the Quiet Title Act that a party plead its claims with particularity. The court rejected the county’s related claims for declaratory judgment and mandamus against the Forest Service because the Quiet Title Act provides the sole basis for the court’s jurisdiction over claims challenging the United States’ title.

The district court in *Shoshone County, Idaho v. United States* ruled for the United States on the merits, dismissing this action by a county and a mining company seeking to quiet title to an alleged R.S. 2477 right-of-way on Eagle Creek Road, located on National Forest System land within the Coeur d’Alene National Forest in Idaho. Notably, the court rejected, on grounds of sovereign immunity, plaintiffs’ assertion that the right-of-way was established by the federal government’s failure to challenge an official action taken by the county to “validate” the putative right-of-way in 2009, pursuant to a state law purporting to authorize such validations.

## Supporting the Management of the National Wildlife Refuge System



Rocky Flats National Wildlife Refuge Open Space FWS Map

In *Town of Superior v. United States Fish and Wildlife Service*, two municipalities and two environmental groups challenged the FWS’s decision to convey an easement totaling 100 acres for the construction of a four-lane highway along the eastern border of the Rocky Flats National Wildlife Refuge in Colorado. In return, the Service would receive conservation elements, including a 617-acre parcel that would be used to extend the refuge elsewhere. Various complexities in the proposed land exchange, including the involvement of numerous properties and property owners, made it necessary to consummate the exchange by December 31, 2012. Plaintiffs alleged that the proposed land exchange violated NEPA, the ESA, and the Rocky Flats National Wildlife Refuge Act of 2001, but the court ruled in the Service’s favor on all counts on December

21, 2012. Days later, the Division defeated plaintiffs' motion for an injunction pending appeal in both the district court and court of appeals, and the land exchange was completed as planned on December 31, 2012.

Another refuge case, *Copeland v. Salazar*, involved a challenge to FWS's management of the Noxubee National Wildlife Refuge in east-central Mississippi. Plaintiffs alleged that the Service had failed to address the decline of the Red-cockaded woodpecker population in the refuge in violation of the ESA and further alleged that certain timber sales within the refuge had been approved in violation of NEPA. ENRD negotiated a settlement pursuant to which FWS agreed to limit timber harvesting on the refuge while it prepared a new management plan and associated environmental review, thereby avoiding costly and protracted litigation while also preserving the most important management priorities.

The Division also defended FWS's use of cooperative farming agreements on National Wildlife Refuges, which allow certain land within the refuges to be farmed in exchange for making a portion of the crops available to sustain the local wildlife. Such agreements have recently been the subject of litigation because they allow, in some cases, the planting and use of genetically modified crops. The Division successfully defended against one such challenge in *Center for Food Safety v. Salazar*, which involved the approval of cooperative farming agreements in the Refuge System's Midwest Region.



Watercolor of the Red-Cockaded Woodpecker

## Defending the Forest Service's Implementation of the 2005 Travel Management Rule

Motorized recreational use of National Forest System lands grows each year as the number and capabilities of vehicles increase. This has led to difficult management issues for the Forest Service. As the Forest Service has continued working to implement the 2005 Travel Management Rule, the Division has led the defense of motorized travel management decisions for national forests across the United States. National forests have been completing their environmental analyses and issuing decisions designating roads, trails, and areas open to the public for motor vehicle use. The decisions typically take years for the Forest Service to analyze and prepare, and involve evaluation of nearly every aspect of the Forest Service's multiple-use management approach. Litigation over these decisions is brought by both off-highway vehicle user groups and environmental groups and raise complex issues under NEPA, Executive Orders 11644 and 11989, the 2005 Travel Management Rule, and the NFMA. The Division is currently defending 20 cases in nine states at various stages of litigation and appeals, and more litigation is expected as the Forest Service continues issuing decisions for various national forests across the country. ENRD has been working closely with the Forest Service regional and headquarters' offices and U.S. Attorneys' Offices across the country to coordinate litigation strategy and defend the Forest Service's decisions.

The following cases are illustrative of this type of litigation in fiscal year 2013:

—*Backcountry Hunters and Anglers v. U.S. Forest Service* concerned a 2010 closure order by the Forest Service that carried forward decisions from a 1999 Forest Service order that adopted the San Juan National Forest’s motorized vehicle travel map. The Division secured a favorable ruling from



San Juan National Forest

FS Photo

the district court in Colorado, which held that the 1999 order was the current operative Forest Service decision governing motorized use. The court also found that the Forest Service had properly exercised its discretion in determining that there were no “considerable adverse effects” sufficient to justify trail closures under the executive orders.

—In *Central Sierra Envtl. Res. Ctr. v. United States Forest Service*, the Division successfully defended significant portions of the travel management plan governing motorized vehicle use for the Stanislaus National Forest in California under NEPA and the 2005 Travel Management Rule.

—The Division successfully defended the Forest Service’s travel management decision for the Tahoe National Forest in *Friends of Tahoe Forest Access v. USDA*. In November 2013, the district court in California ruled in the Forest Service’s favor on all of plaintiffs’ challenges, holding that the travel plan fully complied with NEPA and the 2005 Travel Management Rule. The court concluded that the depth and scope of the analysis allowed for adequate consideration of the impacts of the alternatives.

## Defending Other Forest Service Land Management Planning Actions

*American Whitewater v. Tidwell* concerned a challenge by whitewater boating groups to the Forest Service’s recreation management plan for the Chattooga Wild and Scenic River. The decision involves three national forests in two states. The recreation management plan allowed, for the first time in more than 30 years, whitewater rafting enthusiasts to boat on the upper one-third of the river, subject to seasonal and flow restrictions. A recreation group argued that the management plan was too restrictive and that the Forest Service violated several laws, including the Wild and Scenic Rivers Act and NEPA. The district court in South Carolina rejected all of plaintiff’s claims and held that the Forest Service achieved an appropriate balance of competing uses for National Forest System lands, including



Chattooga River

FS Photo



all claims, finding that plaintiff lacked standing to pursue its ESA claims and that the statute of limitations had expired on plaintiff's NEPA claim.

The Division worked with the United States Attorney's Office to obtain the dismissal of a claim alleging that a Forest Service district ranger violated livestock grazing permittees' First Amendment rights by reducing grazing on the Jarita Mesa and Alamosa allotments of the Carson National Forest in *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service*. Plaintiffs, who are local livestock associations and Spanish-American/Hispanic permittees, accused the district ranger of reducing permitted livestock numbers on the allotments in retaliation for their speaking out against the ranger's management practices. The district court in New Mexico dismissed plaintiffs' First Amendment claim. The court found that plaintiffs' administrative appeals before the agency had failed to raise any issue or assertion that the district ranger's decision was motivated by retaliatory animus, and therefore plaintiffs were barred from raising the claim for the first time in litigation. We continue to litigate plaintiffs' remaining environmental claims.



*Bison in Yellowstone National Park*

*NPS/Peaco Photo*

## Defending the Forest Service Against Constitutional Claims

In *City of Tombstone v. United States*, the Ninth Circuit affirmed the denial of a preliminary injunction, rejecting a claim by the City of Tombstone, Arizona, that it had an unfettered right to use mechanized equipment in a designated wilderness area to restore water supply routes without interference or regulation by the Forest Service, which managed the wilderness areas. After a fire and flood, the city obtained permission from the Forest Service to use certain motorized equipment in the wilderness area to rebuild water supply facilities, but the Forest Service did not allow motorized equipment to work at additional springs not previously utilized. The city sued, claiming that the Forest Service was violating the Tenth Amendment by interfering with the sovereign prerogatives of the State of Arizona, which had declared an emergency based on damage to the city's water system. The court of appeals found that Tombstone had failed to raise any serious questions going to the merits of its Tenth Amendment challenge. The Supreme Court subsequently declined the city's request to review the case.

## Protecting National Forest Roadless Areas

In 2011, following a judicial decision reinstating the USDA's 2001 Roadless Rule in the Tongass National Forest in Alaska, the State of Alaska and a coalition of industry groups filed suit in *Alaska v. United States Dep't of Agriculture*, raising a host of challenges to the promulgation of the 2001 Rule. In March 2013, the district court in Alaska granted our motion to dismiss the lawsuit as barred by the statute of limitations.

## Protecting Federal Reclamation Interests in the Central Valley Project

In *Pacific Coast Fed'n of Fishermen's Ass'n v. Interior*, we secured a partial dismissal of a suit challenging the Bureau of Reclamation's compliance with NEPA for interim renewal of water service contracts in the West San Joaquin Division and San Luis District of the Central Valley

# CALIFORNIA'S CENTRAL VALLEY PROJECT

—The Central Valley Project, one of the world's largest systems for storing and moving water, extends 400 miles from the Cascade Range in the north to the Tehachapi Mountains near Bakersfield, California, in the south.

—The project provides flood protection for and water irrigation to large parts of the Central Valley. It also operates to supply water to domestic and industrial users in the Central Valley, as well as major urban centers in the San Francisco Bay Area; to restore and protect fish, wildlife, and wetlands; and to enhance water quality.

—Construction of major Central Valley Project facilities began in 1938 with the breaking of ground for the Shasta Dam on the Sacramento River near Redding, California. Over the next five decades, the project was expanded into a system of 20 dams and reservoirs that together can hold nearly 12 million acre-feet of water. It includes 500 miles of canals and aqueducts and 11 hydroelectric power plants.

—Water for the Central Valley Project comes from rain and runoff from snowmelt in the Sierra Nevada and Shasta-Trinity Mountains that is captured and stored in reservoirs. Releases from dams pass through rivers and canals to the Central Valley, serving contractors in the northern half, referred to as the Sacramento Valley, and the southern half, referred to as the San Joaquin Valley.

—Bureau of Reclamation Website



Central Valley Project  
DOI Map

Project in California. Notably, the district court held that, as a matter of law, renewal of water service contracts on existing terms does not cause significant environmental effects requiring preparation of an environmental impact statement.

## Securing Federal Water Rights

In fiscal year 2013, the Division successfully concluded several longstanding water rights cases in state court.

—After a trial in *Montana General Adjudication*, the general stream adjudication for all 90 basins in the State of Montana, the Montana Water Court ruled in favor of the United States, rejecting the two sole remaining objections to a compact negotiated between the United States and Montana in 2007 to resolve U.S. claims on behalf of the U.S. Forest Service.

—In the administrative phase of the Oregon state general stream adjudication in the Klamath River Basin, the Division secured a largely favorable disposition of more than 700 claims for pre-1910 and federal reserved water rights. If the administrative findings and conclusions are ultimately sustained by the state circuit court, they will approve numerous significant federal reserved rights and state appropriative rights for a national park, national forests, wilderness areas, wild and scenic rivers, wildlife refuges, Indian reservations, and the Klamath Reclamation Project encompassing 200,000 acres in southern Oregon and northern California. In the initial judicial proceedings in Klamath County Circuit Court in Oregon, we defeated several petitions to stay enforcement of the Klamath Project and tribal water rights.

—ENRD achieved numerous favorable results in *In re Snake River Basin Adjudication*, a general stream adjudication in Idaho covering 87% of the state. For example, in a subcase concerning the Palisades Reservoir Hydropower Water Rights, the Special Master issued a recommendation rejecting objections to the Bureau of Reclamation’s (BOR’s) water rights for Minidoka Reservoir.

## Defending Management of Mineral Resources Against Constitutional Challenges

This year, the Division successfully defended the Department of the Interior’s withdrawal of public lands from mineral prospecting. Various plaintiffs in four consolidated cases titled *Yount v. Jewell* alleged that the Secretary of the Interior’s decision to withdraw from mineral location and entry for 20 years approximately one million acres of public lands and

national forest lands in the Grand Canyon watershed was unlawful because the statutory provision authorizing the withdrawal contains an unconstitutional legislative veto provision. The veto provision purports to authorize the U.S. Congress, by concurrent resolution of both houses, to invalidate a secretarial withdrawal without presentment of the resolution to the President. In a matter of first impression, ENRD argued that the veto provision is severable from the withdrawal authority. In March 2013, the district court agreed, holding that the veto provision is unconstitutional but that the Secretary’s withdrawal authority remains valid.

In *McKown v. United States*, a mining claimant asserted that the Forest Service’s improper implementation of mining restrictions under the California Desert Protection Act of 1994 resulted in a taking of his property under the Fifth Amendment and a violation of numerous other constitutional rights. The district court rejected the claims in November 2012, and upheld the Interior Board of Land Appeal’s determination that plaintiff’s mining claims were invalid for lack of a valuable mineral deposit. Later, in March 2013, the court dismissed plaintiff’s remaining claims with prejudice, including claims to quiet title and to vindicate alleged civil rights violations.

“A withdrawal is the right approach for this priceless American landscape. People from all over the country and around the world come to visit the Grand Canyon. Numerous American Indian tribes regard this magnificent icon as a sacred place and millions of people in the Colorado River Basin depend on the river for drinking water, irrigation, industrial and environmental use. We have been entrusted to care for and protect our precious environmental and cultural resources, and we have chosen a responsible path that makes sense for this and future generations.”

—Former Secretary of the Interior Kenneth Salazar’s January 9, 2012 Announcement of the Decision to Withdraw Public Lands near the Grand Canyon from New Mining Claims

## Handling Litigation Related to Management of Wild Horses

The Wild Free-Roaming Horses and Burros Act requires BLM to manage wild horses on public lands, primarily in the West, as part of the natural ecosystem, which sometimes requires BLM to remove excess horses from the range when the number of horses exceeds carrying capacity. To implement this mandate, BLM conducts a number of gathers each year to remove excess horses from the wild and hold them available for adoption. These gathers often result in motions for a temporary restraining order and/or a preliminary injunction. In addition, wild horse gathers often prompt plaintiff groups to challenge the BLM's allocation of rangeland resources to livestock. This year, the Division, on behalf of BLM, successfully defended against such challenges in the cases of *Leigh v. Salazar* (Owyhee Complex Roundups in Nevada); *In Defense of Animals v. U.S. Dep't of the Interior* (Twin Peaks gather in California); *Cloud Found. v. Salazar* (Triple B gather in Nevada); and *Leigh v. Salazar* (Silver King gather in Nevada). In each of these cases, the gathers proceeded as planned, thereby allowing BLM to carry out its statutory mandate. Also, the district courts in *Cloud Found. v. Salazar* and *In Defense of Animals v. U.S. Dep't of the Interior* agreed with the Division's view that wild horse gather decisions are not an appropriate forum for changing a land use plan's allocation of rangeland resources.



Wild Horses in Nevada

BLM Photo

## Successful Implementation of the Endangered Species Act

Congress enacted the 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 FWS and NMFS, respectively, to achieve this objective by listing imperiled species, designating critical habitat for such species, and then applying the protections of ESA section 7 (consultation obligations) and section 9 (take prohibition). Such decisions are often challenged.

In fiscal year 2013, ENRD attorneys achieved favorable results in a number of such cases, thereby allowing full and effective implementation of the act and its protections.



Polar Bear

DOI Photo

—The D.C. Circuit upheld the FWS decision to list the polar bear as a threatened species throughout its range in *In re Polar Bear Endangered Species Act Listing*. The State of Alaska and various hunting groups had challenged that decision as arbitrary and capricious and contrary to law. In 2008, the Service listed the polar bear as threatened for three principal reasons: the bears' dependence on Arctic sea ice for its survival; existing and projected reductions in the extent and quality of sea ice habitat because of global climate change; and the inadequacy of existing regulatory measures to preserve the species. The court found meritless all of the challenges to the listing decision, which included claims that: (1) FWS failed to adequately explain each step in its decision-making process, particularly in linking habitat loss to future extinction; (2) FWS erred by issuing a single, range-wide determination; (3) FWS relied on defective population models; (4) FWS misapplied the term “likely” when it determined that the species was likely to

become endangered; (5) FWS erred in selecting a period of 45 years as the “foreseeable future”; (6) FWS failed to “take into account” Canadian polar bear conservation efforts; and (7) FWS violated section 4(i) of the ESA by failing to give an adequate response to the comments submitted by the State of Alaska regarding the listing decision.

—In *Bear Valley Mut. Water Co. v. Salazar*, plaintiffs challenged FWS’s designation of critical habitat for the Santa Ana sucker, a threatened fish species in southern California. Because of the potential for impacts on water supply and development, this particular designation has been controversial and in legal limbo for years, with several past designations being remanded by courts. On the challenge to this newest critical habitat designation, the district court granted the U.S. motion for summary judgment in its entirety and rejected all of plaintiffs’ claims. In so doing, ESA protections provided by the designation will remain in place for the first time in over a decade.

—In *Building Indus. Ass’n of the Bay Area v. U.S. Dept. of Commerce*, ENRD successfully defended a challenge to NMFS’s final rule designating critical habitat for the threatened Southern distinct population segment of North American green sturgeon in northern California. After extensive summary judgment briefing and oral argument, the court upheld the designation in full, thereby affording the species the full protection of the ESA.

—The Division had similar success in *Safari Club Int’l v. Salazar* and *Exotic Wildlife Ass’n v. U.S. Dep’t of Interior*. These cases raised novel questions regarding the appropriate legal treatment for three antelope species—the Scimitar-horned oryx, the Addax, and the Dama gazelle—that now exist almost exclusively in captivity. Hunting organizations challenged the rule listing these species under the ESA as well as a FWS rule addressing the appropriate management regime for these species. On cross-motions for summary judgment, the district court in the District of Columbia upheld both rules in their entirety.



**Antelopes: Scimitar-Horned Oryx, Dama Gazelle, and Addax**  
Photos Courtesy of the Smithsonian National Zoo and  
Susan E. Adams

—The D.C. Circuit unanimously rejected an attempt by Safari Club International to intervene in long-pending litigation between environmental groups and the FWS in *In re Endangered Species Act Section 4 Deadline Litigation*. Safari Club wanted to oppose a consent decree intended to address the Service’s delinquencies in considering whether to propose more than 250 “candidate” species for listing under the ESA. The consent decree established time schedules for the Service to make decisions whether each candidate species was either (1) warranted or (2) not warranted. Safari Club contended that the decree violated its procedural right to have the Service consider making a third finding—a warranted-but-precluded finding—which would have allowed the Service to defer further listing action until other higher priority species are addressed. The D.C. Circuit affirmed the district court’s rejection of the intervention request. The appellate court held that Safari Club had not demonstrated any violation of a procedural right as the ESA does not require the Service to decide whether listing a species is precluded before it issues a warranted finding and proposes a listing rule. Further, it concluded that Congress had not designed the warranted-but-precluded provision of the ESA to protect Safari Club’s interest in delaying listing decisions. In the absence of showing a valid procedural violation of the ESA, Safari Club lacked standing to intervene.

## Defending NMFS Management of Ocean Fisheries

The Magnuson-Stevens Fishery Conservation and Management Act and other related statutes charge NMFS with the difficult task of managing ocean commercial fishing to provide for conservation and sustainable fishing while, at the same time, optimizing fishing yield. In fiscal year 2013, ENRD again successfully defended various fishery management actions necessary to meet these objectives. Of note this year was the Division’s successful defense of NMFS’s authorization of the Hawaii-based Shallow-set Longline Fishery in *Turtle Island Restoration Network v. Commerce*. The authorization of this fishery has been particularly contentious over the years due to the fishery’s potential for interactions with listed sea turtles and sea birds. In this latest litigation, FWS issued its first-ever special use permit for incidental take of sea birds under the MBTA. The MBTA permit, along with NOAA’s authorization of the fishery, was challenged on multiple grounds, including for failure to comply with the MBTA, the ESA, and NEPA. After extensive summary judgment briefing and oral argument, the district court in Hawaii rejected all challenges and upheld both the FWS permit and NOAA authorization, thereby allowing the fishery to proceed under the new rule.

The Division had similar success in *Oceana v. NMFS*, a case challenging Amendment 13 to the Coastal Pelagic Species Fishery Management Plan (FMP). Amendment 13 was intended to bring the FMP into compliance with the requirements of the Magnuson-Stevens Act and NMFS’s associated revisions to the National Standard guidelines. After summary judgment briefing and oral argument, the court upheld the amendment.

*Center for Biological Diversity v. Bryson* involved a challenge to a NMFS final rule modifying fishing seasons and retention limits applicable to the Atlantic Bluefin Tuna General Category (Rod and Reel) and Harpoon Fisheries. The rule was carefully crafted to balance the Magnuson-Stevens Act’s requirements to maximize fishing opportunities as appropriate with the United States’ international obligations under Atlantic Tuna Conventions. The district court in the District of Columbia granted our cross-motion for summary judgment, rejecting all of plaintiffs’ claims and upholding the rule.



*Black Rhinoceros*



*Mohawk River, New York*

# ENFORCING THE NATION'S CRIMINAL POLLUTION AND WILDLIFE LAWS

## Safeguarding America's Waters

Dominick Mazza and his company, Mazza & Sons, Inc., operated a solid waste management company in New Jersey. From 2006 to 2011, defendants and co-conspirators transported thousands of tons of pulverized construction and asbestos-contaminated demolition debris from their facility to a farm containing federally protected wetlands owned by co-defendant Cross Nicastro along the Mohawk River in upstate New York. As part of the scheme, defendants fabricated a New York State Department of Environmental Conservation permit and forged the name of an official on the fake permit, and destroyed documents responsive to grand jury subpoenas. Dominick Mazza, Mazza & Sons, and Cross Nicastro were convicted by a jury of conspiracy, CWA, obstruction of justice, false statement, and CERCLA violations. Mazza was sentenced to serve 51 months of incarceration and to pay a \$75,000 fine. Mazza & Sons received a \$100,000 fine and a five-year term of probation, and was required to implement an environmental compliance plan at its New Jersey facility. Nicastro was sentenced to serve 33 months of incarceration and to pay a \$25,000 fine. Mazza, the company, and Nicastro also were ordered to pay a total of \$494,000 in restitution to EPA for clean-up costs and to third-party solid waste management facilities that were fraudulently solicited to dump at the site. Three more defendants pleaded guilty to similar charges and were sentenced to serve a total of 57 months of incarceration and to pay restitution.



*Demolition Debris at Mazza Facility*

Between July 2006 and February 2008, Wal-Mart Store, Inc., shipped more than two million pounds of damaged household products including solid and liquid pesticides from its six return centers to Greenleaf, L.L.C., a recycling facility located in Missouri. Wal-Mart failed to provide oversight

for proper disposal of these pesticides, which resulted in the pesticides being mixed together and offered for sale to customers without the required registration, ingredient lists, or use information. In this prosecution, handled jointly by the Division and the U.S. Attorney's Office, Wal-Mart pleaded guilty to violating the Federal Insecticide, Fungicide, and Rodenticide Act and was sentenced to pay an \$11 million fine and a \$3 million community service payment, and to complete a three-year term of probation. On the same day, in a multidistrict case handled by several U.S. Attorneys' Offices, Wal-Mart pleaded guilty to CWA violations for illegally handling and disposing of hazardous waste. Prior to 2006, Wal-Mart operated its 4,000 stores without a program in place to train its employees on how to properly manage and dispose of hazardous waste. Instead, hazardous wastes were routinely dumped down sinks or placed in municipal dumpsters. In this case, Wal-Mart was sentenced to pay a \$40 million fine and an additional \$20 million community service payment, including \$6 million to open a Retail Compliance Assistance Center that will help retail stores across the nation learn how to properly handle hazardous waste, and to complete a two-year term of probation.

**“B**y improperly handling hazardous waste, pesticides and other materials in violation of federal laws, Wal-Mart put the public and the environment at risk and gained an unfair economic advantage over other companies. Today, Wal-Mart acknowledged responsibility for violations of federal laws and will pay significant fines and penalties, which will, in part, fund important environmental projects in the communities impacted by the violations and help prevent future harm to the environment.”

—Former Assistant Attorney General Ignacia S. Moreno, *Wal-Mart Plea Announcement*

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

In January 2013, in *United States v. Yi*, the Ninth Circuit upheld the conviction and sentence of Charles Yi. Yi was an experienced real estate investor who purchased a 214-unit apartment complex in Winnetka, California, for the purpose of converting it into condominiums. In 2006, knowing that there was asbestos in the ceilings at the complex, he hired a group of day laborers to scrape the ceilings of 47 units without telling them that there was asbestos in the ceilings, without providing them with the required protective gear, and without complying with the work standards for asbestos removal required by the CAA. Yi was convicted of conspiracy and five substantive CAA violations and sentenced to 48 months of imprisonment. The appellate court rejected Yi's challenge to the “deliberate ignorance” instruction the district court had given, holding that the instruction was a correct statement of the law and that there was sufficient evidence in the record to justify giving the instruction. (The district court instructed the jury that defendant acted “knowingly” if the jury found beyond a reasonable doubt that defendant was aware of a high probability that there was asbestos in the ceilings but deliberately avoided learning the truth. It also instructed the jury, however, that it may not find such knowledge if the jury found that defendant actually believed that there was no asbestos in the ceilings or if the defendant was simply careless.) The court also rejected Yi's challenge to the district court's Sentencing Guidelines calculations, finding that the district court properly gave enhancements for an offense resulting in a substantial likelihood of death or serious bodily injury and for Yi's role as an organizer or leader of the crime.

Matthew Bowman, president of Port Arthur Chemical and Environmental Services, L.L.C. (PACES), pleaded guilty to OSHA and false statement violations for his involvement in an incident that caused the death of a PACES employee. The company was in the business of producing and selling caustic materials to paper mills. The production of the caustic materials involved hydrogen sulfide, a poisonous gas. According to the National Institute for Occupational Safety and Health, hydrogen sulfide is an acute toxic substance that is the leading cause of sudden death in the workplace. Bowman did not properly protect PACES employees from exposure to hydrogen sulfide, which resulted in the death of truck driver Joey Sutter on December 18, 2008.



*PACES Facility*

Bowman also was responsible for approving and directing the disposal of wastewater at PACES. He admitted to directing employees to falsify transportation documents to conceal that the wastewater was coming from PACES after a disposal facility placed a moratorium on all shipments from PACES following receipt of loads containing hydrogen sulfide. Bowman was sentenced to the maximum sentence of six months under OSHA for the death, plus a one-year sentence for his false statement.

## Ensuring Safe Storage of Hazardous Waste

William Duran Vizzerra was president, director, and part owner of Precision Pavement Markings, Inc., a road and parking lot painting and striping business that operated in Anchorage, Alaska, from 2006 to 2009. He illegally stored hazardous waste, including methyl methacrylate paint and toluene, which was used to clean paint wastes, at the company's facility. He ordered his employees to dispose of the waste at a local landfill, but the landfill refused to accept hazardous wastes. After Vizzerra was told by an environmental services company that it would cost tens of thousands of dollars to properly dispose of the hazardous waste, he abandoned 321 55-gallon drums, 179 five-gallon pails, and two 200-gallon totes of extremely flammable paint waste at a storage facility. Many of the drums were rusted and bulging. Vizzerra pleaded guilty to the illegal disposal of hazardous waste, and was sentenced to serve 15 months of incarceration and to



*Abandoned Paint Waste*

pay \$395,319 in restitution to the victims of his crime for the costs they incurred to clean up and dispose of the abandoned waste.

## Co-Chairing the Presidential Task Force on Wildlife Trafficking

The Department of Justice has long been a leader in the fight against wildlife trafficking. ENRD works with United States Attorneys' offices across the country, and in coordination with investigators from FWS, NOAA, and other agencies, to prosecute international wildlife trafficking crimes, primarily under the ESA and the Lacey Act, as well as crimes related to wildlife trafficking, such as smuggling, money laundering, and criminal conspiracy. The Division also works in the international sphere by assisting enforcement partners in source, transit, and destination countries to combat the illegal trade in protected wildlife. The Justice Department also collaborates on wildlife trafficking-related initiatives with the State Department, the U.S. Agency for International Development, Interpol, and various international organizations, including efforts to train investigators, prosecutors, and judges.

Illegal trafficking in wildlife, plants and timber, and marine creatures has reached truly 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 to Combat Wildlife Trafficking (the Executive Order).

The Division represents the Department of Justice on the Presidential Task Force on Wildlife Trafficking (the Task Force), 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, and global development. In fiscal year 2013, among other tasks, ENRD began work in close coordination with the other Task Force agencies to draft the first-ever *National Strategy for Combating Wildlife Trafficking*. The strategy was issued by the President on February 12, 2014.

## Protecting Wildlife Through Enforcement

Federal criminal enforcement of wildlife statutes is a critical factor in deterring the illegal killing of wildlife and augments state, tribal, and foreign wildlife management efforts. Criminal prosecutions for these violations focus on both the individual and corporate perpetrators, result in disgorgement of the profits of the illegal conduct, include community service and restitution to help mitigate the harm caused by the violations, and result in forfeiture of the instrumentalities used to commit the crimes. The Division prosecuted a number of these cases in fiscal year 2013, as explained below.

## Operation Crash

With no known predators other than humans, the rhinoceros is a prehistoric species and one of the largest herbivores on earth. All rhinoceros species are protected under U.S. and international law, and the black rhinoceros is listed as endangered under the ESA. Despite national and international protection efforts dating back to 1976, the demand for rhinoceros horn and black market prices have skyrocketed in recent years due to the value some cultures place on the horns for



Rhinoceros

FWS/Karl Stromayer Photo

for ornamental carvings, good luck charms, and medicinal purposes.

This has led to a decline of the global rhinoceros population, which has plummeted by more than 90% since 1970. Between 2007 and 2013, the poaching of wild South African rhinoceros increased from a low of 13 animals taken in 2007 to 1004 taken in 2013.



Evidence Seized by FWS Agents Searches in Operation Crash  
FWS Photo

“Operation Crash” is an ongoing nationwide effort led by the FWS and ENRD in conjunction with United States 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.) In fiscal year 2013, it resulted in successful prosecutions against nine individuals and one company totaling 131 months of incarceration, \$135,000 in fines, \$185,624 in restitution, and the forfeiture of several million dollars in cash, gold ingot, watches, precious stones, vehicles, rhinoceros horns and feet, and ivory pieces. Two cases are described below.

Between January 2011 and February 2013, Qiang Wang *a/k/a* Jeffrey Wang, smuggled over \$1,000,000 worth of Asian artifacts, including libation cups, made from rhinoceros horns and elephant ivory from his antiques business known as Bao Qing Gallery in Flushing, New York, to China. There is a tradition in China dating back centuries of making intricately carved “libation” cups out of rhinoceros horns. Drinking from such a cup was believed by some to bring good health. The escalating value of these items has resulted in an increased demand for rhinoceros

“We’re reaching a tipping point, where the unprecedented slaughter of rhinos and elephants happening now threatens the viability of these iconic species’ wild populations in Africa. This slaughter is fueled by illegal trade, including that exposed by Operation Crash. We will continue to work relentlessly across the United States government and with our international partners to crack down on poaching and wildlife trafficking.”

—U.S. Fish and Wildlife Service Director Dan Ashe, *Wang Sentencing Announcement*

**"S** muggling wildlife artifacts made from rhino horn and elephant ivory undermines the international conservation protections put in place to save these species from extinction. This is an active and ongoing investigation that is designed to send a clear message to buyers and sellers that we will vigorously investigate and prosecute those who are involved in this devastating trade."

—Acting Assistant Attorney General Robert G. Dreher,  
*Wang Sentencing Announcement*

horn, which has helped fuel a thriving black market. Wang made and used false U.S. Customs Declarations for the packages containing rhinoceros horns and ivory objects in order to conceal the true contents of the packages. He pleaded guilty to smuggling and Lacey Act conspiracy violations and was sentenced to serve 37 months of incarceration, ordered to forfeit all ivory in his possession, and was banned from all future trade in elephant ivory and rhinoceros horns.

Vinh Chung "Jimmy" Kha and Felix Kha were involved in a U.S.-based trafficking operation in the black market trade of white and black rhinoceros horns to be made into libation cups and exported to Vietnam. The Khas admitted making payments to Vietnamese customs officials to ensure the rhinoceros horns would clear customs there and acknowledged failing to pay U.S. income taxes for 2009 and 2010. The Khas pleaded guilty to conspiracy, smuggling, Lacey Act, money laundering, and tax fraud violations. Jimmy Kha was sentenced to serve 42 months of incarceration, and to pay a \$10,000 fine and \$76,062 in restitution to the Internal Revenue Service (IRS). Felix Kha was sentenced to serve 46 months of incarceration, and to pay a \$10,000 fine and \$109,562 in restitution to the IRS. The Khas also forfeited rhinoceros mounts, rhinoceros horns, one million dollars in cash, approximately one million dollars in gold ingots, jewelry, watches, precious stones, and vehicles. A third defendant, Jin Zhao Feng, pleaded guilty to a smuggling violation and was sentenced to serve eight months of incarceration. Win Lee Corporation, the Khas' company, pleaded guilty to smuggling and Lacey Act violations and was ordered to pay a \$100,000 fine and complete a five-year term of probation.

## OPERATION CRASH

—Operation Crash is an ongoing multidistrict criminal investigation that is addressing all aspects of U.S. involvement in the black market rhino horn trade.

—It is being led by the U.S. Fish and Wildlife Service, partnering with the U.S. Postal Investigative Service; the U.S. Immigration and Customs Enforcement's Homeland Security Investigations; the Internal Revenue Service; and the Bureau of Alcohol, Tobacco, Firearms and Explosives. Prosecutions have been, or are being conducted, by ENRD's Environmental Crimes Section and the U.S. Attorneys' Offices for C.D. California, S.D. New York, E.D. New York, New Jersey, S.D. Florida, E.D. Texas, and W.D. Texas.

—Charges filed against defendants include conspiracy, smuggling, money laundering, tax evasion, and bribery, as well as violations of the Endangered Species Act and Lacey Act (a law that prohibits the illegal trafficking of wildlife and plants).

— In fiscal year 2013 alone, Operation Crash resulted in successful prosecutions against nine individuals and one company totaling 131 months of incarceration, \$135,000 in fines, \$185,624 in restitution, and the forfeiture of several million dollars in cash, gold ingot, watches, precious stones, vehicles, rhinoceros horns and feet, and ivory pieces.

## Operation Silent Wilderness

The Division is wrapping up its prosecutions resulting from a nationwide investigation by FWS into the illegal killing and commercialization of eagles and other migratory birds protected by federal law, known as “Operation Silent Wilderness.” The comprehensive effort has resulted in charges for selling and purchasing migratory bird feathers against 33 individuals in seven states. The covert investigation was jointly conducted with the Navajo Nation Department of Fish and Wildlife. To date, the investigation has resulted in \$25,210 in fines, \$66,700 in restitution, 1060 hours of community service, 26 months of home confinement, and more than seven years of incarceration.

## Illegal Big Game Hunting of Deer and Elk

Beginning in 1988, Dennis Rodebaugh operated a Colorado big game outfitting business called D&S Guide and Outfitters. D&S offered multi-day elk and deer hunts in the White River National Forest for between \$1,200 and \$1,600 per hunt. Each spring and summer, Rodebaugh placed hundreds of pounds of salt as bait near the tree-stands. It is illegal to use bait to hunt big game in Colorado. Out-of-state clients then would shoot deer and elk from the tree stations, using archery equipment. A jury found Rodebaugh guilty of six Lacey Act violations, and he was sentenced to serve 41 months of incarceration and to pay a \$7,500 fine and \$37,390 in restitution to the State of Colorado for the value of illegally taken elk and deer.



*Elk Kneeling to Reach Salt on the Ground*

## Reducing Pollution from Ocean-Going Vessels

In fiscal year 2013, the penalties imposed in vessel pollution cases prosecuted by the Division totaled nearly \$12.7 million. This brought the penalties imposed as a result of ENRD’s Vessel Pollution Initiative, which began in the late 1990s, to more than \$342 million in criminal fines and more than 27 years of confinement. The Division’s most recent prosecutions of these deliberate violations include the representative cases below.

In May 2012, several crew members provided photos and videos of illegal discharges of bilge waste from four vessels (*M/T King Emerald*, *M/T Nordic Passat*, *M/V Cape Maas*, and *M/T Cape Taft*) operated by Columbia Shipmanagement (Deutschland) and Columbia Shipmanagement, Ltd. The illegal discharges of bilge waste from the *M/T King Emerald* were made at night off the coast of Central America, including a discharge within the Exclusive Economic Zone of Costa Rica where a national park is located. The discharges from the *M/T Nordic Passat*, the *M/V Cape Maas*, and the *M/T Cape Taft* occurred off the coasts of Delaware, San Francisco, and New York. The firms pleaded guilty in two districts to violations of the Act to Prevent Pollution from Ships (APPS) and obstruction-of-justice violations. They were sentenced to pay

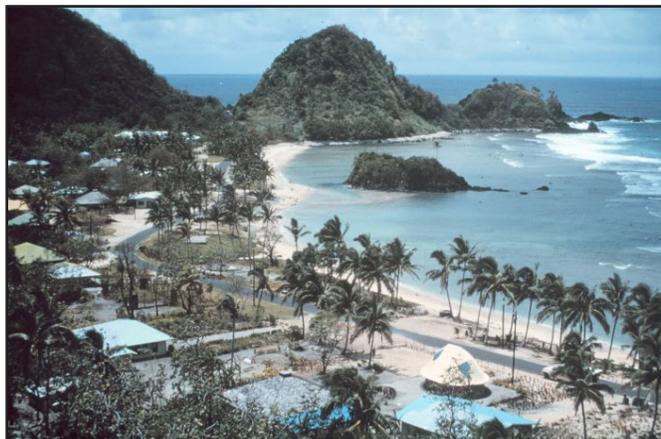


*M/T King Emerald*

a \$7.8 million fine and an additional \$2.6 million as a community service payment to the National Fish and Wildlife Fund that will be used to help restore the coastal environment of New Jersey and Delaware hit by Hurricane Sandy. Jeffrey Lupera, a second engineer on the *M/T King Emerald*, pleaded guilty to obstruction and false statement violations and was sentenced

to a two-year term of probation. Vladimer Kondratyev, chief engineer for the *M/T Nordic Passat*, pleaded guilty to obstruction of justice and falsification of records and was sentenced to pay a \$500 fine followed by a two-year term of probation; second engineer Sergiy Shapovalov pleaded guilty to a false statement violation and was sentenced to a one-year term of unsupervised probation and sent back to Ukraine.

Sanford, Ltd., of New Zealand owned and operated the fishing vessel the *F/V San Nikunau*, which fished primarily tuna in the South Pacific Ocean and sold its catch at U.S. ports. The *San Nikunau* routinely dumped oily bilge waste from the ship both at sea and in port at Pago Pago, American Samoa, without processing the waste through the required oil water separator or recording the discharges in the oil record book. Some of the world's most pristine marine ecosystems are in the South Pacific. Sanford, Ltd., and the *San Nikunau's* chief engineer, Ronald Pogue, were convicted by a jury of conspiracy, APPS, and obstruction-of-justice violations. Sanford, Ltd., was sentenced to pay a \$1.9 million fine and a \$500,000 community service payment to the National Marine Sanctuaries Foundation. The company also must serve a three-year term of probation and institute an environmental compliance plan. Pogue was sentenced to serve 30 days of incarceration, followed by five months of home confinement, to pay a \$6,000 fine, and to complete a two-year term of supervised release. Another chief engineer for the *San Nikunau*, Rolando Ong Vano, pleaded guilty to an APPS violation and was sentenced to pay a \$2,000 fine and to complete a one-year term of unsupervised probation.



*Pago Pago, American Samoa*

*NOAA Photo*

Guilty pleas or convictions by a jury were entered in two additional cases involving deliberate violations by vessel operators and crew members: *United States v. Pacific Int'l Lines, Ltd.*, and *United States v. Nimmrich*. In these cases, companies and individuals were sentenced to pay a total of \$3 million in fines and \$400,000 in community service payments, and probation, for crimes including conspiracy, false statements, obstruction-of-justice, and oil record book violations under APPS.

## **Working With Others to Protect the Environment Through Pollution and Wildlife Prosecutions**

In fiscal year 2013, the Division continued to partner with state and local agencies and working groups to ensure that pollution and wildlife prosecutions are given the attention and resources they merit. We developed and participated in major training events and meetings. Division attorneys provided environmental crimes training to EPA Criminal Investigation Division agents, FWS agents, NOAA agents, Deputy U.S. Marshals, regional associations such as the Northeastern Environmental Enforcement Project and Western States Project, and Assistant United States Attorneys. ENRD also participated in meetings of the Environmental Issues Working Group of the Attorney General's Advisory Committee. Additional international training activities conducted by the Division are discussed in the next chapter.



*Jeffrey C. Bank 2013*

**Skyline Drive, Virginia**

**Photo by Jeff Bank**



**Everglades, Florida**

**NPS/Rodney Cammauf Photo**

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# DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

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## **Upholding Administrative Actions Related to Regulation of Greenhouse Gases and Climate Change**

Over the past several years, EPA has developed a regulatory program under the CAA to regulate greenhouse gas emissions that contribute to global climate change. In 2012, the Division obtained a groundbreaking victory in *Coalition for Responsible Regulation v. EPA*, a large, consolidated CAA case in which the D.C. Circuit upheld EPA's principal regulations setting greenhouse gas emission standards for motor vehicles and phasing in greenhouse gas permit requirements for stationary sources. In July 2013, in *Utility Air Regulatory Group v. EPA*, ENRD secured a favorable decision from the D.C. Circuit dismissing challenges to follow-up EPA actions to facilitate permitting for major stationary sources of greenhouse gas emissions, such as power plants, in 13 states whose State Implementation Plans did not already provide authority to address greenhouse gas emissions in preconstruction permits for major sources. In October 2013, following extensive briefing by the Solicitor General's Office (in conjunction with the Division), the Supreme Court denied the lion's share of nine separate petitions for certiorari seeking further review of the D.C. Circuit's 2012 decision in *Coalition for Responsible Regulation*. The Supreme Court did agree to consider a single issue pertaining to stationary source greenhouse gas permit requirements, which was argued in February 2014.

## **Defending the U.S. Response to the Deepwater Horizon Explosion, Fire, and Oil Spill**

The Division continues to defend some cases arising from the Deepwater Horizon explosion, fire, and oil spill, which occurred in the Gulf of Mexico in April 2010.

—In November 2012, the Fifth Circuit issued a decision reversing a finding of contempt made against the Secretary of the Interior for his actions taken and statements made following the Deepwater Horizon disaster; it also vacated the \$530,000 award of attorneys' fees given to the industry plaintiffs. The Fifth Circuit concluded that the district court had abused its discretion in invoking its contempt power because the Secretary's actions and statements leading up to the issuance of a subsequent drilling suspension in the Gulf of Mexico in July 2010 did not clearly

## KEY FEDERAL CLEAN AIR ACT REGULATORY INITIATIVES CHALLENGED IN *COALITION FOR RESPONSIBLE REGULATION V. ENVIRONMENTAL PROTECTION AGENCY (D.C. CIRCUIT)*

— **The Endangerment Finding:** *Greenhouse Gas Endangerment and Cause or Contribute Finding (December 7, 2009)*

EPA issued a final Clean Air Act regulation finding that six greenhouse gases constitute a threat to public health and welfare, and that the combined emissions from motor vehicles cause or contribute to the climate change problem.

— **The Tailpipe Rule:** *Standards to Reduce Greenhouse Gas Emissions and Fuel Use for New Passenger Cars and Light-Duty Trucks (April 1, 2010)*

EPA and the National Highway Traffic Safety Administration announced a joint final regulation under the Clean Air Act and the Energy Policy and Conservation Act establishing a historic national program that will reduce greenhouse gas emissions and improve fuel economy for new passenger cars, light-duty trucks, and medium-duty passenger vehicles, covering model years 2012 through 2016.

— **The Timing Rule:** *Regulation Establishing When Certain Stationary Source Permitting Takes Effect (March 29, 2010)*

EPA concluded that an air pollutant becomes subject to permitting under the Clean Air Act New Source Review Prevention of Significant Deterioration and Title V Operating Permit Programs only when a regulation requiring control of that pollutant takes effect.

— **The Tailoring Rule:** *Regulation Controlling Greenhouse Gas Emissions from Large Stationary Sources (May 13, 2010)*

EPA issued a final regulation that establishes thresholds for greenhouse gas emissions that define when permits under the Clean Air Act New Source Review Prevention of Significant Deterioration and Title V Operating Permit Programs are required for new and existing industrial facilities. This final rule “tailors” the requirements of these permitting programs to phase in which facilities will be required to obtain such permits. Facilities responsible for nearly 70% of the U.S. greenhouse gas emissions from stationary sources are subject to permitting requirements under this rule. This includes the nation’s largest greenhouse gas emitters—power plants, refineries, and cement production facilities.

and convincingly violate the district court’s order prohibiting the Secretary from enforcing a drilling suspension that he had issued in May 2010. The court further concluded that, because the industry plaintiffs failed to adequately brief the issue on appeal, they had waived their alternative basis for affirming the award of attorneys’ fees based on the government’s alleged bad faith litigation tactics. The industry plaintiffs subsequently filed a petition for a writ of certiorari, which the Supreme Court denied in December 2013.

—Several cases challenge aspects of the federal government’s approval of exploration and production plans and lease sales in the Gulf of Mexico and Alaskan waters after the Deepwater Horizon explosion, fire, and oil spill. For example, in *Oceana v. Bureau of Ocean Energy Mgmt.*, a group of plaintiffs dispute the Bureau’s decision to conduct Lease Sale 216/222, which is the first Outer Continental Shelf lease sale to be conducted in the Central Gulf of Mexico following the Deepwater Horizon explosion, fire, and oil spill. The Division completed briefing on summary judgment in 2013 and the matter is now fully submitted for disposition by the district court.

## Continuing Defense of EPA's Cross-State Air Pollution Rule

In 2012, the D.C. Circuit issued an adverse decision in *EME Homer City Generation v. EPA*, striking down the Cross-State Air Pollution Rule (also known as the Transport Rule), a very important EPA CAA rule intended to control interstate contributions to ozone and particulate matter pollution in almost 30 states in the eastern part of the country. Following the D.C. Circuit's denial of a petition for rehearing in January 2013, ENRD worked closely (and on an expedited basis) with the Solicitor General's Office to file a petition for a writ of certiorari with the Supreme Court, and that petition was granted in June 2013.

ENRD and the Solicitor General's Office then collaborated on merits briefing in support of the Transport Rule. The case was argued before the Court in December 2013.

**"N**o community should have to bear the burden of another community's polluters, or be powerless to prevent air pollution that leads to asthma, heart attacks and other harmful illnesses. These Clean Air Act safeguards will help protect the health of millions of Americans and save lives by preventing smog and soot pollution from traveling hundreds of miles and contaminating the air they breathe. By maximizing flexibility and leveraging existing technology, the Cross-State Air Pollution Rule will help ensure that American families aren't suffering the consequences of pollution generated far from home, while allowing states to decide how best to decrease dangerous air pollution in the most cost effective way."

—Former EPA Administrator Lisa Jackson's Announcement of the Cross-State Air Pollution Rule

## Successful Defense of EPA's Actions Implementing the Regional Haze Program

During fiscal year 2013, the Division obtained important decisions from the Eighth and Tenth Circuits largely upholding actions that EPA has taken to implement CAA requirements intended to improve visibility in national parks and wilderness areas. In a July 2013 decision in *Oklahoma v. EPA*, the Tenth Circuit strongly affirmed EPA's authority to disapprove state regional haze plans that do not meet the act's requirements and to issue a federal plan to correct the noted deficiencies in the state plan. The Eighth Circuit reached a similarly favorable result in its September 2013 decision in *North Dakota v. EPA*, also affirming EPA's general regional haze authority in a case involving North Dakota's regional haze plan, while remanding only a single narrow issue to the agency. These two decisions are among the first to consider the scope of EPA's authority to review state regional haze plans and are not only important in their own right, but also as precedent for a number of other regional haze cases that currently are pending in these and other circuits.

## Defending Controls on Air Pollution from Ships in Coastal Waters

In *State of Alaska v. Clinton*, the State of Alaska sued to challenge federal enforcement of low-sulfur fuel requirements for marine vessels operating in certain Alaskan coastal waters. The low-sulfur requirements were implemented pursuant to the United States' obligations as a party country to the International Convention for the Prevention of Pollution from Ships and APPS. Alaska filed a motion for a preliminary injunction, arguing that the low-sulfur requirement constituted a treaty amendment that was invalid because it had not been accepted by the U.S.

Senate and because it allegedly did not comply with APPS. The Division filed motions to dismiss arguing, among other things, that the court lacked jurisdiction to review the claims under the political question doctrine and the Administrative Procedure Act (APA). In September 2013, the district court in Alaska granted our motions to dismiss, denied Alaska’s injunction motion, and entered judgment in favor of the United States.

## Upholding the Integrity of EPA’s Rulemaking Discretion

Plaintiffs in *Trumpeter Swan Soc’y v. EPA* sought judicial review of EPA’s denial of a petition to initiate a rulemaking to regulate lead in bullets and shot under the Toxic Substances Control Act. The district court in the District of Columbia had dismissed an earlier case on grounds that plaintiffs did not file the action within the time limit established by the law to obtain de novo review of whether a chemical substance poses an unreasonable risk to human health and the environment. When plaintiffs refiled their petition with no material changes, EPA treated the second petition as a petition for reconsideration and denied it. We moved to dismiss the second suit for lack of jurisdiction, and the court granted that motion. The court found that EPA is entitled to deference concerning decisions on how to manage its docket and had offered a reasoned and persuasive explanation for why it treated the second petition as merely a petition for reconsideration. The case is significant in that it confirmed that when a plaintiff misses a deadline to obtain review of EPA’s denial of a rulemaking petition, the plaintiff cannot get a second bite at the apple simply by filing a new rulemaking petition.

## Defending Challenges to EPA Oversight of Water Quality Planning in and Around Cape Cod, Massachusetts

In *Conservation Law Found. v. EPA*, the Division successfully defended EPA’s oversight of water quality planning efforts by the State of Massachusetts and municipal entities concerning nitrogen loading in and around Cape Cod and Nantucket, Massachusetts. The district court in Massachusetts upheld 13 separate Total Maximum Daily Loads (TMDLs) for impaired waters, rejecting claims that the TMDLs should have classified 130,000 septic systems and all waste treatment facilities on Cape Cod as point sources in the waste load allocation, and were otherwise deficient because they failed to consider climate change impacts on nitrogen

loading to Cape Cod’s bays. (The TMDLs identify the maximum annual and daily amounts of pollutants that waters can receive and still meet water quality standards issued under the CWA.) The case had potentially significant programmatic ramifications because utilizing the categorization of sources in a TMDL to essentially create additional federal permitting

### Impaired Waters and Total Maximum Daily Loads

Under section 303(d)(1)(A) of the Clean Water Act, states, territories, and authorized tribes are required to develop lists of impaired waters. These are waters that are too polluted or otherwise degraded to meet the water quality standards set by states, territories, or authorized tribes. Section 303(d)(1)(C) requires that these jurisdictions establish priority rankings for waters on the lists and develop Total Maximum Daily Loads (TMDLs) for these waters. A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still safely meet water quality standards.

requirements would substantially alter the manner in which EPA responds to discharges of pollutants.

## Upholding EPA's TMDL for the Chesapeake Bay

In *American Farm Bureau Fed'n v. EPA*, industry groups challenged EPA's 2010 TMDL determination for the Chesapeake Bay and its watershed area, which encompasses states from New York to Virginia. The Chesapeake Bay TMDLs establish pollutant loads for nitrogen, phosphorus, and sediment for the Chesapeake Bay and its tidal tributaries. Plaintiffs, including

### CHESAPEAKE BAY TMDL

—On December 29, 2010, EPA established the Total Maximum Daily Load (TMDL) for the 64,000 square-mile Chesapeake Bay Watershed, the largest TMDL ever developed by the agency.

—The TMDL identifies the necessary pollution reductions of nitrogen, phosphorus, and sediment across the District of Columbia and large sections of Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia, and sets pollution limits necessary to meet water quality standards in the Bay and its tidal rivers.

—Specifically, the TMDL sets limits of 185.9 million pounds of nitrogen, 12.5 million pounds of phosphorus, and 6.45 billion pounds of sediment per year—a 25% reduction in nitrogen, 24% reduction in phosphorus, and 20% reduction in sediment.

—The pollution limits were further divided by jurisdiction and major river basin based on state-of-the-art modeling tools, extensive monitoring data, peer-reviewed science, and close interaction with jurisdiction partners.



Chesapeake Bay Watershed

EPA Map

—The TMDL is designed to ensure that all pollution control measures needed to restore the Chesapeake Bay and its tidal rivers are in place by 2025, with practices in place by 2017 to meet 60% of the overall nitrogen, phosphorus, and sediment reductions.

—On September 13, 2013, in the case of *American Farm Bureau v. EPA*, a district court in Pennsylvania ruled in EPA's favor, upholding the validity of the TMDL in all respects.

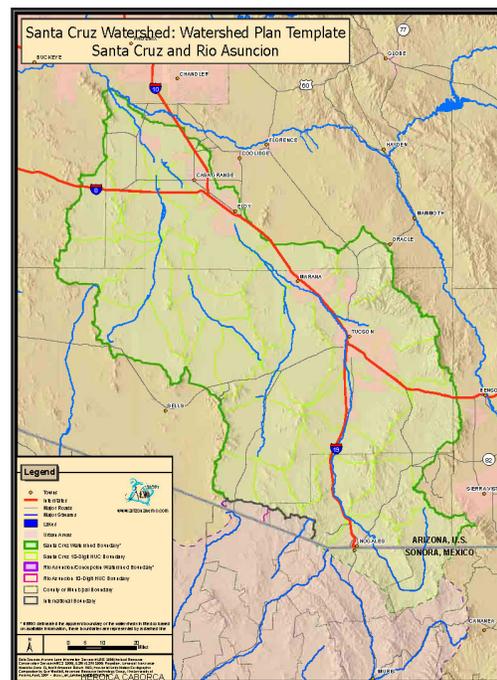
—EPA Fact Sheet

a number of trade associations representing agri-business, contended, among other things, that EPA's issuance of the TMDLs and pollution loads in cooperation with the seven affected states in the Chesapeake Bay watershed area was not authorized under the CWA. In September 2013, the district court in Pennsylvania denied plaintiffs' motion for summary judgment and granted EPA's cross-motion, ruling in EPA's favor on all issues.

## Defending the CWA Regulatory Program for Protecting Wetlands and Other Waters of the United States

The D.C. Circuit, in a unanimous opinion in *Mingo Logan Coal Co. v. EPA*, reversed a district court decision concluding that EPA's authority under section 404(c) of the CWA to "veto" the Army Corps' specification of fill disposal sites in a section 404 permit did not allow the exercise of that authority after the permit had issued. The Corps had issued Mingo Logan Coal Company a section 404 permit in 2007 for discharge of waste into wetlands associated with coal mining. At the time, EPA had decided not to invoke its section 404(c) authority to "prohibit" specification of the disposal sites in that permit. Four years later, however, based on information concerning the adverse effects of such disposal, EPA "withdrew" those same specifications using its section 404(c) authority. This was only the third post-permit veto in the history of the CWA. In its reversal, the D.C. Circuit held that section 404(c) unambiguously grants EPA "backstop" authority to withdraw specification of a disposal site at any time, so long as the agency determines that discharges of fill material into that site will have one of four enumerated "unacceptable adverse effects." Mingo Logan filed a petition for certiorari requesting that the Supreme Court review the D.C. Circuit's decision, which was denied in March 2014.

In two cases, the Division defeated efforts to obtain premature judicial review of Corps determinations regarding the status of certain waters for purposes of federal regulatory jurisdiction. In *Belle Company, L.L.C. v. Army Corps of Eng'rs*, we successfully moved to dismiss a challenge to a Corps' determination that plaintiff's land contained wetlands within federal regulatory jurisdiction. Plaintiff argued that the Supreme Court's 2012 decision in *Sackett v. EPA* changed the analysis of whether courts have jurisdiction to review such agency determinations. We persuaded the district court in Louisiana otherwise, and it dismissed the case. Similarly, in *Hawkes Co. v. Corps of Eng'rs*, a challenge to a Corps' jurisdictional determination in connection with peat mining operations in Minnesota, the district court concluded that the *Sackett* holding on pre-enforcement review of administrative compliance orders should not be extended to Corps' jurisdictional determinations, and dismissed the case. In a third case, *Nat'l Ass'n of Home Builders v. EPA*, the district court in the District of Columbia used a similar rationale in dismissing a challenge to a determination that two segments of the Santa Cruz River in Arizona are



Santa Cruz Watershed

EPA Map



**Santa Cruz River**

**EPA Photo**

traditional navigable waters. The court first found that plaintiffs lacked standing to sue, and then went on, in the alternative, to conclude that even if plaintiffs have standing, the determination does not establish any rights or obligations or have any legal consequences and, therefore, it lacks finality and is not subject to judicial review.

*Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs* involved claims under the APA, CWA, and NEPA asserting that the Corps unlawfully issued a CWA section 404 fill permit for a mountaintop mining project in eastern Kentucky. Plaintiffs filed two motions for partial summary judgment, arguing that the

Corps violated NEPA and the CWA by failing to consider effects of the mining project on human health in the nearby community, and that the Corps violated its regulations and the CWA section 404(b)(1) guidelines with respect to various aspects of compensatory mitigation required by the permit. We moved for partial summary judgment on both issues. In August 2013, the district court in Kentucky granted our cross-motions, upholding the permit. As to the first motion, the court agreed with our position that, under NEPA and the CWA, the Corps is required only to examine the impacts of the specific permitted activity—the discharge of dredged or fill material into jurisdictional waters—and not the entire project. Regarding the second motion, the court held that Corps' determinations regarding a variety of permit-specific issues involving compensatory mitigation were not arbitrary, capricious, or contrary to law.

The Division handled litigation related to multiple decisions by the Corps to issue CWA section 404 permits authorizing the discharge of dredge and fill materials into various waters of the United States in conjunction with important infrastructure projects. Several victories in this area include:

—*Ouachita Riverkeeper v. Corps of Eng'rs*, in which the court upheld the Corps' use of a nationwide permit to allow water crossings associated with a pipeline to safely transport treated wastewater to a discharge point;

—*Cook Inletkeeper v. U.S. Army Corps of Eng'rs*, in which the court denied plaintiffs' motion for a preliminary injunction in a case involving a challenge under the CWA and NEPA to the Corps' issuance of an individual section 404 permit to the Alaska Railroad Corporation for the construction of a railroad line that will link Port Mackenzie, which is located in Anchorage, Alaska, with an existing railroad line farther north; and



**View of Port Mackenzie, Anchorage, Alaska**

**Photo Courtesy of NJWilson23**

—*City of Dania Beach, Florida v. U.S. Army Corps of Eng’rs*, in which the court sustained a permit authorizing the discharge of dredge and fill materials with respect to the expansion of the southern runway at the Fort Lauderdale-Hollywood International Airport.

## Supporting the Corps’ Management of Critical Waterways—the Great Lakes Ecosystem

Invasive species are a significant threat to the Great Lakes ecosystem. Asian carp have come to dominate sections of the Mississippi River and its tributaries. If the carp were to become established in the Great Lakes, it is feared that the species could create an ecological disaster by consuming the bottom of the food chain and negatively impacting the Great Lakes’ multibillion-dollar fishery industry. In 2013, the Division continued its defense before the Seventh Circuit of the interests of the United States in litigation



**Bighead Carp**  
Photo Courtesy of the Asian Carp Regional Coordinating Committee



**Silver Carp**  
Photo Courtesy of the Asian Carp Regional Coordinating Committee

involving the migration of Asian carp into the Great Lakes through the Chicago Area Waterway System. This appellate court litigation follows favorable decisions in *State of Michigan v. U.S. Army Corps of Eng’rs*, in which the States of Michigan, Wisconsin, Illinois, Pennsylvania, and Ohio filed suit against the Corps, alleging that the Corps had created a public nuisance by operating structures around Chicago in such a way as to allow Asian carp to enter Lake Michigan. Plaintiffs sought a preliminary injunction, which the district court denied and the Seventh Circuit upheld. The appellate court held that the injunctive relief sought would only marginally decrease the likelihood of harm during the pendency of the litigation while imposing great costs on the government and the public. It concluded that any effort by the courts to intervene in the ongoing extensive interagency effort to stop the invasion of carp was unnecessary and might do more harm than good given the relative competency of the branches of government. Following the Seventh Circuit’s affirmation of the denial of a preliminary injunction, the states filed a petition for a writ of certiorari in the U.S. Supreme Court. In February 2012, the Supreme

Court denied the petition. In December 2012, the district court granted our motion to dismiss the case, and the Division is actively defending that decision on appeal.

## Protecting Water Quality in the Everglades

In 2013, the United States and Florida worked collaboratively to restore water quality in the Florida Everglades. The South Florida Water Management District initiated implementation of \$880 million worth of remedial projects under a CWA National Pollutant Discharge Elimination System permit issued last year by the Florida Department of Environmental Protection, in coordination with EPA. Also underway is a host of other major restoration initiatives designed to restore historic flows to the Everglades. The Department continues to provide legal advice to the federal agencies working on these initiatives, and to participate in periodic meetings of the South Florida Ecosystem Restoration Task Force.



*Eco Pond in Everglades National Park*

*USGS Photo*

## Upholding Important Department of Agriculture Programs

In *WildEarth Guardians v. Animal and Plant Health Inspection Service* (APHIS), the Division successfully defended APHIS's predator damage management program from a NEPA challenge. The district court in Nevada granted the Division's motion to dismiss all of plaintiffs' NEPA claims for failure to establish standing. The court held that plaintiffs failed to satisfy the redressability requirement for standing because the State of Nevada would carry out predator damage management even in the absence of APHIS's participation. After the court's ruling, plaintiffs voluntarily dismissed their one remaining claim under the Wilderness Act, ending the litigation.

In May 2013, the Ninth Circuit in *Center for Food Safety v. Vilsack* upheld a decision of APHIS to deregulate "Roundup Ready" alfalfa, a genetically modified product created by Monsanto Corporation. The deregulation decision allows the product to be sold for commercial planting

by farmers. Monsanto genetically engineered this alfalfa to be resistant to the herbicide glyphosate, a pesticide manufactured by Monsanto known as “Roundup.” Following years of litigation over a prior decision by APHIS to deregulate “Roundup Ready” alfalfa, APHIS completed the Environmental Impact Statement and concluded that the genetically engineered alfalfa no longer should be considered a “plant pest” subject to regulation under the Plant Protection Act (PPA). The court of appeals held that because APHIS had properly concluded that “Roundup Ready” alfalfa no longer constituted a “plant pest,” it lacked authority to regulate the harms that plaintiffs complain about, such as contamination of non-genetically engineered alfalfa and increased glyphosate usage. Additionally, because APHIS had no further authority under the PPA, it was not required to engage in consultation under the ESA to consider post-deregulation impacts on listed species and was not required by NEPA to look at alternatives to unconditional deregulation because it lacked the authority to adopt them where the product met the standards for deregulation. Finally, the court held that APHIS was not required to analyze whether “Roundup Ready” alfalfa is a noxious weed because Monsanto’s petition did not trigger APHIS’s separate noxious weed authority.

## Supporting Investments in Transportation Infrastructure

In *St. Paul Branch of the NAACP v. Dep’t of Transp.*, plaintiffs challenged an 11-mile light rail project that will connect St. Paul with Minneapolis, on the ground that the Department of Transportation did not comply with NEPA. In an earlier ruling, the court granted defendants’ motions for summary judgment in most respects and denied plaintiffs’ request for an injunction, but ordered the agency to supplement the Environmental Impact Statement with discussion of impacts of light rail construction on small business revenues. Plaintiffs claimed that the agency’s effort was proceeding too slowly. The district court denied plaintiffs’ renewed request for an injunction, finding that the agency was proceeding appropriately to comply with the court’s order. The court’s order allowed this important project to proceed while the agency addresses the court’s remaining concerns. The case has now been dismissed. Throughout the course of this litigation, the Division worked closely with the U.S. Attorney’s Office.

*Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb* concerns an infrastructure project that would upgrade and provide additional capacity on the Zoo Interchange in western Milwaukee County, Wisconsin. The Zoo Interchange is a key link in the local, state, and national transportation network. Milwaukee community-based organizations brought a challenge to the project under NEPA, including stating a claim that the agency failed to comply with Title VI of the Civil Rights Act. In 2013, the district court dismissed this claim, holding that NEPA does not provide an avenue through which plaintiffs may seek compliance with Title VI or the agency’s Title VI disparate impact regulations. We continue to work closely with the federal and state agencies involved to help ensure that project impacts on minority communities in the City and County of Milwaukee are appropriately addressed.

The Division worked successfully with City and County of Honolulu transportation agencies to defend a major rail transit project linking western O`ahu with downtown Honolulu, obtaining a largely favorable ruling on summary judgment in *Honolulu Traffic.com v. Federal Transit Admin.* The project will provide significant transit benefits to minority and disadvantaged communities in western O`ahu, as noted above, in addition to easing severe traffic congestion and alleviating air pollution. The Division is currently defending the agencies’ compliance with the district court’s limited remand order.

In *Defenders of Wildlife v. North Carolina Dep't of Transp. and Federal Highway Admin.*, the Division worked closely with the U.S. Attorney's Office for the Eastern District of North Carolina to successfully defend the Federal Highway Administration's planned replacement of the Herbert C. Bonner Bridge in Dare County, North Carolina. The project will replace the existing bridge across Oregon Inlet between Bodie Island and Hatteras Island that is nearing the end of its useful life, and maintain a transportation route from the Oregon Inlet to Rodanthe. In September 2013, the court ruled in our favor on all claims under NEPA and section 4(f) of the Department of Transportation Act.



*Herbert C. Bonner Bridge, Dare County, North Carolina*

*Native Songbird Care and Conservation v. Foxx* concerns an important infrastructure project to widen and realign existing Highway 101 to provide additional high-occupancy vehicle lanes that will reduce congestion and improve traffic operations between Marin County and Sonoma County, California. In 2013, the Division, working with the state transportation agency, obtained a court decision that denied a motion for preliminary injunction that would have limited certain construction activities to one month out of each year.

## **Protecting the Public Fisc from Unfounded Takings Claims**

Over the past year, the Division has defended numerous cases seeking compensation under the Fifth Amendment to the U.S. Constitution for the alleged taking of private property.

Of particular note is the Division's ongoing defense against flooding-related takings claims, including cases related to storm-event flooding and cases related to the operation and maintenance of dams and other flood control structures throughout the United States. One of these cases is *St. Bernard Parish v. United States*, a proposed class action of approximately 75,000 landowners brought in the aftermath of Hurricane Katrina. The Division represented the United States in a valuation trial in November 2013, arguing that damages to the plaintiffs' properties were not caused by actions of the United States. Another flooding-related case handled by the Division over the past year is *Lone Star Indus. v. United States*, in which the trial court dismissed claims alleging the taking of the plaintiff's deep draft offshore marine import terminal as a result of the 2008 de-authorization and 2009 closure of the Mississippi River Gulf Outlet. Finally, in *Steuve Brothers Farms, L.L.C. v. United States*, the Federal Circuit issued an opinion in December 2013 affirming the trial court's dismissal of claims alleging the taking of a flowage easement related to modifications to the Prado Dam on the Santa Ana River in California, finding that the mere apprehension of future flooding does not constitute a taking of a flowage easement.

In *Casitas Mun. Water Dist. v. United States*, the Federal Circuit affirmed the Court of Federal Claims' (CFC's) dismissal of this Fifth Amendment takings action on ripeness grounds. Casitas operates and holds the water rights to a water project constructed by the Bureau of Reclamation. Casitas alleged that the United States took a portion of its water rights by requiring it to install and operate a fish ladder at the project, which reduced Casitas' diversions of water from the Ventura River. In a prior appeal, the Federal Circuit held that the taking claim should be

analyzed as a physical appropriation of Casitas' water rights, rather than as a regulatory taking. On remand, the CFC held that Casitas' taking claim is not ripe because Casitas has suffered no harm to its property interest in the beneficial use of water to date. The CFC dismissed, without prejudice to refiling if and when the fish ladder's operation does affect Casitas' interest in the beneficial use of water. In affirming, the Federal Circuit held that, under California law, Casitas has a property interest only in the beneficial use of water and that storage of water in Casitas' reservoir was not itself a beneficial use. The court concluded that the CFC did not clearly err in finding that the fish ladder flows had not deprived Casitas of any beneficial use of water, and that absent any infringement by the federal government of Casitas' property interest in beneficial use, its taking claim had not accrued.

## Resolving Ongoing Constitutional Claims Deriving from the Federal Rails-to-Trails Program

The Division continues to defend nearly 10,000 claims brought under the Fifth Amendment deriving from the implementation of the National Trails System Act. Under that statute, thousands of miles of railroad corridors throughout the United States that are no longer needed for active rail use have been

preserved for future rail use and converted into trails. While these trails provide significant benefit to countless communities, their creation also has led to numerous lawsuits in which adjacent property owners argue that they should be compensated by the United States because the property interests conveyed to the railroads did not contemplate trail use. Most of these cases are filed as class actions that may include hundreds of landowners seeking compensation. The Division continues to work diligently to bring these cases to a fair and efficient conclusion. In addition to securing court dismissal of numerous claims that did not have merit through briefing or by stipulation, we have negotiated favorable settlements of other claims, resulting in resolution of many longstanding cases.



*Trail on Upper Gold Camp Road, Colorado*

*Photo Courtesy of the Rails-to-Trails Conservancy and ascensionist*

## Acquiring Property for Public Purposes

Consistent with the Fifth Amendment's mandate to pay just compensation when the United States must acquire private property, ENRD works to ensure that all landowners receive fair market value, while taxpayers are not required to pay in excess of fair market value. Great efforts are made to resolve disputes without litigation where feasible. During fiscal year 2013, six major leasehold acquisitions for government administrative space were secured on behalf

of the General Services Administration (GSA) with Division assistance after initial negotiations failed. The total cost savings to the United States for these six acquisitions alone exceeded \$1.1 billion.

The federal government's power of eminent domain was exercised successfully to enable the efficient transfer of title to the Thomson Correctional Center in Illinois from the State of Illinois to the Federal Bureau of Prisons. *United States v. 146.541 Acres of Land Situate in Carroll County, Illinois, and the Illinois Dep't of Central Mgmt. Serv.* The Division guided valuation of the Thomson property on behalf of the Bureau of Prisons by qualified, independent experts, with the end result that the State of Illinois consented to accept \$165 million as just compensation. In April 2013, the district court approved the parties' joint stipulation of just compensation, bringing years of negotiations to a close.



*Thomson Correctional Center, Illinois*

Eminent domain also was used to acquire approximately 154,000 square feet of office space in Washington, D.C., for use by Department of Commerce components for a term of three years in *United States v. 176,071 Rentable Square Feet of Office and Related Space in the Building Located at 1441 L St., NW, Washington, D.C.* This case was filed at the request of GSA. The Division negotiated a favorable agreement with the landlord retroactive to the date of expiration of the preceding lease. This settlement will result in payment of approximately \$20,500,000 over three years, with GSA gaining the ability to terminate the lease in some of the space earlier if the space is no longer needed.

The Second Circuit affirmed the district court's favorable decision in *United States v. 25.202 Acres of Land in the Town of Champlain, Clinton County, New York, and Amexx Warehouse Company, Inc., d/b/a Duty Free Americas, Inc.* We filed the case to acquire property on the United States/Canada border for construction of a crossing facility on behalf of U.S. Customs and Border Protection and GSA. At trial, the United States presented evidence supporting a fair market value of \$208,000. Defendant's expert had estimated the taking at \$10.3 million and the landowner had claimed \$18 million. A jury returned a verdict of \$208,000. The trial result and affirmation on appeal represent significant favorable precedent for a number of other land port of entry acquisitions in which millions of dollars are at issue, and for ENRD's eminent domain practice as a whole.

During fiscal year 2013, the Division also continued a multi-year project of representation of the Corps in eminent domain actions filed to compensate landowners for property taken to enable repair and strengthening of levees surrounding New Orleans.

## **Responding to U.S. Congressional Proposals for Environmental and Natural Resources Legislation and Related Matters**

The Division responds to a variety of relevant legislative proposals and Congressional requests, including those from the U.S. Government Accountability Office; prepares for appearances of Division witnesses before Congressional committees; and drafts legislative proposals, including proposals implementing settlements of Division litigation. This work continued in fiscal year 2013.

## Reviewing Administrative Rulemakings

The Department serves as part of the interagency review team for federal rulemakings developed pursuant to Executive Order 12866. The Division reviewed a substantial number of such rules in fiscal year 2013.

## 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 2013, ENRD attorneys spoke at joint training and cooperative activities and met with law enforcement counterparts in Brazil, China, Hungary, Nicaragua, and Thailand. ENRD also participated in meetings in Washington, D.C., or by teleconference with officials representing governments and non-governmental organizations from Angola, Botswana, Brazil, Canada, Colombia, Kenya, the Republic of Korea, Mozambique, New Zealand, Peru, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe.

Division attorneys spoke at and participated in a number of meetings to promote the Administration's effort to combat wildlife trafficking. They addressed meetings of the Association of South East Asian Nations Wildlife Enforcement Network in Thailand and the Central American



*Acting Assistant Attorney General Robert Dreher Speaking at the United States-China Strategic and Economic Dialogue*

Wildlife Enforcement Network in Nicaragua. The Chief of the Environmental Crimes Section participated in the U.S. delegation to the 10th Meeting of the China-U.S. Joint Liaison Group on Law Enforcement Cooperation in Guangzhou, China, and spoke about law enforcement with respect to wildlife crimes. Acting Assistant Attorney General Robert Dreher met with Chinese officials to discuss wildlife trafficking during the United States-China Strategic and Economic Dialogue. ENRD attorneys also spoke about the Division's efforts to prosecute wildlife trafficking cases with a visiting group of wildlife officials from countries in Sub-Saharan Africa.

ENRD participates in negotiations led by the Office of the U.S. Trade Representative for the environment chapter of the Trans-Pacific Partnership Trade Agreement with 11 Asian and South American countries, 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.-Republic of Korea Environmental Affairs Council and Environmental Cooperation Commission under the recent free trade agreement with South Korea.

As a member of the presidentially appointed Interagency Committee on Trade in Timber Products from Peru, ENRD representatives actively participated in the review of a petition filed by the Environmental Investigation Agency alleging shipments of illegal timber from Peru to the United States. The Interagency Committee was created under the Forest Governance Annex to the United States-Peru Trade Promotion Agreement.

The Division continued to conduct domestic and international outreach in order to disseminate information about the 2008 amendments to the Lacey Act, which added enforcement tools to combat international trafficking in illegally harvested timber and wood products. For example, ENRD attorneys conducted workshops about the Lacey Act for Brazilian wood products exporters in Sao Paulo and Belem, Brazil.

ENRD provided training on prosecution of environmental crimes to prosecutors and other officials from Eastern European countries at the International Law Enforcement Academy (ILEA) in Budapest, Hungary, and from Southeast Asian countries at the ILEA in Bangkok, Thailand. Division attorneys also continued to be actively involved in the INTERPOL Wildlife Crime, Fisheries Crime, Timber Crime, and Pollution Crime Working Groups.

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

The Division participates as *amicus curiae* in cases in which the United States is not a party in order to protect the interests of the United States and its component agencies. We filed *amicus curiae* briefs in several important cases in fiscal year 2013.

One illustration is the case of *Decker v. Northwest Env'tl Defense Ctr.* (NEDC) and *Georgia-Pacific West v. NEDC*, a citizen suit brought by NEDC under the CWA. It implicates a longstanding EPA rule addressing what silvicultural activities are subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under the CWA. The United States participated in the district court and Ninth Circuit as *amicus curiae* in support of defendants, the State of Oregon and the private timber entities, arguing that EPA regulations exempted

## EPA Regulation of Stormwater Runoff from Logging Roads

—In December 2012 EPA revised its Phase I stormwater regulations to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity under the Clean Water Act and that National Pollutant Discharge Elimination System permits are not required for these stormwater discharges.

—The agency modified language to clarify that the only facilities under Standard Industry Classification (SIC) code 2411 that are “industrial” for purposes of assessing whether stormwater discharges are “associated with industrial activity” are rock crushing, gravel washing, log sorting, and log storage. See 40 C.F.R. 122.26(b)(14).

stormwater discharges from logging roads from the NPDES permitting requirements and that EPA’s interpretation should be given deference. The Ninth Circuit disagreed, holding that the CWA precluded that interpretation of the EPA regulations. In its revised opinion after petitions for rehearing, the Ninth Circuit kept intact its entire opinion on the merits, but clarified in a new section that the court has subject matter jurisdiction to decide the issue.

After issuance of the revised opinion, the State of Oregon and the timber defendants petitioned for writs of certiorari in the U.S. Supreme Court. Following the Supreme Court’s grant of certiorari, the United States filed an *amicus* brief in the Supreme Court in support of petitioners. In 2013, the Supreme Court reversed the Ninth Circuit. The Court accorded *Auer* deference to EPA’s interpretation of its stormwater rule expressed in the *amicus* brief, finding it was reasonable for the agency to conclude that the stormwater discharges from logging roads at issue were not subject to permits, particularly in light of the “broad discretion the [CWA] gives the EPA in the realm of stormwater runoff.” Finding the discharges at issue exempt from NPDES permitting requirements, the Court declined to address whether the discharges of channeled runoff were “point sources” within the meaning of EPA’s Silvicultural Rule and the CWA.

Another case in which ENRD filed an *amicus* brief is *Trinity Indus. v. Chicago Bridge and Iron Co.* Trinity appealed to the Third Circuit an order of the district court dismissing its CERCLA section 113 contribution and section 107 cost recovery claims. The district court had held that an administrative order on consent between Trinity and the State of Pennsylvania did not authorize a contribution claim under section 113(f)(3)(B) because Trinity’s settlement with the state did not expressly resolve Pennsylvania’s CERCLA claims. The district court also found that Trinity could not pursue its section 107 claim for response costs because Trinity did not “voluntarily” incur response costs at the site in question, raising the question of whether a potentially responsible party is entitled to pursue a cost recovery whenever it incurs response costs and a contribution action is not available to it. Neither question had been addressed by the Third Circuit. We filed a brief as *amicus curiae* in support of Trinity on both issues, arguing that a state consent order need not expressly resolve CERCLA liability to authorize a contribution claim under CERCLA section 113, and that, if Trinity lacked a section 113 claim, Trinity was entitled to proceed under section 107. In August 2013, the Third Circuit issued an opinion reversing the district court on the section 113 issue on the basis of arguments made in the U.S. briefs. Given its decision on the section 113 issue, the court did not reach the section 107 issue.

The Division also participated as *amicus curiae* in *Munce’s Superior Petroleum Products, Inc. v. New Hampshire Dep’t of Env’tl Serv.* This was a bankruptcy case in the First Circuit that

involved the question of whether civil penalties assessed against a Chapter 11 debtor-in-possession for violations of environmental law that occur after bankruptcy qualify for administrative expense priority, which typically requires the debtor to pay the penalties in full. The Bankruptcy Court for the District of New Hampshire determined that the fines assessed by the state's Department of Environmental Services for the debtor's violations of state groundwater protection laws should be given administrative priority and the district court agreed. We filed a brief in the First Circuit and participated in oral argument in support of the State of New Hampshire. In November 2013, the First Circuit upheld the lower court decision. The U.S. filing in this case supported the federal government's interest in ensuring that bankrupt entities violating environmental laws and regulations remain subject to legal requirements, including penalties for noncompliance applicable to their conduct.

The Division also conducts the Department's review of citizen suit complaints and consent judgments under the CAA and CWA. The statutes contain provisions allowing citizens to file suit for violations of the statutes, and require that citizen suit complaints and consent judgments be served on the Department and EPA. When served with complaints, we offer our assistance to counsel for the parties, and we review all 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 in 2013 is *Ogeechee-Canoochee Riverkeeper, Inc. v. King America Finishing, Inc.* The Riverkeeper, a Georgia non-profit, claimed that defendant had violated the CWA by discharging wastewater and substances related to its fabric finishing facility into the Ogeechee River and that the discharges had resulted in a fish kill downstream from the facility. The proposed consent decree included extensive injunctive relief and the payment of funds for SEPs. In coordination with EPA, we worked with the parties to ensure that implementation of the SEPs under this settlement will be transparent and consistent with EPA's and the Division's standards. Under this decree, \$350,000 would be spent on future SEPs that directly benefit the watershed.

## 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 2013, the Division received more than a hundred such requests and completed the processing of more than a hundred responses

to outstanding requests. We closed nine of the 10 oldest pending requests from fiscal year 2012, as well as the sole outstanding request for "consultation" from another federal agency as to how it should respond to a FOIA request. ENRD also worked with the Department's Office of Information Policy on several appeals related to FOIA requests, the majority of which were affirmed in the Division's favor or withdrawn by the requester. 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.

"The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice."

—Attorney General Eric Holder's 2009  
Memorandum on the Freedom of Information Act



*U.S. Army's National Training Center, Fort Irwin, California*

*Marine Photo*



*Planes Over Naval Air Station Whiting Field, Florida*

*Navy Photo*

# 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.

## Supporting Critical Military Training and Security Needs

The United States has decided to build and operate a second explosives-handling wharf at Naval Base Kitsap in Bangor, Washington. The proposed wharf is necessary to ensure the continuing viability of the Navy's "Trident" class ballistic missile submarines, which the Navy developed during the Cold War to serve as a survivable retaliatory strike force in the event of a nuclear attack against the United States. The naval base houses eight "Trident" class ballistic missile submarines, each capable of carrying up to 24 missiles. The proposed wharf would increase the Navy's capability to load and unload Trident missiles from the submarines for purposes of conducting maintenance. Plaintiffs in *Ground Zero Center for Nonviolent Action v. Navy* argued that the Navy violated NEPA in approving construction of the wharf because the Navy allegedly withheld project information from public review and insufficiently analyzed means of mitigating the environmental impacts of the proposed wharf. Plaintiffs in *Suquamish Tribe v. U.S. Army Corps of Eng'rs* challenged the Navy's decision, as well as the Corps' and NMFS's authorization of the proposed explosives handling wharf, and alleged that the agencies violated a number of statutes, including the ESA, as well as fishing rights secured to them by treaty. In January 2013, the district court issued orders denying plaintiffs' motions for preliminary injunction in both cases and finding that plaintiffs were unlikely to succeed on the merits of their claims. The Suquamish Tribe



**Navy Base Kitsap, Bangor, Maine**

**Navy Photo**

**Naval Base Kitsap was created in 2004 by merging the former Naval Station Bremerton with Naval Submarine Base Bangor.**

voluntarily dismissed its lawsuit shortly thereafter. The Division then briefed cross-motions for summary judgment in the *Ground Zero* case and ultimately prevailed on all counts.

In fiscal year 2013, we successfully defended against an appellate challenge to the Navy's proposed new \$100 million Undersea Warfare Training Range (USWTR), which is to be located 75 miles off the Atlantic coast of Florida. The USWTR facility will enhance and improve the Navy's anti-submarine warfare training activities, which are essential to the Navy's ability to detect and defeat submarines operating in shallow water environments where environmental conditions coupled with new noise reduction technologies make detection increasingly difficult. The USWTR will be the only training range of its kind on the East Coast, and it will provide ships, submarines, and aircraft in the Atlantic Fleet with a realistic and challenging training environment that mirrors the areas in which the Navy finds itself increasingly operating. In *Defenders of Wildlife v. U.S. Dep't of the Navy*, plaintiffs brought suit, alleging that the Navy's decision to construct the USWTR violated NEPA and the ESA. Plaintiffs also challenged the associated biological opinion prepared by NMFS. As we reported last year, after extensive summary judgment briefing and oral argument, the district court ruled in the Navy's and NMFS's favor on all claims, putting the Navy in position to begin implementing the next steps of this vital project. In October 2013, the Eleventh Circuit upheld that decision.

## Defending Dredging Projects Necessary for National Defense and Economic Vitality

In *Town of Bald Head Island v. Army Corps of Eng'rs*, plaintiffs challenged a Corps' dredging project that was essential to the operation of the Military Ocean Terminal—Sunny Point (MOTSU), which is located between Wilmington and Southport, North Carolina, on the west bank of the Cape Fear River. The MOTSU is the largest ammunition terminal in the United States. Ammunition and weapons are transported to MOTSU from all over the United States, loaded onto ships, and transported to supply forward-deployed troops overseas. MOTSU serves a critical role in numerous operations plans supporting the European and Southwest Asia theaters. Ninety percent of the ammunition supplied to troops in Iraq and Afghanistan is shipped from MOTSU. Additionally, the dredging was required to keep the Port of Wilmington available for deep-draft ships and assure sound economic development for the Wilmington area. In fiscal year 2013, ENRD secured an appellate victory in this case, when the Fourth Circuit upheld an earlier ruling by the district court dismissing the case. This ruling finally ensured unfettered access to Cape Fear River channels serving MOTSU and the Port of Wilmington.

## Supporting the Administration's Renewable Energy Agenda

A key element of U.S. efforts to reduce its dependence on foreign oil and the emission of greenhouse gases from the burning of fossil fuels is the expansion of cleaner domestic sources of renewable energy such as solar and wind power. In fiscal year 2013, the Division continued to defend against challenges to permits and rights-of-way issued by BLM to promote the

**"**The all-of-the-above energy strategy I announced a few years ago is working, and today, America is closer to energy independence than we've been in decades."**"**

—President Barack Obama, 2014 State of the Union Address

development of renewable energy projects on western public lands. ENRD is handling more than 25 cases involving solar, wind, and transmission projects located in California, Oregon, Tennessee, Delaware, Maine, Massachusetts, Ohio, and Vermont. We successfully prevailed on summary judgment in cases involving the Ivanpah Solar Project, Genesis Solar Project, North Sky River Wind Energy Project, Ocotillo Wind Energy Project, West Tennessee Solar Farm Project, and Steens Mountain Wind Project. These successes have enabled substantial development of renewable energy resources.

The Ivanpah Solar Energy Generating System (ISEGS) is the largest solar project in the world. The 377-megawatt solar complex uses mirrors to focus the power of the sun on solar receivers atop power towers. When completed, the \$2.2 billion system will use 173,500 computer-controlled mirrors to aim 1,000-degree rays at boilers mounted on three 459-foot towers, turning water into enough steam-generated electricity to power 140,000 homes. The project has already begun to deliver power to the grid. As reported last year, we successfully prevailed in the Ninth Circuit on a request for a preliminary injunction in *Western Watersheds Project v. BLM*, which was the first appellate preliminary injunction decision to address new solar projects sited on federal land. In fiscal year 2013, the Division secured victories at the district court level on motions for summary judgments in *Western Watersheds Project v. BLM* and *La Cuna v. U.S. Dept. of the Interior*.

As reported last year, the Genesis Solar Energy Project is another of the first large-scale renewable energy projects to be constructed on federal public land managed by BLM. When complete, the project will provide up to 250 megawatts of clean solar energy to southern California. The Division has successfully defended this important project in three different lawsuits. In fiscal year 2012, we obtained the complete dismissal of *California Unions for Reliable Energy v. U.S. Dep't of the Interior*. In fiscal year 2013, we secured a stipulation of dismissal after multiple favorable rulings in *Colorado River Indian Tribes v. U.S. Dep't of the Interior*. In *La Cuna de Aztlan v. U.S. Dep't of the Interior*, a group of individuals alleged that BLM violated various laws governing public lands, and failed to adequately analyze the impacts of the project under NEPA. After several rulings granting dismissal but allowing for the filing of amended complaints, in fiscal year 2013 the district court dismissed with prejudice the bulk of plaintiffs' claims.

The Ocotillo Wind Energy Project, which is located on 10,000 acres of BLM lands in western Imperial County in California, will produce up to 465 megawatts of electricity. As reported last year, the Division has defended five separate actions regarding this project and has defeated each of the three requests for emergency injunctive relief filed to stop the development of the project. During fiscal year 2013, in the two cases remaining, we secured favorable opinions in *Desert Protective Council v. U.S. Dep't. of the Interior* and *Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep't of the Interior*. The opinions confirm BLM's full compliance with environmental laws in its decision to allow development of the Ocotillo Project, including NEPA, the National Historic Preservation Act, FLPMA, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act.

The Division also continues to defend a permit issued for the Cape Wind Project in Nantucket Sound, which is America's first offshore wind project. In four separately filed cases that have been consolidated, environmental groups, fishermen, a local township, and an Indian tribe seek to overturn the decision by the Secretary of the Interior to approve the construction of the project under multiple statutes. We have fully briefed all the claims in this very complex

litigation. The court earlier this year denied challenges to the completeness and contents of the administrative record, challenges that if granted could have resulted in years of delay. We have aggressively sought resolution of the case on an expedited schedule.

In fiscal year 2013, ENRD obtained a favorable ruling in *Sierra Club v. Kenna*, which is a challenge to the North Sky River Wind Energy Project. There, a developer is utilizing about 13,000 acres of private land situated at the southern end of the Sierra Nevada mountain range for the purpose of wind power generation. The project will contain up to 102 wind turbines and have a maximum electrical output of up to 300 megawatts. The court rejected challenges under the ESA and NEPA to BLM's decision to grant a right-of-way and allow for construction of a road and transmission lines to the project. In making its NEPA determinations, the court deferred to the BLM's determination that, if the BLM had declined to approve the road and transmission line project, North Sky nonetheless would have built a private road with transmission lines to serve the project. Therefore, the court found that the road construction was not a proximate cause of the wind project and, accordingly, NEPA does not require BLM to conduct an environmental analysis of the wind project being constructed on private lands. The court further concluded that, because Kern County had analyzed the wind project under the California Environmental Quality Act, the rule of reason eliminated any requirement that BLM analyze the wind project a second time. The project is now operational.



**Wind Turbines**

**DOI Photo**

In *National Parks Conservation Auth. v. Jewell*, the Division defended challenges, under multiple statutes, including NEPA and the Organic Act, to a National Park Service decision to issue construction and expanded right-of-way permits to two utilities for a major infrastructure upgrade to transmit power more efficiently into New York City. The transmission lines being upgraded have been in operation for 85 years. The transmission upgrade itself was

fast-tracked by the Administration as one of seven projects to demonstrate streamlined federal permitting and enhanced governmental cooperation. In fiscal year 2013, the court issued a favorable summary judgment opinion on all claims.

The Mascoma Biorefinery Project, which is now under construction in Michigan's Upper Peninsula, is one of the Department of Energy's (DOE) first large-scale biomass energy projects. When complete, the project will convert wood



**Location of the Mascoma Biorefinery Project**

**DOE Image**

chips into 21 million gallons of ethanol on a daily basis. The Division successfully defended this important renewable energy project in *Klein v. U.S. Dep't of Energy*. The federal district court in Michigan granted our motion for summary judgment and found that DOE had fully considered the environmental impacts of the project.

## Defending Fossil Fuel Development, Transportation, and Storage

In fiscal year 2013, the Division also had several key victories in cases involving fossil fuel development. In *Native Village of Chickaloon v. NMFS*, plaintiffs challenged the Incidental Harassment Authorization (IHA) that NMFS issued to Apache Alaska Corp. under the MMPA for the purpose of conducting seismic surveys as part of oil and gas exploration in the Cook Inlet of Alaska. On motions for summary judgment, the court largely upheld the IHA against

challenges under the ESA, MMPA, and NEPA. As a result, surveying operations were able to move forward in a manner that complied with all environmental safeguards found necessary by NMFS.



Map Showing Cook Inlet, Alaska

Image Courtesy of Matthew Trump

Similarly, in *Shell Gulf of Mexico v. CBD* and *Alaska Wilderness League v. U.S. Dept. of the Interior*, ENRD successfully defended the Department of the Interior's review and approval of Shell Oil Company's oil spill response plans for exploratory oil and gas drilling in the Beaufort and Chukchi Seas, off the coast of Alaska. In these cases, the sufficiency of Interior's approval was challenged under a variety of statutes. The district court in Alaska granted summary judgment for the United States on all counts. This allowed exploration to proceed in an environmentally protective manner.



Map of the Beaufort and Chukchi Seas

Image Courtesy of Norman Einstein

Two major pipeline projects became operational following the resolution of litigation this year. In the first case, *Sierra Club, Inc. v. Bostick*, which was filed in Oklahoma, plaintiffs

challenged the Corps' authorization of the \$2.3 billion segment of its Keystone XL Oil Pipeline from Oklahoma to the Texas coast by nationwide permit. We successfully secured denial of a motion for a preliminary injunction in the district court, which was affirmed by the appellate court.

In the second case, which was filed in the District of Columbia and also captioned *Sierra Club, Inc. v. Bostick*, the Division also obtained a denial of an emergency request to stop construction of a another pipeline. The Flanagan South Pipeline of Enbridge, Inc., will transport oil sands and crude oil from Flanagan, Illinois, to Cushing, Oklahoma, and ultimately down to the U.S. Gulf Coast. The 589-mile pipeline provides producers in North Dakota and western Canada more options to deliver crude oil supplies to refinery hubs located as far away as the Gulf Coast. The district court, in denying a motion for a preliminary injunction, recognized that the whole project was not federalized by the Corps' authorization of the project by nationwide permit. The court balanced the lack of imminent harm established by plaintiffs against both the value of the project and of the nationwide permit process in facilitating a sensible Corps' permitting system.

## **Supporting the Border Fence Project and Securing the Nation's Borders**

ENRD continues to litigate land acquisition cases brought to secure the nation's borders on behalf of the Department of Homeland Security. Fiscal year 2013 saw the successful resolution of actions filed to acquire property interests along the United States/Mexico border in California and in Texas; several multi-million dollar settlements were pending approval at year's end.

The Division and the U.S. Attorney's Office for the District of Arizona also coordinated in initiating litigation on behalf of the U.S. Customs and Border Protection to enable installation and maintenance of towers, access roads, and other associated structures to secure the United States/Mexico border in southern Arizona.



**Southwest Border Fence Construction in Yuma Sector, California**

**DHS Photo**

## Acquiring Additional Property to Improve Military Preparedness and National Security

In 2011, we brought the case of *United States v. 2,560 Acres of Land in Imperial County, California* on behalf of the U.S. Navy to acquire privately owned land located within El Centro Naval Air Facility. Prior landowners had previously leased the property to the Navy, but subsequently declined to renew the lease, thereby jeopardizing vital military training. El Centro is the second most heavily used bombing range in the United States. Tactical training at this air installation is critical to ensuring that the military is effectively prepared for combat. Based on alleged high-quality clay deposits and potential alternative energy development, the landowners initially claimed the property was worth \$1 billion. The United States' independent experts, however, opined a value of \$1.203 million. Mediation by the district court in California resulted in a settlement for \$1.5 million in fiscal year 2013, providing property needed for critical military training, while potentially saving the government hundreds of millions of dollars.

Similarly, the case of *United States v. 1,136.526 Acres of Land in Goliad County, Texas, and the County of Goliad* was filed at the Navy's request to acquire an airfield for training operations based out of Naval Air Station Corpus Christi. This airfield had been owned by the United States, but was closed in the 1990s during the Base Realignment and Closure process and deeded to Goliad County for one dollar. More recently, a hydrocarbon producing formation was identified in the vicinity, and hydraulic fracturing activities spurring mineral development were undertaken. The U.S. expert opined that the 1,136-acre property was worth \$2,450,000 on the date of taking; Goliad County appraised the property at a value of at least \$9,000,000. A team of Division and U.S. Attorney's Office attorneys successfully mediated this dispute to a settlement favorable to the United States of \$3,625,000.

In cooperation with the U.S. Attorney's Office for the Central District of California, the Division also initiated over a dozen eminent domain cases in fiscal year 2013 to expand the National Training Center at Fort Irwin, California, at the request of the Department of the Army. Each month, the National Training Center provides thousands of troops with essential training opportunities, including force-on-force and live-fire training of the heavy brigade-sized military forces necessary to maintain and improve military readiness and promote national security.

We also provided counseling and litigation services to enable the Navy to acquire aviation easements in support of safe operation of military aircraft at the Navy Outlying Landing Field in Summerdale, Alabama; Naval Air Station Whiting Field in Milton, Florida; and Evergreen Naval Outer Landing Field in Conecuh, Alabama. Aviation easements ensure safe flight clearance while compensating affected landowners for noise levels resulting from low and frequent flights.



**F-A-18A Hornets in Formation at Naval Air Facility El Centro, California**

**Navy Photo**



*2013 White Mountain Apache Water Rights Signing Ceremony*

*DOI Photo*



*View of Monument Valley, Navajo Nation*

*Photo Courtesy of J. Brew*

# PROTECTING TRIBAL RIGHTS AND RESOURCES AND ADDRESSING TRIBAL CLAIMS

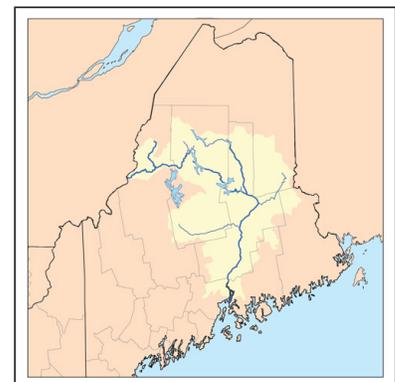
In fiscal year 2013, the Division continued to handle a range of matters affecting Indian tribes and their members. This includes litigation to protect and defend tribal resources and rights; policy and litigation work to help ensure that communities in Indian Country enjoy the protections of the natural resources and environmental laws; and the respectful and responsible defense of lawsuits brought by tribes against the federal government. The United States has a government-to-government relationship with tribes, and we seek to work collaboratively with tribes in carrying out this work wherever possible.

## Supporting Tribal Authority Over Tribal Lands and Resources

ENRD addressed various issues concerning reservation boundaries, the status of tribal land, and tribal governmental authority over that land. For example:

—The Seventh Circuit affirmed the district court’s dismissal of a case that raised, for the first time, the issue of the applicability of local stormwater management fees to Indian trust lands. The Oneida Nation of Wisconsin sued the Village of Hobart, Wisconsin, seeking a declaration that the village lacked authority to assess a stormwater fee on tribal trust land, including lands on which the Oneida Tribe maintains its own stormwater system. The village had filed a third-party complaint against the United States, alleging that the United States is liable for the fee. In *Village of Hobart v. Oneida Tribe of Indians of Wisconsin*, the Seventh Circuit held that states and their subdivisions are not authorized to regulate stormwater or other pollution on Indian lands, including Indian trust lands. The court found no indication that Congress intended to put regulation of pollution in tribal territory under state control.

—The Division intervened in litigation brought by the Penobscot Nation against the State of Maine. The controversy concerns whether the Penobscot Reservation—in large part islands in the Penobscot River—includes some portion of the Penobscot River or ends at the water’s edge. The Penobscot filed a lawsuit,



**Map of the Penobscot River Watershed**

*Courtesy of Karl Musser*



*Penobscot River, Maine*

*Penobscot Nation v. Mills*, to protect the right of tribal members to exercise fishing rights in the river and to protect its authority to regulate the taking of wildlife and game on those portions of the river falling within its reservation. This case also has environmental justice elements, as discussed above.

—We filed, for the first time, an *amicus* brief in a tribal court. The brief, which was filed in *Village of Pender v. Parker*, supported the Omaha Tribe’s argument that an act of Congress did not alter or diminish the tribe’s reservation boundary. Our position was drawn from the opinion of the Solicitor’s Office in the Department of the Interior. The tribal court ruled that the reservation boundary remains intact. Following the ruling by the tribal court, the case returned to a federal district court as *Smith v. Parker*, and the Division filed a motion for summary judgment, again arguing that the reservation boundary had not been changed by Congress.

—As reported last year, the Department of the Interior has for more than 60 years actively promoted tribe-specific employment preferences in leases relating to a particular tribe’s trust resources. In 1988, the Equal Employment Opportunity Commission (EEOC) took the position that Title VII of the Civil Rights Act—which prohibits national origin discrimination—prohibited such tribe-specific preferences by private employers. The Department of the Interior, in contrast, takes the position that such preferences, when they involve resources held in trust for the tribe, are based on political (tribal) sovereignty, rather than national origin. This distinction is significant because political preferences fall beyond the scope of Title VII. In *EEOC v. Peabody W. Coal*, the Secretary of the Interior was pled into an EEOC enforcement action in the district court in Arizona due to Interior’s role in approving the mineral leases in question. As a result, ENRD, on behalf of Interior, asserted the validity of the tribal employment preference provisions in a series of leases involving Navajo Nation lands. In fiscal year 2012, ENRD prevailed in district court. In fiscal year 2013, the Division actively defended the lower court decision on appeal.

## Defending Tribal and Federal Interests in Water Adjudications

We assert water rights claims for the benefit of federally recognized Indian tribes and their members in complex water rights adjudications throughout the western United States. Settlements are often the preferred way to resolve these complex matters. These settlements seek to protect and recognize the federally reserved water rights, which the United States holds in trust for tribes. In fiscal year 2013, the United States concluded some highly significant tribal water rights cases.

—In *New Mexico ex rel. State Eng’r v. United States*, the adjudication court entered a decree adopting the settlement resolving the water rights of the Navajo Nation in the San Juan River Basin. Congress ratified the settlement in 2009 through the Northwestern New Mexico Rural Water Projects Act, and the Secretary signed the settlement in 2010. This decree puts in place a historic settlement reached between the Navajo, the United States, and New Mexico and will ensure that potable water will be available to the tribe and its members in northwestern New Mexico.

—The Division also negotiated and the United States signed three separate historic water rights settlements: (1) Aamodt—resolving the water rights of the Pueblo of Nambé, the Pueblo of Pojoaque, the Pueblo de San Ildefonso, and the Pueblo of Tesuque; (2) Taos—resolving the water rights of the

Taos Pueblo; and (3) White Mountain Apache—resolving the water rights of the White Mountain Apache Tribe in the Gila River Basin in Arizona. These settlements end decades of litigation and will protect tribal rights while bringing certainty to all the water users in these river basins.



*Gila River, Arizona*

Settlements are not always possible. In those situations, resolution of these complex water issues falls to the adjudicating court or administrative agency. This year, we successfully defended claims for the benefit of the Klamath Tribes in the Klamath Basin Adjudication in Oregon. The Oregon Water Resources Department approved the majority of an administrative law judge’s affirmance of water rights to support productive habitat for fish, wildlife, and edible plants on the Klamath River in southern Oregon.

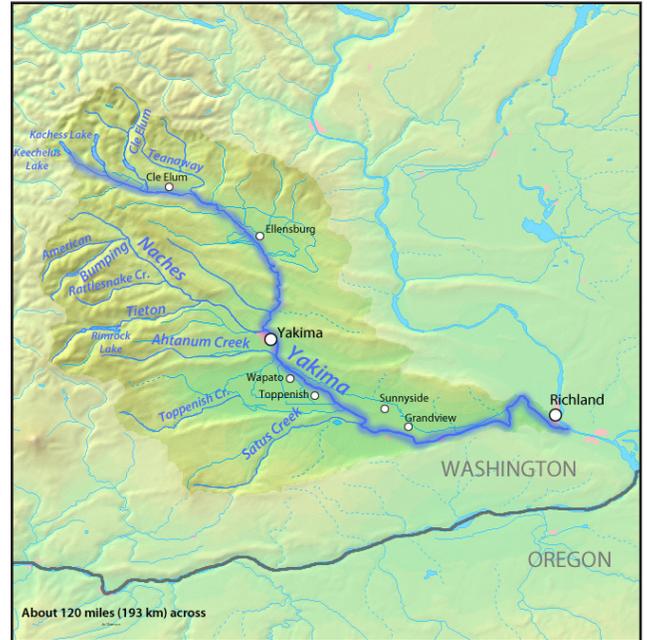


*Map of the Gila River*

*Courtesy of Karl Musser*

The Division also successfully litigated several water rights cases before appellate courts during fiscal year 2013.

—In *Washington Dep’t of Ecology v. Acquavella*, the Washington Supreme Court reversed a partially adverse lower court decision that had unduly limited the amount of federally reserved water rights for the Confederated Tribes of the Yakama Nation (the Nation) in the Yakima River Basin. The order at issue adjudicated water rights to Ahtanum Creek, which runs through a part of the Yakama Reservation. The state supreme court held that the lower court erred in ruling that a 1964 decree, which had been entered pursuant to litigation in the Ninth Circuit that quantified the Nation’s agricultural water rights, precluded the Nation from diverting water to storage outside the irrigation season and made a claim to a storage right for the nation premature. The supreme court remanded for reconsideration of the Nation’s water rights under the well-established “practicably irrigable acreage” standard, which should substantially increase the amount of irrigable acreage for which water rights are confirmed and allow the Nation to divert water to storage year-round, which is a critical right in arid eastern Washington where this portion of the Nation’s reservation is located. The state supreme court also ruled, consistent with our position, that non-reservation water right claimants who were not awarded water rights in the 1964 Ninth Circuit decree have no rights in Ahtanum Creek water.



**Map of the Yakima River Basin Including Ahtanum Creek**  
Courtesy of Shannon1

—In *Pyramid Lake Paiute Tribe v. Nevada*, in a ruling favorable to the United States and the



**Pyramid Lake Indian Reservation, Nevada**

**USDA/Lynn Betts Photo**

Pyramid Lake Paiute Tribe, the Ninth Circuit limited the amount of agricultural water rights in the Newlands Reclamation Project in Nevada that could be transferred for use in restoring downstream wetland wildlife habitat. Such a transfer would have been to the detriment of Pyramid Lake, which provides habitat for two federally listed endangered and threatened fish species and is the principal feature of the Pyramid Lake Paiute Tribe’s reservation. The water rights in question are governed by the Alpine Decree, which provides that when irrigation water rights are transferred to a different use only the portion of the water duty that is

consumed by the crops (here 2.99 acre-feet per acre versus the full 3.5 acre-feet per acre) may be transferred. The Nevada State Engineer, who has jurisdiction over applications to transfer water rights held pursuant to the decree, allowed the full water duty to be transferred, reasoning that the application of water to wetlands was for the growth of plants and thus constituted a continued irrigation use. The Ninth Circuit disagreed, holding that the Alpine Decree expresses a singular concern with providing irrigation water for agricultural use, as reflected in decades of Ninth Circuit decisions interpreting the decree. The court also concluded that under Nevada law, which generally governs the transfer of water rights under the decree, use of water for wetlands is a “wildlife” use distinct from an “irrigation” use. Although the court recognized that, as a technical matter, the use of water for wetlands involved the application of water to grow plants, it held that neither the decree nor the Nevada water code treat use of water for wetlands and wildlife habitat as irrigation.

## Protecting Tribal Hunting, Fishing, and Gathering Rights

We litigate to preserve treaty-protected tribal hunting, fishing, and gathering rights. In 1970, the United States initiated *United States v. Washington* to protect the treaty fishing rights of the tribes in the Pacific Northwest. In 1974, the federal district court in Phase I of the case reaffirmed the fishing rights reserved by the tribes, holding that the right of taking fish “in common with the citizens” reserved to the tribes the right to take up to 50% of the harvestable stocks of fish, and established the tribes as co-managers of the fishery resource.

Phase II of the litigation included a second claim related to fish habitat protection. As development pressures increase in western Washington, fish habitat has degraded in both quantity and quality. As a result, harvest levels have declined precipitously, and many stocks of anadromous fish are listed as threatened or endangered under the ESA. In 1980, the district court held that the treaty right included a right to protect the habitat needed by the fish to survive, but the Ninth Circuit ultimately vacated that ruling on the grounds that a declaratory judgment was “contrary to the exercise of sound judicial discretion” absent a concrete fact situation.

In the recent “Culverts Case,” one of many sub-proceedings of *United States v. Washington*, the tribes and the United States sought to litigate the Phase II habitat question in the narrow context of culverts beneath state roads. Poorly

constructed and inadequately maintained culverts directly block passage of anadromous fish to spawning grounds and the access of juvenile fish to the ocean. In 2007, the district court ruled that “the right of taking fish secured to the tribes by treaty imposes a duty on the state to refrain from building or operating

culverts under state-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” In 2013, the court entered a permanent injunction against the state and in favor of the tribes and United States, requiring



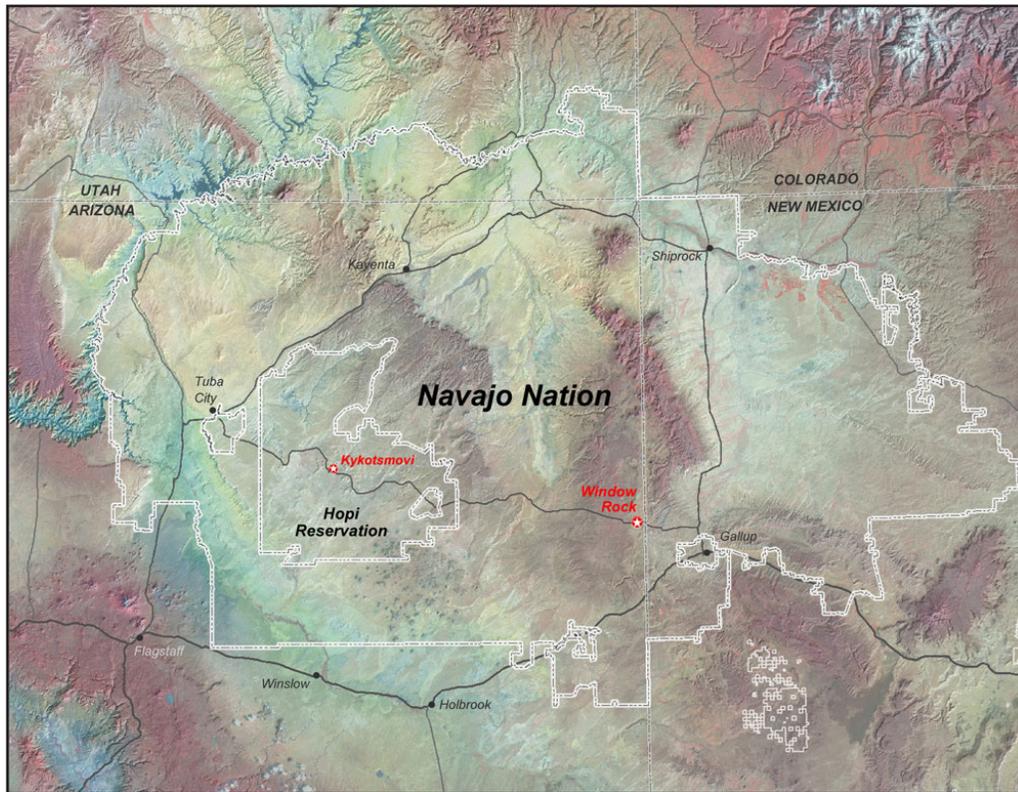
**Example of Corrected Fish-Blocking Culverts in Washington**  
Courtesy of Washington Department of Natural Resources

the state to inventory its fish-blocking culverts within six months and correct them within 17 years.

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

The Division continued to actively defend the Department of the Interior’s authority to take land into trust for tribes. In 2009, in *Carcieri v. Salazar*, the Supreme Court limited the Department of the Interior’s trust land acquisition authority to those tribes that were “under federal jurisdiction” when the Indian Reorganization Act was enacted in 1934. The decision created uncertainty regarding Interior’s trust acquisition authority, resulting in a backlog of trust applications. In fiscal year 2012, the Division worked closely with Interior to develop a framework for interpreting what “under federal jurisdiction” means in trust land acquisition cases.

This year, the Division successfully opposed emergency motions to enjoin the Secretary from acquiring land in trust for tribes in two cases. In *Stand Up for California v. Dep’t of the Interior*, the district court in the District of Columbia rejected efforts to challenge the decision of the Secretary of the Interior to acquire land for the North Fork Rancheria of Mono Indians. In a significant win for the United States, the district court in the District of Columbia rejected the argument that North Fork Rancheria was not “under federal jurisdiction” in 1934, and therefore could not qualify for land acquisition pursuant to *Carcieri v. Salazar*. In *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Salazar*, the district court in California denied emergency relief to prevent the Secretary of the Interior from acquiring land into trust for the Enterprise Rancheria of Maidu Indians of California.



Navajo Nation

EPA Map

## Empowering and Partnering with Tribes to Address Environmental Issues Affecting Tribes

Through strong enforcement of environmental laws, we ensure that Native Americans—like all Americans—have the benefit of a safe and healthy environment. For example, in fiscal year 2013, ENRD handled various environmental cases for the benefit of Indian tribes. One key case was the *Tronox* bankruptcy matter, also discussed above. Personnel from the Navajo Nation assisted the U.S. Government’s legal team in litigating the case. In the recent opinion from the Bankruptcy Court, the former parent of Tronox, Kerr McGee, was found liable for significant damages for the fraudulent transfer of assets in an attempt to avoid liability for environmental contamination—including uranium mining on Navajo Nation lands. EPA stands to recover a large portion of the damages, which will be used for cleanup of the former Kerr McGee uranium mines within the Navajo Nation. Several more environmental cases brought for the benefit of Indian tribes are discussed in the Environmental Justice chapter, above.



Abandoned Mine

EPA Photo

## Defining Tribal Subsistence Rights

In July 2013, in *Katie John v. United States*, the Ninth Circuit issued its third decision in nearly twenty-five years of litigation among Alaska Natives, the State of Alaska, and the United States over the scope of the term “public lands” in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). Title VIII accords a priority to “rural Alaska residents” in the taking of fish and wildlife on “public lands” for subsistence purposes. Initially, Alaska was to manage this subsistence program, but in 1989 the Alaska Supreme Court held that state administration of the priority violated the Alaska Constitution. As a result, the federal government promulgated regulations and took over administration of the priority in 1990. The original federal regulations excluded all navigable waters from the definition of “public lands,” which the statute defines as “lands, waters and interests therein, the title to which is in the United States.” Those regulations were challenged by both Alaska Native individuals and groups and the State of Alaska. During the course of that litigation, the federal government broadened its position on the scope of the priority in light of the statute’s purpose to protect subsistence fishing and the importance of fish to rural Alaska subsistence life, to include those navigable waters in which the United States holds federally reserved water rights. This change in position was upheld by the Ninth Circuit in 1995. Thereafter, the agencies promulgated new regulations to identify specifically the waters that are “public lands” by reason of federally reserved water rights. The new regulations were once again challenged by the state as too extensive, and by Alaska Native plaintiffs as too narrow. The district court rejected all challenges to them, and both the state and the Alaska Native plaintiffs appealed. Although recognizing it was a novel approach, the Ninth Circuit’s most recent decision upholds the federal government’s use of the federal reserved water rights doctrine as a measure of determining which navigable waters are subject to Title VIII’s priority.

## Defending Against Tribal and Individual Indian Breach-of-Trust Claims

Over the past several years, the Division has sought to resolve, without protracted litigation, dozens of Indian tribal “breach of trust” lawsuits. In these cases, numerous federally recognized Indian tribes and certain tribal groups allege that the United States, principally the Departments

In fiscal year 2013, the United States resolved the trust accounting and trust mismanagement claims of 14 tribes for \$427 million.

of the Interior and the Treasury, violated the federal government’s trust duties and responsibilities to the tribes by failing to provide full and complete historical trust accountings and failing to manage the tribes’ trust funds and non-monetary trust assets or resources in an adequate manner. The tribes seek declaratory

and injunctive relief, as well as monetary compensation for their alleged financial injuries. By 2009, the United States was defending approximately 97 such lawsuits brought by 114 Indian tribes in federal district courts in the District of Columbia and Oklahoma and in the Court of Federal Claims. Since 2002, when this set of tribal trust litigation began, the United States has been involved in formal mediation and informal settlement discussions to resolve these cases when possible.

In fiscal year 2012, the United States settled the trust accounting and trust mismanagement claims of 62 tribes for about \$1.25 billion. The federal government continued its settlement efforts in fiscal year 2013 and resolved the trust accounting and trust mismanagement claims of 14 additional tribes for \$427 million. Among other things, all of the settlements set forth a framework for promoting tribal sovereignty and improving aspects of the tribes’ relationship with the United States, while reducing or minimizing the possibility of future disputes and avoiding unnecessary litigation. Under the settlements, the tribes and the United States will implement measures that will lead to strengthened management of trust assets and improved communications between the Department of the Interior and the tribes. Also, the tribes and the United States will use an alternative dispute resolution process to address concerns regarding the future management of the tribes’ trust funds and non-monetary trust resources.

These tribal trust case settlements continue to demonstrate the United States’ strong commitment to resolve pending tribal trust accounting and trust management cases in an expeditious, fair, and just manner. At the Department of Justice, we will continue, through our cases, to vigilantly protect tribal sovereignty, safeguard tribal lands and resources, and honor tribal treaty rights.

## Limiting Breach-of-Trust Claims Against the United States

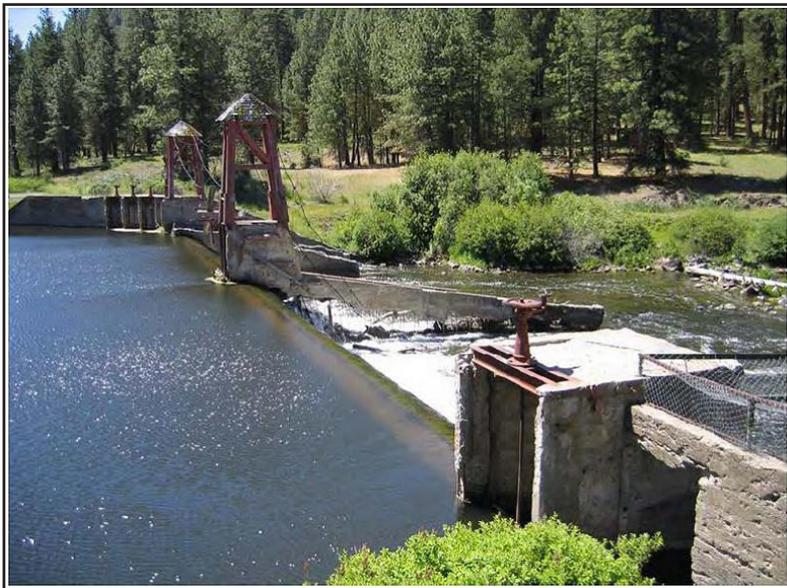
This year, the Division was successful in defending the United States against various breach-of-trust claims brought by individual Indians or Indian tribes:

—ENRD prevailed on appeal in defending the dismissal in *Blackfeet Housing Auth. v. United States*, a \$30 million suit for breach of trust for the failure to provide safe and proper housing on a reservation under the Native American Housing Assistance and Self-Determination Act. The district court held that the statute of limitations barred the action for breach of trust and, in any event, plaintiff failed to state a viable breach-of-trust claim. With regard to the statute of limitations, the court held that actual knowledge is not required; rather, plaintiff is on notice

of the material facts underlying the claim that are not inherently unknowable. In rejecting the breach-of-trust claim, the court ruled that the Blackfeet Housing Authority could not rely on general principles of trust law to state a claim for a breach of trust. The court held that control and involvement alone in the oversight of the provision of housing grants and assistance in the absence of the violation of statutory duties is insufficient to imply a damages remedy under the Tucker Act. The Federal Circuit affirmed in a *per curium* opinion.

—In what may have been the largest claim before the Court of Federal Claims in fiscal year 2013, we secured dismissal in *Shinnecock v. United States* of the tribe’s \$1,105,000,000 claims for alleged breach of trust and a judicial taking founded on the Eastern District of New York’s judgment dismissing a Non-Intercourse Act claim against the State of New York for land situated in the Hamptons.

—In *Wolfchild v. United States*, the Division won a partially favorable final opinion in the Court of Federal Claims that significantly limited the monetary recovery for plaintiffs. Plaintiffs had claimed that damages could be in the billions of dollars based on a breach of trust action brought by 20,000 individuals all seeking damages from being precluded from sharing in the proceeds of one of the most lucrative casinos in the United States. These damages were in addition to damages for the misdistribution of land and money to allegedly improper tribal entities.



View of Now-Removed Chiloquin Dam

BOR Photo

—In *Klamath Tribe Claims Comm. v. United States*, plaintiff alleged that the United States took Indian trust assets, violated the 1954 Klamath Tribe Termination Act by failing to reimburse the tribe and the tribal membership as set forth in the Termination Act, and effectuated a taking based on removal of the Chiloquin Dam. Plaintiff also alleged breach of fiduciary duties and sought damages of \$10 million. Plaintiff represented the 1954 membership of the Congressionally terminated Klamath Tribe. The Division obtained dismissal of the claims in the Court of Federal Claims on ground that the restored Klamath Tribe was an indispensable party to the claims.

—In *Villegas v. United States*, plaintiff filed actions in both the United States District Court and the Court of Federal Claims relating to an interest in an allotment that was part of the Midnite Mine, a uranium mine on the Spokane Reservation. The mine, which is now a Superfund site, is being remediated pursuant to a consent decree. Plaintiff

The Midnite Mine is an inactive former uranium mine in the Selkirk Mountains of eastern Washington. Located within the reservation of the Spokane Tribe of Indians, the mine was operated from 1955 until 1981.

—EPA Website

alleged that the Department of the Interior mismanaged his land, resources, and monetary accounts; committed an unconstitutional taking of his land and property; trespassed and allowed trespass by third parties; and committed environmental torts. We secured dismissal of the case in the district court with very favorable rulings on jurisdiction and other issues.

## Defending Against Other Tribal Claims



View of the Midnite Mine Superfund Site on the Spokane Reservation

EPA Photo

The Division also prevailed in *Hopi Tribe v. United States*, a case involving monetary claims alleged to be worth \$20 million. The tribe asserted that the executive orders establishing the Hopi Tribe's reservation contain a mandatory fiduciary duty to build and provide drinking water infrastructure. The tribe alleged that its groundwater contains higher levels of arsenic than permitted under the Safe Drinking Water Act. The court rejected all claims.

In *Pueblo of Jemez v. United States*, we successfully defended the U.S. interests in the Valles Caldera National Preserve, which consists of approximately 94,000 acres in New Mexico. The tribe contended that it maintained aboriginal title over the entire preserve because it had, in the past, exercised control and thus retained present rights to the property, even though the land was patented in the 1860s to a private party. The court held that the Indian Claims Commission Act provided the exclusive remedy for pre-1946 tribal land claims against the United States.



Valles Caldera National Preserve

Preserve Photo

ENRD resolved issues related to the need to consult with the Yakama Tribe prior to taking law enforcement action on the reservation in *Yakama Tribe v. Holder*. We represented multiple components of the Department of Justice and

the Department of the Treasury that participated in the execution of a search warrant at the reservation. The parties ultimately executed a settlement in which the United States agreed to sign *Recitals of Joint Law Enforcement Goals* with the tribe.

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***ENRD Land Acquisition Section, Staff Training Retreat***



***Acting Assistant Attorney General Robert Dreher presents award certificates to ENRD's \$AVE Committee members.***

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# SUPPORTING THE DIVISION'S STAFF

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## Promoting Diversity at Work

ENRD continues to be a leader concerning diversity in the Departmental workplace. This year, we administered the Department's first employee survey on Lesbian, Gay, Bisexual, and Transgender issues in cooperation with DOJ Pride. The Division also took some important steps forward in the areas of hiring, training, and outreach.



—The Diversity Committee set up a new program by which law students nationwide can apply

for internships and established a new process for interviewing and evaluating candidates. The program is intended to create opportunities for broadening the applicant pool and promoting diversity among law clerks, many of whom go on to apply to the Attorney General's Honor Graduate Program. Students from 87 law schools submitted applications for summer 2014 law clerk internships.

—The Division also established a Scoping Committee composed of ENRD support and non-attorney staff. The purpose of the Scoping Committee is to integrate support and non-attorney staff into the Diversity Committee and to identify areas of concern to these staff. Recently, the Scoping Committee recommended that the Division explore ways to recognize staff performance. As a result, ENRD issued a Time-Off Award Directive in 2013 to recognize outstanding staff performance.

## 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, as well as conducting in-person training on government ethics for all Division attorneys and certain other staff in fiscal year 2013.

### Recognition of Division Staff

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

—EPA recognized a number of ENRD attorneys. The agency awarded its “Gold Medal” to the Environmental Defense Section team that worked on the court of appeals litigation and opposition to a petition for a writ of certiorari in the principal CAA greenhouse gas case, *Coalition for Responsible Regulation v. EPA*; and to a pair of Environmental Enforcement Section attorneys for handling groundbreaking cases to reduce



***EPA-Department of Justice Team Handling Coalition for Responsible Regulation v. EPA***

air pollution from industrial flares.

EPA’s Region V conferred a “Green Medal” (a special award from the Office of Regional Counsel based on a poll of the attorneys in that office) to an Environmental Enforcement Section attorney for her work on *United States v. Metropolitan Water Reclamation Dist. of Greater Chicago*, a case in which the United States and the State of Illinois required the district to control sewer overflows under the CWA. EPA awarded a “Silver Medal” to the pair of Appellate and Law and Policy Section attorneys who handled *Decker*



*v. Northwest Env’tl Defense Ctr.* and *Georgia-Pacific West v. NEDC* on appeal and helped to develop a “a plan to protect the nation’s waters from the harmful effects of stormwater discharges from forest roads.” The agency conferred “Bronze Medals” on the Environmental Defense Section team that handled the court of appeals litigation and successful petition for a writ of certiorari in the Cross-State Air Pollution Rule challenges in *EME Homer City Generation v. EPA*; the Environmental Crimes Section team that handled the *Pelican Refinery* prosecution; and the “Mega-Pesticides Team” of the Wildlife and Marine Resources Section for its work in *Center for Biological Diversity v. EPA*, a case in which plaintiffs alleged that EPA had violated the ESA with respect to the impacts of 382 different pesticide active ingredients on more than 200 different endangered species nationwide.

Various Environmental Enforcement Section attorneys also received “Bronze Medals” as part of the teams handling *United States v. General Electric Co.*, a case involving massive PCB contamination in the Housatonic River; *United States v. The Gillette Co.*, a case concerning the Mercury Refining Superfund Site in Albany County, New York; *United States v. Suiza Dairy*

*Corp.*, a case resulting in the protection of thousands of citizens from potential accidental release of anhydrous ammonia in Puerto Rico; and *United States v. Durand Glass Manufacturing Co.*, a case resolving CAA violations and securing the application of precedent-setting selective catalytic reduction technology to the facility. EPA's Criminal Investigative Division also commended an Environmental Crimes Section attorney for the *DPL/Aircare* prosecution.

—Attorneys from the Wildlife and Marine Resources and Natural Resources Sections have successfully defended against numerous challenges to horse gathers over the past several years. BLM Nevada State Director Amy Lueders commended the trial teams for having achieved excellent results time and again despite the significant time constraints routinely encountered in this litigation. She celebrated the “bold management decisions that we can make at the BLM because of the support we receive from ENRD and the confidence we have in the work you do.”

—Ms. Lueders also presented the Natural Resources Section trial team in the case of *United States v. Estate of E. Wayne Hage* with a photograph of the public lands being protected by their efforts. The litigation—which was the most recent installment in more than two decades of litigation involving illegal cattle grazing activities by the Hage family—seeks relief from the family's ongoing illegal trespass on BLM and Forest Service land. The trial team devoted thousands of hours to the case, including a 22-day merits trial in Reno, Nevada, as well as a separate week-long trial dealing with civil contempt proceedings involving two government officials.

Several organizations also conferred awards on Environmental Crimes Section attorneys: “Prosecutor of the Year” from the Federal Law Enforcement Foundation and an Annual Award of Excellence from the Atlantic States Marine Fisheries Commission for significant contributions to the conservation of Atlantic Coast fisheries.

## Managing the Division's Financial Resources During Times of Fiscal Constraint



Fiscal year 2013 presented historic budgetary challenges to the Department of Justice and other federal agencies. We are pleased to say that the Division was able to manage its budget so as to avoid furloughs and other

extreme measures. The Division's Office of the Comptroller worked closely with ENRD's \$AVE Committee to identify over \$1.4 million in cost-saving measures in fiscal year 2013. Dozens of difficult cost-cutting measures were instituted in order to remain fiscally solvent: parking spaces were relinquished, transit benefits for volunteers were decreased, certain phone services were eliminated, various contractor support services were reduced, and the Division's workforce became still more vigilant in spending resources.

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

In fiscal year 2013, the Division took steps to enhance its capacity to provide training using internal resources. We outfitted a new training room with a new sectional conference room table that separates into several smaller training desks and a cost-effective sound system and technological instructor's podium. The Division invested in interactive training "clickers," which allow students to provide real-time feedback, responses, and voting during training sessions. Finally, the Division acquired two new large touch-screen monitors, which have enhanced presentation capabilities.

## Continuing to Meet Fiduciary Responsibilities under the Superfund Agreement

The Office of the Inspector General (OIG) routinely audits ENRD's Superfund program focusing on compliance with the annual interagency agreements with EPA. In its latest review, the OIG conducted an in-depth audit of costs associated with the Division's Superfund work in fiscal year 2011 and fiscal year 2012. The large statistical sample that was tested revealed no issues in the manner with which the Division accounts for the funding it receives from EPA to litigate CERCLA cases. The OIG's final report contained no findings or recommendations for ENRD.

## Providing High-Quality and Cost-Effective Automated Litigation Support Services

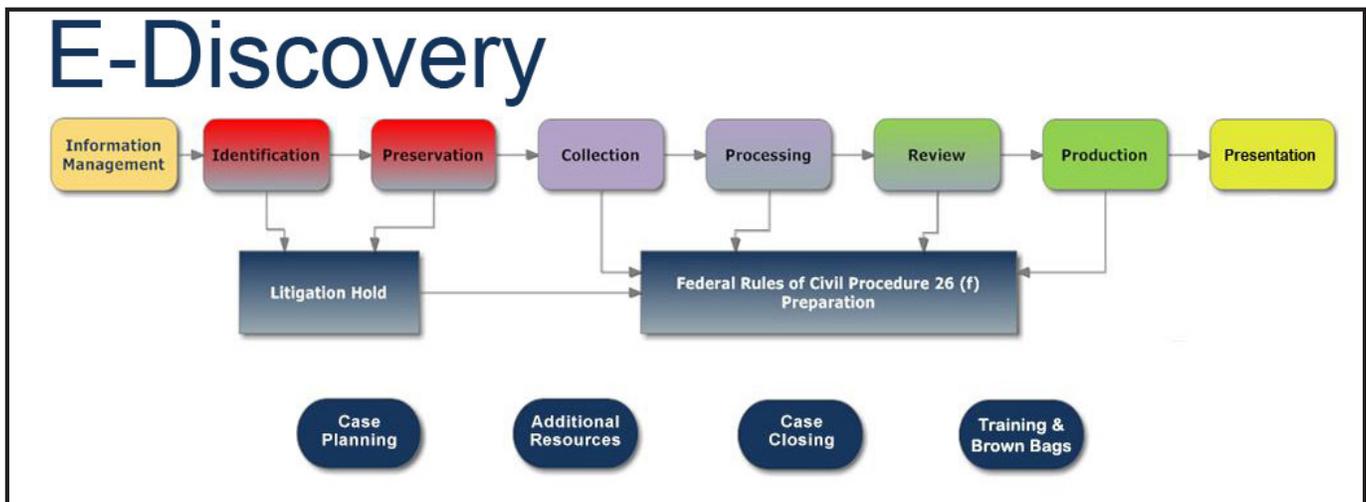
Each year, innovative technology becomes more and more interwoven into the fabric of the law. The Division has made it a priority to ensure that the Division's lawyers have the tools required to confront well-financed adversaries in the courtroom. In fiscal year 2013, ENRD provided high-quality and cost-effective automated litigation support (ALS) and other automated services to its workforce:

—We consolidated contractor-provided and in-house ALS services to support ENRD casework, realizing significant cost-savings and economies of scale along the way. In addition to providing contract support for the Deepwater Horizon explosion, fire, and oil spill case—one of the largest cases ever undertaken by the Department—the Division's Office of Litigation Support also provided contract support to a number of large and complex cases and initiatives. These include the pipeline and refinery cases, Tribal Trust cases, western U.S. water rights adjudications, vessel pollution investigations, and power plants cases. At the same time, ALS services were provided in-house for more than 250 cases through the Division's Computer Lab at a significant savings. Using onsite capabilities, we are able to provide such services as document scanning, e-discovery processing, Bates numbering, optical character recognition, media duplication, and audio/video digitization. We also supplied secure online database hosting services to support over 400 cases using state-of-the-art advanced analytics searching and collaboration with agency personnel and expert witnesses.

—We designed, developed, and implemented an ALS project management system to ensure that project requests for processing and producing documents and data in discovery meet requirements under the Federal Rules of Civil Procedure and provide automated e-mails for trial teams to track the progress of their projects.

—We expanded the existing program for processing administrative records by applying the technologies and processes used in discovery. The Division now routinely assembles, reviews, and files administrative records electronically.

—We augmented the E-Discovery Project Coordinator position to provide as-needed guidance and operational support as case teams move through fact-gathering and strategic decision-making related to the initial stages of E-Discovery on their cases. The position now functions as a strategic consultant in many regards, offering advice to client agencies on their litigation obligations and litigation-related business processes.



—ENRD’s Service Center supported Division attorneys and support staff in fiscal year 2013 by processing more than 37,000 e-Court filings. The 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 scanned more than 11,000 incoming court documents received via the U.S. Postal Service and reproduced over two million pages of electronic documents to paper format.

## Employing Innovative Technology for ENRD’s Workforce

In fiscal year 2013, despite budgetary constraints, ENRD achieved success in providing both front-end client-based automated technologies and back-end automated services.

—On the front-end, the Division’s Office of Information Technology refreshed the operating system and all applications on the laptop inventory deployed throughout the Division. All laptops were collected, backed up, re-imaged, and returned to the users with very little disruption. It is important for productivity, security, and morale that ENRD keep these information technology assets up to date and the applications synched with the desktop versions. Along with the software update, we also migrated all ENRD users over to the new remote access solution, DOJ Connect. This new solution provides a much improved virtual private network (VPN) capability, increased speed, and simpler end-user experience.

—We also replaced the Division’s Video Teleconferencing (VTC) hardware with new equipment from Cisco. These hardware updates include many advanced features that were not available with the predecessor solution. Some of the key upgrades include HD cameras which significantly improve video quality and the overall user experience and include improved user controls such as touch-screen interfaces which help reduce training requirements for users. Two other major improvements included with the deployment of the new VTC hardware were increased bandwidth to allow for more VTC sessions as well as the capacity to establish VTC connections with other Departmental components, other federal agencies, and private enterprise both nationally and internationally. These improvements increase employee confidence in and satisfaction with VTC as a replacement for in-person meetings that previously required travel, the funding for which is no longer available in the current budget environment.

—On the back-end, the Office of Information Technology deployed new server virtualization hardware environment. The new hardware consists of best-of-breed hardware manufactured from different companies. Different manufacturers have partnered to offer a solution that provides advanced capabilities, increased performance, and greater storage efficiencies, but also offers improved maintenance and support options. The initial deployment of the new hardware began in 2013 at the Patrick Henry Building and the Rockville Data Center. All servers, data, and applications deployed on the hardware are replicated to the new hardware in Rockville, which will greatly improve the Division’s Continuity of Operations (COOP) and fault tolerance capabilities. With the new hardware, ENRD will be able to continue its virtualization evolution and better position the Division to respond to increased litigation and budget challenges in the coming years.

## **Supporting Records and Systems Management**

In support of recent Presidential and Departmental directives, ENRD’s Office of Administrative Services completed an updated records series inventory. The purpose of the inventory was to ensure more efficient handling and tracking of important government records. The inventory included both electronic and paper records and for the first time, provided a full accounting of the Division’s permanent and temporary administrative records.

Additionally, the Division’s Office of Information Management devised and documented ENRD’s (and the Department’s) first data extraction guidelines and procedures to retire electronic case management data for cases closed for 25 years or more to the National Archives.

## **Promoting Division Security**

To ensure the safety of Division personnel and facilities, in fiscal year 2013, ENRD developed separate COOP plans for each field office that satisfy the Federal Emergency Management Agency’s and the Department’s COOP training requirements. 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

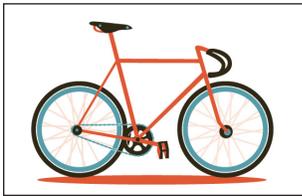
The Division held its 10th annual Earth Day service celebration at Marvin Gaye Park in April 2013. Enthusiastic participants built large planters, planted trees, removed trash, gardened, and landscaped.



ENRD also continued to lead the Department in green building initiatives.

The Division maintained its trend of lowering energy usage, with 2013 marking the sixth consecutive year that energy consumption has decreased. The Patrick Henry Building (PHB), where ENRD is the primary tenant,

also implemented many environmentally friendly changes in 2013. The building replaced its exterior caulking, cleaned its heat exchangers, and installed variable frequency drives to water pumps to increase energy efficiency. PHB also no longer runs heating and cooling systems on the weekends. In addition, the building recently replaced vestibule and roof lighting with LED fixtures, which lose much less energy to heat and have a longer lifespan several times over. The building remains LEED certified, and is an Energy Star-labeled building.



Finally, Division-wide participation in the bicycle transit subsidy program, which started in 2009, continues to be very strong.

