Department of Justice (DOJ)

I. INTRODUCTION

During his campaign, Biden **pledged** to hold polluters accountable:

> "Allowing corporations to continue to pollute – affecting the health and safety of both their workers and surrounding communities – without consequences perpetuates an egregious abuse of power. Biden will direct his EPA and Justice Department to pursue [criminal anti-pollution] cases to the fullest extent permitted by law..."

Yet according to government records, thousands of polluters from Trump's final years in office continued to violate environmental laws throughout Biden's first year in office. The EPA's Enforcement and Compliance History Online (ECHO) **database** identifies thousands of facilities across the country with multiple significant violations[1] that have been non-compliant for 3 years. (The severity of the problem varies between but is present across states: Louisiana has 1,675 facilities with significant violations; Maine has 64; Michigan has 516; Oregon has 69.) These facilities have committed violations of the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and the Resource Conservation and Recovery Act—America's bedrock environmental laws.

Environmental litigation is key to ensuring that companies and individuals comply with environmental laws. Without the threat of litigation, the laws protecting ecosystems and public health are toothless. The Environment and Natural Resources Division (ENRD) is one of seven litigating components of the Department of Justice (DOJ) and the largest environmental litigator in the country. ENRD attorneys take on both affirmative civil and criminal enforcement and defensive cases. Cases arise under approximately **150 federal environmental and natural resource laws** like the Clean Air Act, Clean Water Act, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), National Environmental Policy Act (NEPA), and the laws which govern the management of public lands held in trust for Native American tribes. The ENRD receives case referrals from agencies like the Environmental Protection Agency (EPA) and handles the prosecution of environmental violations and crimes.

Despite Biden's promises, Public Employees for Environmental Responsibility (PEER) **found** that EPA referrals for prosecutions in FY 2021 fell by one-third compared to FY 2010. This represents less than half of the new cases that EPA referred to DOJ in 2013, and "the lowest number of new cases developed in 33 years." The decline in cases was matched by **a decline in litigators**; the ENRD had 433 attorneys in 2010, and only 373 in 2021. The drop-off in attorneys happened largely in Trump's first two years in office; the division had 439 litigators in 2017, 427 in 2018, and only 370 in 2019, meaning that it lost sixteen percent of its litigators over two years.

[1] **Facilities with Significant Violations** are facilities with current significant violations based on a count of unique facility IDs where the current compliance status for at least one statute is in significant violation.

By comparison, the **ten largest US law firms** in 2020 had between 2,000 and 4,700 attorneys apiece. Losing staff naturally undermines the ENRD's ability to **promote** public health, protect American taxpayers, recover federal funds, and deliver other benefits in the interest of American residents. The lack of attorneys could also slow down the implementation of new initiatives such as those expressed in **Executive Order 14008**.

Biden's Executive Order 14008 calls upon executive branch agencies to develop programs, policies, and activities to address high and adverse human health, environmental, climate-related, and other cumulative impacts on disadvantaged communities. It specifically **directs** the Attorney General to consider "creating an Office of Environmental Justice within the Department to coordinate environmental justice activities among Department of Justice components and United States Attorneys' Offices nationwide," among other expansive environmental justice priorities. In May 2022, the Attorney General **announced the creation** of an Office of Environmental Justice within the ENRD.

Implementing strategies to better identify and manage cases with environmental justice implications **can be resource-intensive**, as it requires ENRD attorneys to do "additional research and information gathering, sensitive client counseling, and manage the usual pressures of defensive litigation." Considering the time and resources needed to carry out Executive Order 14008, the ENRD is in dire need of more attorneys.

The ENRD's budget request is first composed by the Justice Department and sent to the White House's Office of Management and Budget. Biden takes that information and comes up with his own budget proposal, which then goes to Congress, where the budget is haggled over and eventually some version is passed into law. So the blame for falling staff numbers and stagnating budget falls among many parties. It's imperative that Biden goes to bat for the increases that environmental litigators and other vital protectors need to actually enforce existing environmental laws.

Other agencies play a part in this effort, too. The Department of Interior (DOI) and the EPA have been the **two most active** agencies in environmental enforcement since the DOJ began systematically tracking environmental prosecutions around 1986. DOI's Deb Haaland and EPA's Michael S. Regan must boost their own hiring alongside other changes to ensure that their agencies increase their case investigation and referral capacity, and do their part to crack down on corporate polluters.

II. CIVIL ENVIRONMENTAL ENFORCEMENT

Civil environmental enforcement cases are an essential tool for the government to hold corporations accountable for their environmental impact. The authority to bring such cases falls either to the ENRD—as the Attorney General's authority to handle the civil enforcement of environmental laws is formally **delegated** to ENRD's Assistant Attorney General (currently Todd Kim)—or else to the U.S. Attorney's Office. Within the ENRD, the approximately **155 staff attorneys** of the **Environmental Enforcement Section** specially handle the civil enforcement of environmental laws.

Between civil and criminal cases, one crucial difference is the standard for liability: civil cases can hold corporations and individuals responsible for violations of environmental laws regardless of whether

they knew they were breaking the law, while criminal cases must involve "knowing violations." Another fundamental difference is that only in criminal cases can individuals be incarcerated for their crimes. Otherwise, monetary penalties and mandatory actions to remedy environmental harms are possible outcomes in both types of environmental enforcement cases. The ENRD can also pursue **parallel civil and criminal** suits against the same defendant, opening up more avenues for relief and potentially strengthening the deterrent effect of environmental enforcement.

Most settlements of civil environmental enforcement cases must ultimately be approved by AAG Kim, but U.S. Attorneys still have **significant authority**. The AAG can delegate individual cases to U.S. Attorneys, and some types of cases are referred directly to U.S. Attorneys, like wetland cases referred by the Army Corps of Engineers. Whether a case is ultimately brought by the ENRD or the U.S. Attorney's Office, it most likely starts with a referral from **another federal agency**, such as the EPA or the Departments of the Interior, Agriculture, Defense, or Energy. This referral dynamic means that the effectiveness of environmental enforcement depends upon the leadership, resources and staffing of investigative offices at other agencies too. When the EPA's investigative staff was **gutted under Trump**, the whole pipeline of environmental enforcement suffered, **civil prosecutions included**.

When the DOJ negotiates settlements in civil enforcement cases, they have a variety of tools at their disposal. They can negotiate "injunctive relief," banning corporations from certain behaviors or requiring them to take certain actions, like cleaning up environmental contamination. In May 2022, Garland **reinstated use of supplemental environmental projects** (SEPs), banned under Trump, which allow for third-party payments as part of civil settlements to fund environmentally beneficial projects in the harmed communities. Settlements can also stipulate future environmental audits or require a company to adopt an **environmental management system** to help it comply with regulations. They can require the installation of **monitoring devices**—as a recent **settlement with Chevron Phillips** did, requiring fence-line monitoring of benzene emissions—and prescribe corrective actions if and when the monitoring devices report excess emissions. Creative and targeted settlements can mitigate harm and deter future noncompliance. But weak settlements leave intact the attitude that breaking environmental laws is ultimately more lucrative than complying with them.

It can be challenging to measure the impact of enforcement on compliance with environmental laws. Nevertheless, **one study** found a way to quantify the deterrent effect of enforcement by documenting the increase in pollution after the EPA announced in March 2020 that it would stop enforcing certain environmental regulations because of COVID. Over the next several months, counties with more **Toxic Release Inventory** sites experienced a "large, sustained, and statistically significant increase in air pollution," suggesting "that firms respond in the absence of regulatory incentives to increase pollution." Not only that, but "increases in pollution resulting from the rollback of EPA enforcement led to large and statistically significant increases in COVID-19 cases and deaths." As soon as the EPA indicated it would stop seeking penalties for certain environmental violations, polluters had no incentive to self-regulate, the cost of which can be measured in illness and death.

While some enforcement is undeniably better than no enforcement, enforcement today is chronically underfunded, and nowhere near comprehensive enough to detect or deter most environmental violations. Correspondingly, the literature on the effectiveness of enforcement as a deterrent is mixed;

some studies find an important deterrent effect, while others find that current monetary penalties have a negligible or only short-term effect on corporate behavior. A common thread among many studies is that current fines are insufficient to deter larger corporations from re-offending. For civil environmental enforcement to deter violations by the biggest corporations, fines must be large enough that powerful corporations don't feel they can just "pay to pollute," and fines must be paired with mandatory mitigation actions to address the harm done to people and ecosystems. Practically speaking, most violations allow for considerable damages[2] if the government's case and spine are both strong enough.

Noteworthy civil settlements with corporate polluters include a **2016-2017 multi-part settlement with Volkswagen** for violating the Clean Air Act by selling cars equipped with "defeat devices" to cheat on federal emissions tests, requiring among other things for Volkswagen to pay $1.45 billion civil penalty, fund a $2.7 billion mitigation trust fund, and spend $2 billion on Zero Emission Vehicle promotion and charging infrastructure. 1.84 percent of the mitigation trust fund was reserved for recompense to Native American tribes—**the first time** tribal governments have been recognized in a major public settlement. In this case, the path to prosecution began with a group of **transportation researchers** tipping off the EPA. The EPA **informed Volkswagen** that they were in violation of the Clean Air Act, and then referred the case to the ENRD, which **brought the case** in **District Court**, leading to a landmark **$14.7 billion dollar civil settlement**. International lawsuits followed, as defeat devices were **installed globally**; Volkswagen has paid out over **€30 billion euros** since 2015.

It should be noted that the Volkswagen case is one of a handful of "outlier" historic settlements, along with cases against BP, Transocean, Fiat Chrysler and Mercedes-Benz (**see Table 3**). When the past two decades of civil environmental enforcement are evaluated without these handful of landmark cases, an **even steeper decline** is apparent.

III. CRIMINAL ENVIRONMENTAL ENFORCEMENT

Criminal environmental enforcement targets deliberate violators of environmental laws, both individuals and corporations, whose actions directly harm human and nonhuman life. For the past two decades, however, the number of federal criminal cases against polluters has **fairly steadily diminished**. Case referrals from the EPA to the DOJ reached a **30+ year low in 2021**—just 152 referrals, many of which weren't even pursued; only 105 defendants were charged with pollution crimes in 2021.

The Environment and Natural Resources Division (ENRD) has recently articulated a goal of bringing environmental criminal enforcement back up **to Obama-era levels**. But that goal is hardly inspiring; the DOJ **prosecuted more environmental crimes** under George W. Bush than Obama. (The Bush administration **brought pollution charges** against an average of 148.75 defendants a year, while the Obama administration averaged 139.25, and Trump a stunningly low 82.5.)

[2]Some environmental statutes (including the Clean Water Act) do not have a statutory cap on civil penalties for multiple violations in one case, though many have maximums by day and per violation; the discretion of the Environmental Enforcement Section attorneys involved in the case, and the scope of the client agency's monitoring and investigation, impact the degree of leniency or strictness with which violations are penalized.

Though ENRD head Todd Kim has called criminal environmental enforcement a division "priority," and emphasized his willingness to "prosecut[e] individuals who commit and profit from corporate malfeasance," a large gap remains between current criminal enforcement levels and the impact and extent of corporate environmental crime. Former EPA administrator Cynthia Giles writes in "Noncompliance with Environmental Rules Is Worse Than You Think" that "Serious noncompliance with environmental rules is common. It is common across all programs and industry types. Significant violations occur at 25% or more of facilities in nearly all programs for which there is compliance data. For many programs with the biggest impact on health, serious noncompliance is much worse than that. Significant violation rates of 50% to 70% are not unusual."

As RDP's Fatou Ndaiye reported: "In 2019 and 2020, the Division successfully resolved 94 percent of its cases. But there's a catch. Both the number of attorneys and cases they take on have steadily declined. Most of the EPA's criminal referrals in FY 2021 were not prosecuted, and nearly eight of ten cases have been closed primarily due to 'insufficient evidence.'" The Environmental Crimes Section of the ENRD has only forty-three prosecutors and twelve support staff to bring complex criminal cases against the nation's most brazen environmental offenders across ninety-four federal judicial districts.

As with civil environmental enforcement, the fact that other federal agencies must refer cases to the Justice Department means that the leadership, staffing and resources of those agencies also impacts potential criminal environmental litigation. In recent years, the Department of the Interior and the EPA have referred the most criminal environmental prosecutions to the DOJ, followed by the Coast Guard, Forest Service, and the National Oceanic and Atmospheric Administration. Under Trump, many agencies adopted anti-environmental practices, repealing environmental protections and bowing to the interests of the fossil fuel, chemical, hunting, logging and other industries. Internal support and resources for strong environmental enforcement diminished. Trump-era EPA Administrator Scott Pruit even diverted EPA special agents from investigative work to provide him with a personal security detail, costing taxpayers millions.

Trump-era ENRD head Jeffrey Clark, who was facing criminal contempt charges himself before agreeing to meet with the Jan. 6 committee this spring, worked on expanding the leniency policy for corporate crimes at the DOJ. In Trump's first two years, the number of criminal Clean Air Act and Clean Water Act prosecutions plummeted by 50 percent and 70 percent respectively. And the number of EPA inspections, criminal investigations and prosecutions declined by 50 percent between 2018 and 2021. The Environmental Crimes Section of the ENRD, as with the understaffed Criminal Investigation Division at the EPA, is facing an uphill climb to resuscitate strong environmental crimes enforcement.

The recent omnibus spending package for 2022 allocates far less to the ENRD and EPA than they need to vigorously increase enforcement, much less advance urgent climate priorities. The EPA only received a meager 4 percent increase in funding, which accounting for inflation is actually a budget reduction, and the ENRD will be vying with other Department of Justice divisions for their share of "General Legal Activities" funding, for which Congress only appropriated $40 million. RDP's Eleanor Eagan assessed that number to be "well short of the $100 million increase that President Biden requested and almost $200 million shy of where 'General Legal Activities' funding would be had it simply kept pace with inflation since 2010." The Center for Biological Diversity called the omnibus

budget “an environmental catastrophe and a colossal failure of leadership by the Democratic establishment.”

The Environmental Integrity Project reports that “from a longer-term perspective based on twenty years of data, almost every measure of performance – inspections, criminal investigations, civil cases referred to or concluded by the Justice Department, criminal defendants charged, civil penalties or criminal fines paid, cleanup costs recovered from polluters – points to a serious decline in EPA’s capacity to enforce our environmental laws. That is a wake-up call the Biden Administration needs to answer before it is too late.”

Congress’s devastating ongoing failure to address the climate crisis, including through authorizing spending, is not an excuse for the government’s environmental crimes investigators and prosecutors to think small. They must still levy all available resources to bring targeted prosecutions under environmental statutes against the most egregious offenders. While the ENRD **sided repeatedly with fossil fuel companies** under Trump and AAG Clark, it should now turn its scrutiny to these and other firms who profit most from environmental destruction.

Given its limited resources, the ENRD could adopt a two-pronged enforcement strategy: first, directing a bulk of expertise and resources to the biggest cases; second, applying strategic pressure through low-cost, time-efficient methods like filing amicus briefs and statements of interest in local courts across the nation to hasten progress in climate litigation. Over the past few decades, environmental enforcement has been increasingly occupied with the biggest, most landmark cases. But the ENRD must go further to shake up corporate complacency, and go to the press to talk up—**not downplay**—their enforcement priorities. The division could take Rohit Chopra’s robust leadership at the Consumer Financial Protection Bureau as an example of **how to put pressure on large corporate re-offenders**.

ENRD lawyers have considerable capacity to lead a climate corporate crackdown in the courts. As RDP’s Hannah Story Brown **wrote in *The American Prospect***, the ENRD “enjoys **prosecutorial discretion** in deciding which enforcement cases to pursue and how to pursue them. And according to two career ENRD attorneys, the division must ‘**exercise its independent judgment** as to what is in the best interests of the United States.’ This balancing act, though challenging, affords the ENRD significant room to maneuver, with big consequences for the direction of environmental litigation. [...] Prosecutorial discretion can amount to the difference between enforcement as a slap on the wrist or a significant deterrent.”

University of Michigan Law Professor David Uhlmann **elaborates**: "If the same violation often could give rise to criminal, civil, or administrative enforcement — and if mental state requirements only preclude criminal enforcement for a small subset of violations — what determines which environmental violations result in criminal prosecution? The answer is the exercise of prosecutorial discretion, which exists in all areas of the criminal law, but assumes a particularly critical role in environmental cases because so much conduct falls within the criminal provisions of the environmental laws." He adds that our understanding is limited by the “broad and unreviewable” nature of prosecutorial discretion, as well

as the fact that “prosecutors are never required to state publicly what factors prompted them to pursue criminal charges."

These points underscore how the expertise, motivation and capacity of the government’s environmental lawyers tangibly impacts the strength of existing environmental law.

IV. WHY WE NEED EFFECTIVE ENFORCEMENT

Effective environmental enforcement improves people’s health, prevents premature deaths, protects the fragile and fast-dwindling biodiversity essential to life on earth, and saves the government and individuals massive amounts of money. Not only does enforcement litigation bring in fines from corporations profiting from breaking environmental laws; those laws themselves are incredibly beneficial to the public, and would lose much of their efficacy without the threat of enforcement. It’s **estimated** that the Clean Air Act saved Americans $22,000,000,000,000 in health care costs between 1970 and 1990 alone. That’s right—*$22 trillion dollars* saved over two decades from one environmental statute.

Astounding big-picture statistics aside, individual enforcement cases can also be important successes. In September 2013, the ENRD settled a **case** against Safeway for violating the Clean Air Act by failing to promptly repair leaks of a greenhouse gas and ozone-depleting substance used in refrigerators. Safeway **agreed** to pay a $600,000 civil penalty and, more importantly, implement a corporate-wide plan to significantly reduce emissions from refrigeration equipment at over 650 stores nationwide. Safeway’s **Refrigerant Compliance Management System** now involves a centralized electronic refrigerant tracking and repair record system **to ensure compliance** with stratospheric ozone regulations. Additionally, the grocery chain **pledged** to reduce its refrigerant leak rate across all facilities from 25 percent in 2012 to 18 percent in 2015.

Such enforcement actions, especially when they mandate changes in corporate behavior, help protect the climate and public health. The hydro-chlorofluorocarbon that Safeway refrigerators leak is **up to 1,800 times more potent** at warming the earth than CO2, and depletes the ozone layer, increasing the number of cancer-causing ultraviolet rays reaching earth. Then-Acting Assistant Attorney General for the ENRD Robert G. Dreher **referred** to the settlement as the first of its kind, presumably both for the type of corporate actions it required, and the large number of facilities it involved (**659**). Dreher called the settlement a model “for comprehensive solutions that improve industry compliance with the nation's Clean Air Act." Such enforcement cases also require ongoing monitoring and enforcement actions to ensure **compliance requirements** are met. For example, in the **Consent Decree**, clear consequences were outlined in the event that Safeway failed to reduce the Corporate-Wide Average Leak Rate to below 18 percent in 2015. To maximize the benefits of a given settlement, the EPA will need sufficient resources to monitor corporate compliance.

Enforcement actions also have direct economic benefits. Through fines, the federal government is able to **fund** conservation efforts like reducing environmental contamination and restoring natural resources damaged by oil spills or releases of hazardous substances into the environment. Additionally, by

imposing civil fines and criminal penalties on bad actors, the ENRD can **remove, or at least reduce**, the economic benefits of non-compliance.

As with enforcement efforts at other agencies, it is clear that for the largest firms, fines are often an accepted "cost of doing business," with the profits made from breaking environmental laws exceeding the penalty incurred when caught. One 2020 study on corporate violations of the Clean Air Act **found that** "the aggregate value of all penalties imposed would need to be increased five fold in order to achieve the EPA's goal of removing the economic benefit from noncompliance." Of the many companies for whom noncompliance is still more profitable than compliance, the study found that the companies committing the largest violations stood to profit most. These findings underscore the need for stronger enforcement and steeper penalties; it should not be highly profitable to do great damage to the environment and public health.

The amount of fines and penalties levied each year varies quite a bit, with large settlements every couple of years ballooning the numbers. **In the past decade**, yearly civil and criminal fines, penalties and costs hit a high of $14 billion in 2016, and a low of $260 million in 2018. Likewise, the value of clean-up and corrective actions secured from environmental violators has varied from a low of $1.16 billion in 2020 to a high of $18.7 billion in 2017. For a division with a budget that's stagnated around $130 million for over a decade, and only a couple hundred attorneys, the relief they secure is significant. But it's far less than they could be bringing in, given the rampant numbers of facilities committing repeat and long-term violations of environmental statutes.

Particularly given the grave ecological crisis that we find ourselves within, corporations should not be able to commit serial, documented environmental violations for years with impunity. Robust enforcement of existing environmental laws is an underrated avenue for environmental protection, and urgently needs more funding.

V. FORWARD-LOOKING CORPORATE CLIMATE CASES

Why Isn't Biden Joining Them?

As Congress has stalled on climate change legislation for decades, executive agencies and the courts have been under increasing pressure to fill that void. Even if the executive and judicial branches of government fully embraced their capacity to equip the nation to address the climate crisis—which is a big *if*—there would still be need for legislation. But the courts and executive agencies can do much more to fight climate change than they are and have. That's where forward-looking climate lawsuits come in, as an opportunity to leverage the judicial system's powers to compel climate action.

Environmental groups have long sued federal agencies under environmental statutes to argue that they are failing to enforce existing laws, or taking actions that are illegal under existing laws. (See **how routinely the EPA is sued**.) This is enabled by the **"citizen suit" provisions** of most federal environmental laws, which allow private individuals to sue corporations, the government, or other citizens for violating those laws. RDP's Hannah Story Brown **has argued that** DOJ Environment and

Natural Resource Division lawyers "should embrace settlements with environmental groups as a tool for advancing the nation's interests, which would be difficult for the fossil fuel industry to undercut legally." Rather than automatically opposing legal challenges to government actions, even when those challenges seek to make the government better enforce its own laws, the government should embrace accountability, especially in a climate context in which government inaction and malfeasance seriously imperils the nation.

Over the past several years, new strains of legal arguments have emerged, seeking to hold the government and corporations accountable for the climate crisis. These **newer types of climate cases include** public trust and constitutional rights cases; public nuisance/torts lawsuits; fraud and consumer protection cases; and securities and financial regulation cases. In many of these cases the federal government may be directly implicated as defendant, have standing to intervene as an interested party, or be able to file an amicus brief in support of the plaintiff or defendant's position. This section will briefly touch on each of these kinds of suits, focusing on how Justice Department lawyers can intervene or lend support to cases against the corporations culpable in causing and accelerating climate change, and sabotaging climate action.

Public Trust and Constitutional Rights Cases

Constitutional climate cases have invoked the Commerce Clause and the First, Fifth and Fourteenth Amendments, among other claims. Climate **public trust cases**—frequently led by young plaintiffs—often target state and federal governments who have failed to protect the natural resources held in public trust and managed by the government under the **public trust doctrine**. (The public trust doctrine in the United States was inherited and adapted from English common law, and holds that the government as trustee of the public has the responsibility to manage and preserve certain natural resources on the public's behalf.) Such cases run the gamut from *Juliana v. United States,* in which American teenagers **sued the government** for violating their constitutional rights to life, liberty and property and failing to protect public trust resources by subsidizing fossil fuel dependency, to *Exxon Mobil Corp. v. City of San Francisco,* where ExxonMobil brought legal action against the California officials who brought climate suits against ExxonMobil, **arguing that** the officials' suits infringed upon ExxonMobil's alleged First Amendment right to deny climate science.

In *Juliana,* DOJ lawyers continue to oppose the young plaintiffs, while corporate polluters like the American Fuel & Petrochemical Manufacturers and the American Petroleum Institute have intervened in support of the government's position. The government could rethink its position in this case, and support the plaintiffs' request to amend their complaint and proceed to trial. In the ExxonMobil case, meanwhile, DOJ lawyers could file an amicus brief in support of the California officials' claims, or in objection to ExxonMobil's legal claims about its First Amendment rights.

It is worth noting that public trust and constitutional rights climate cases have been largely unsuccessful, often on procedural grounds of jurisdiction and standing. One could argue that the legal system is unequipped to deal with the "**super wicked**" problem of climate change, which transcends jurisdiction, affects everyone and so challenges the legal notion of injury as "concrete and particularized," and is all too easy to offload onto some other (perhaps nonexistent) entity to solve. On

the other hand, the legal system is what we've got. And its tools can either be used to protect this nation—not the idea of it, but the people and ecosystems that constitute it—or to abnegate responsibility for it.

Torts/ Public Nuisance Lawsuits

A "tort" is an act which injures another, for which one can be found liable in civil proceedings. Public and private nuisances fall under torts, and while private nuisances harm specific individuals, public nuisances harm the public in general. Over a decade ago, several plaintiffs brought federal suits against power companies claiming that they were public nuisances for emitting greenhouse gasses that worsen climate change. In 2011, the Supreme Court decided in ***American Electric Power Co., Inc. v. Connecticut*** that federal public nuisance claims were displaced by the Clean Air Act as administered by the EPA. But the case **left open the possibility** of state public nuisance claims. Since *AEP v. Connecticut,* many public nuisance cases have been opened in state court, relying on state law, against fossil fuel companies.

Fossil fuel companies have been stalling these cases for years on procedural grounds, favoring the tactic of **arguing that** federal law, not state law, governs the plaintiffs' claims—and thus such claims are displaced by the Clean Air Act, and should be dismissed. That was the result in ***City of New York v. BP*** and ***City of Oakland v. BP***. An ongoing case to watch is *Mayor and City Council of Baltimore v. BP,* which **finally overcame a procedural hurdle** in April 2022 when a federal court remanded it back to state court, and could eventually be precedent-setting.

In *Baltimore v. BP,* Baltimore is seeking damages and equitable relief from BP and 25 other fossil fuel companies **in order to ensure** "that the parties who have profited from externalizing the responsibility for…results of the changing hydrologic regime caused by increasing temperatures, and associated consequences of those physical and environmental changes, bear the costs of those impacts on the City." BP is arguing, among other things, that federal jurisdiction applies and that "the Maryland court has no personal jurisdiction over the defendants due to the global nature of climate change." Justice Department attorneys from the ENRD filed an amicus brief **on the side of the fossil fuel defendants** on March 20, 2020, agreeing with their arguments regarding federal law. This amicus brief should be withdrawn by Garland's Justice Department; it undercuts the potential for states to address climate change at the same time that climate change mitigation stalls on the federal level, and the EPA's authority to regulate emissions is endangered by the **current Supreme Court case *West Virginia v. EPA***.

Fraud and Consumer Protection Cases

Consumer protection cases against fossil fuel companies have targeted their lies and misleading claims about the harms of their product and the impact of climate change. **Massachusetts**, the **District of Columbia**, and **Vermont** are among the states and territories which have recently filed lawsuits against fossil fuel companies under consumer protection statutes. In *Commonwealth of Massachusetts v. Exxon Mobil Corp*, like the aforementioned California case, ExxonMobil is **seeking to dismiss the lawsuit** on the grounds that it violates ExxonMobil's right to protected free speech. A trial judge rejected

ExxonMobil's attempt to dismiss in 2020, and now the case is before the Massachusetts Supreme Judicial Court, which also appears skeptical of ExxonMobil's argument. This would be another opportunity for the Department of Justice to file an amicus brief in support of the plaintiffs, refuting ExxonMobil's interpretation of the First Amendment and affirming state jurisdiction.

The fraud case currently furthest along may be *City & County of Honolulu v. Sunoco LP.* On February 22, 2022, the trial court denied the fossil fuel defendants' motion to dismiss, and **affirmed that** though the case was unprecedented, it was "still a tort case" and "based exclusively on state law causes of action," including failures to disclose, failures to warn, and deceptive marketing. This case may be precedent-setting if decided on the merits in favor of Honolulu, as it would chart a clear path forward for how to successfully seek targeted damages at the state level for the impact of climate change on regional communities from the fossil fuel industry.

In this, like so many other forward-looking climate cases, the Department of Justice could affirm the appropriateness of these claims under state law, helping to dispel the constant jurisdictional disputes that fossil fuel companies use to delay and exhaust climate lawsuits in state court. This is not a new or radical idea; the Department of Justice **regularly files "statements of interest"** in state and federal courts. Vanita Gupta, now Associate Attorney General, previously **described the DOJ's use of statements of interest** in 2015 as "helping clarify the law, and helping courts interpret the law in the right way."

Securities and Financial Regulation Cases

The lion's share of **securities and financial regulation climate cases** involve greenwashing claims, where companies have misled or failed to disclose important information related to a product's environmental impact. Some are class action lawsuits; some are shareholder derivative suits; some are brought by state attorney generals. When cases are brought against federal financial regulatory agencies, like the Securities and Exchange Commission, Department of Justice lawyers are directly involved in that agency's defense. As the Securities and Exchange Commission **released a proposed climate disclosure rule** in March 2022, which would strengthen the disclosure requirements for public companies on their exposure to climate risk, it is expected that **climate-related securities lawsuits will increase**. The Department of Justice will be involved in any suits against the SEC, and should vigorously defend the SEC's authority to mandate climate disclosures.

Past climate securities fraud cases, including ***New York v. Exxon***, have not met with much success. *New York v. Exxon* was decided on the merits, and the New York Supreme Court found that New York's Attorney General **failed to prove** that ExxonMobil materially misled its shareholders about the cost of climate change. The judge did assert that "nothing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil fuel products." But the ruling proves an obstacle to future cases asserting that ExxonMobil deceived its investors about climate change.

The Stakes of Corporate Climate Cases

Filing motions to intervene, amicus briefs, and statements of interest are all tools at the Department of Justice's disposal to lend strategic support to forward-looking climate lawsuits against fossil fuel corporations in state and district courts. There is, however, an even more impressive option: the Department of Justice **commencing its own investigations** into the fossil fuel industry's fraud, negligence, and violations of constitutional rights and the public trust doctrine. This prospect has been raised by a number of voices, including Senators Sheldon Whitehouse and Richard Blumenthal. But Attorney General Merrick Garland, and AAG Todd Kim of the ENRD, appear content to do little to meet this nation's extraordinarily urgent need for climate change mitigation and adaptation and environmental justice. If they continue to squander the Department of Justice's many tools to strategically support and advance climate-forward litigation across the country, they will join the ignominious ranks of powerful Americans who saw the existential stakes of climate change, held the tools to address it in their hands, and chose to do little about it.

VI. THE REVOLVING DOOR BETWEEN BAD-ON-CLIMATE BIGLAW FIRMS AND THE DOJ

A corporate crackdown is not just about fighting outside offenders. It is also about critiquing the corporate ties of those within the government, particularly when those ties provide ample reason for regulators to fail to act against the industry they revolve in and out of, whether for ideological, political, or financial reasons. Revolving in and out of BigLaw is a typical path for many Justice Department employees; this regular occurrence deserves scrutiny for creating overt conflicts of interest. The following Environment and Natural Resource Division attorneys have recently revolved in or out of the DOJ to or from BigLaw firms with records for representing some of the most egregious corporate environmental offenders:

- **Jeffrey Clark:** Clark joined Trump's DOJ after over a decade spent at notorious BigLaw firm Kirkland & Ellis. He had **previously revolved** between Kirkland & Ellis and the DOJ during George W. Bush's presidency. As mentioned in Section III, Trump's ENRD Assistant Attorney General **Jeffrey Clark** weakened corporate crackdown efforts from within by expanding the leniency policy for corporate crimes at the DOJ and furthering the abrupt decrease in civil and criminal environmental prosecutions. To echo **Bloomberg Law**, Clark championed the Trump administration's "deregulatory agenda" and "revamp[ed] policies that guide environmental settlements and internal processes." Clark is now under investigation for seeking to weaponize the Justice Department to help Trump invalidate the election results. Viewed in the legal community as "**radioactive**," Clark did not return to Kirkland & Ellis.

- **Jeffrey Wood:** **Jeffrey Wood** was the ENRD's Acting Assistant Attorney General and Principal Deputy Assistant Attorney General under Trump. He was **asked** to recuse himself from dozens of cases facing the government, due to his past work for Alabama law firm Balch & Bingham LLP. In a February 2017 **memo**, ENRD ethics official Karen Wardzinski listed over 40 cases Wood could not participate in, including enforcement actions stemming from the Volkswagen emissions cheating scandal and litigation over

the EPA's Clean Power Plan and Cross-State Air Pollution Rule update. **A year after** leaving the ENRD, he **became** a partner at Baker Botts, a law firm that **received an F** on The Law Students For Climate Accountability's 2021 climate scorecard. Going from the ENRD to a law firm with a terrible climate record seems counterintuitive at best and deeply troubling at worst.

- **Jonathan Brightbill:** Before joining the ENRD, he was a partner at **Kirkland & Ellis LLP**, a law firm regularly **targeted** in class actions and environmental investigations. He occupied multiple positions at ENRD. Jonathan Brightbill **was** the Deputy Assistant Attorney General from 2017 to 2019, Principal Deputy Assistant Attorney General from 2019 to 2020, and Acting Assistant Attorney General in January 2021. In 2019, Brightbill **represented** the EPA in ***League of United Latin Am. Citizens v. Wheeler***, wherein the EPA **failed to ban** the pesticide chlorpyrifos that adversely affects adults and the neurodevelopment of children. Three months after leaving the ENRD, Brightbill revolved back to private practice and **became a partner** at Winston & Strawn LLP. Winston & Strawn **received a D** on The Law Students For Climate Accountability's climate scorecard.

- **Eric Grant:** Eric Grant **left** law firm Hicks Thomas to serve as the Deputy Assistant Attorney General at ENRD during the Trump years. At the ENRD, Grant helped **defend** the application of Nationwide Permit 12 to an oil pipeline near Beaumont, Texas from attacks under the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. In January 2021, Grant returned to Hicks Thomas, a firm with a **Tier 1 ranking** both nationally and in the Houston metro area for oil and gas law.

- **Corinne Snow:** Snow **left** law firm Vinson & Elkins to join the ENRD as Counsel and Chief of Staff from during the Trump years. Vinson & Elkins **received a F** on The Law Students For Climate Accountability's climate scorecard. While at the ENRD, **Snow defended** the Bureau of Land Management (BLM)'s approval of oil and gas drilling permits in *Dine Citizens Against Ruining our Environment v. Bernhardt,* a suit brought by environmental groups in Federal District Court in New Mexico challenging the agency's National Environmental Policy Act (NEPA) environmental analysis. When she left the ENRD in 2020, she returned to Vinson & Elkins.

- **Stacey Bosshardt:** Bosshardt spent **nearly 14 years** at the ENRD as a trial attorney, senior attorney, and assistant section chief. In September 2020, she was hired by international law firm Perkins Coie where she **represented** mining, energy, pipeline and other business and governmental clients. Perkins Coie **received a D** on The Law Students For Climate Accountability's climate scorecard. While working at Perkins Coie, Bosshardt represented the intervenor, Mountain Valley Pipeline, in ***Wild Virginia v. United States Forest Service***. The Fourth Circuit **concluded** that the Forest Service and the Bureau of Land Management (BLM) inadequately considered the sedimentation and erosion impacts of the Pipeline which covered three and a half miles across Jefferson National Forest in Virginia and West Virginia.

Authorship

Hannah Story Brown *is a Researcher with the Revolving Door Project.*

Fatou Ndiaye *is a Research Assistant with the Revolving Door Project.*

Project Information

The **Corporate Crackdown Project** series of reports documents the power of the executive branch to pursue vigilant enforcement against corporate lawbreakers. Beginning in November 2022, the Corporate Crackdown Project has produced three full-length reports and one polling memo produced in conjunction with Data for Progress.

About the Revolving Door Project

The **Revolving Door Project** (RDP) is a project of the Center for Economic and Policy Research (CEPR), a progressive think tank focused on economic policy. RDP scrutinizes executive branch appointees to ensure they use their office in the public interest, not to serve entrenched corporate power or achieve personal advancement.