

ENRD

Accomplishments Report Fiscal Year 2010



United States Department of Justice
Environment & Natural Resources Division

**SUMMARY OF
LITIGATION
ACCOMPLISHMENTS**

FISCAL YEAR 2010



Columbia River Gorge, Oregon

Photo Courtesy of Jeffrey Bank

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FOREWORD

I am pleased to present the Fiscal Year 2010 Accomplishments Report of the Environment and Natural Resources Division (the Division). As this report demonstrates, we have achieved meaningful results in protecting human health and the environment for the benefit and enjoyment of the American people.



Ignacia S. Moreno
*ENRD Assistant
Attorney General*

A core mission of the Division, and a priority of the Obama Administration and the Department of Justice, is strong enforcement of civil and criminal environmental laws to protect our nation's air, land, water and natural resources. The Division's mission also includes vigorous defense of environmental, wildlife and natural resources laws and agency actions; effective stewardship of our public lands and natural resources; and careful and respectful management of the United States' obligations to American Indian tribes and their members, including litigation to protect tribal sovereignty, rights and resources. In all of the work that we do, we are mindful of the goals of environmental justice: to ensure that all communities enjoy the benefit of a fair and even-handed application of environmental laws and that affected communities have a meaningful opportunity for input in the consideration of appropriate remedies for violations of the law.

In collaboration with other federal agencies, U.S. Attorneys' Offices and state, local, and tribal governments, the Division's civil and criminal enforcement efforts have immeasurably protected human health and the environment through significant reductions in emissions and discharges of harmful pollutants. In addition, in fiscal year 2010, our collaborative efforts secured nearly \$1.3 billion in civil and stipulated penalties, cost recoveries, natural resources damages, and other civil monetary relief, including over \$922 million recovered for the Superfund. We secured over \$7.5 billion in corrective measures through court orders and settlements. Of particular note, the Division announced several Clean Air Act settlements that resolved violations on a company-wide basis, including settlements with the nation's second-largest manufacturer of Portland cement and second-largest container glass manufacturer. We also secured notable Clean Water Act

Fiscal Year 2010 Civil Results

\$1.3 Billion

Civil and stipulated penalties, cost recoveries, natural resources damages, and other civil monetary relief

Includes \$922 million recovered for the Superfund

\$7.5 Billion

Corrective measures through court orders and settlements

settlements with a number of municipalities to address discharges of untreated sewage from wastewater treatment and collection systems, a pressing issue in many of our nation's cities. For example, we reached an agreement that requires the City of Kansas City, Missouri, to spend over \$2.5 billion to reduce sewer overflows and address stormwater pollution throughout one of the nation's largest sewer districts. We also negotiated a consent decree amendment that requires Hamilton County and the City of Cincinnati, Ohio, to spend an additional estimated \$1.3 billion (and over \$3 billion total) to improve sewer systems and come into compliance with the Clean Water Act. These efforts resulted in meaningful progress in improving the health and environment of vulnerable communities.

The Division also concluded 50 criminal cases against 79 defendants, obtaining over 23 years in jail time and over \$104 million in criminal fines, restitution, community service funds, and special assessments. Notable cases ranged from the prosecution of "Profish," one of the District of Columbia's largest seafood wholesalers, for purchasing illegally harvested striped bass, to the prosecution of Irika Shipping, S.A., a ship management company, for concealing the deliberate discharge of oil and plastics from a Greek-flagged cargo ship. In addition, the Division continued its work in several criminal enforcement priority areas, including: (1) prosecutions under the Clean Water Act and other federal pollution statutes; (2) the Division's worker safety initiative, combining environmental and worker health and safety investigations; and (3) Lacey Act enforcement, including domestic and international efforts to combat illegal logging and wildlife trafficking. Importantly, the Division's civil and criminal enforcement efforts resulted in significant reductions in the emission and discharge of pollutants, thereby protecting and enhancing public health and the environment. Our efforts will serve to deter others from violating federal environmental laws and regulations in the future.

Fiscal Year 2010 Criminal Results

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The Division's accomplishments in other areas were equally outstanding. In the Division's enforcement of the nation's environmental laws, we have not forgotten vulnerable, low-income and minority communities. We have taken concrete steps in making environmental justice a reality. With our partners at the Environmental Protection Agency (EPA), we have incorporated new approaches into our work to further the important principles of meaningful participation by affected communities and meaningful relief for these communities. This report summarizes noteworthy settlements that further these goals, such as the agreement with the City of Kansas City noted above. We also have established a Division-wide environmental justice workgroup to ensure that we achieve the goals of environmental justice in all of our work and that our efforts are enduring.

In addition, the Division continued its important work in defending, advising, and otherwise supporting a broad range of federal agencies, including EPA, the Department of the Interior, the Department of Defense, the Department of Homeland Security, the U.S. Army Corps of Engineers, and the National Oceanic and Atmospheric Administration. The work of our client agencies, and by extension our work, is diverse and ranges from implementing the Clean Water Act, Clean Air Act, and other federal pollution statutes, to managing the nation's vast natural and cultural resources, including national forests, national parks, other public lands, and wildlife, to making what are often critical decisions involving threatened and endangered species and their habitat, to protecting our national security, and to ensuring that we honor our obligations to Indian tribes.

In fiscal year 2010, the Division defended a number of challenging matters, including: defending the U.S. Fish and Wildlife's decision to list the polar bear as a threatened species under the Endangered Species Act; protecting the public fisc while acquiring land to allow the Department of Homeland Security and other agencies to carry out their national security missions; defending litigation seeking to compel additional actions to prevent migration of Asian carp into the Great Lakes; assisting the military in its plans to move operations and personnel from Okinawa, Japan to Guam; and assisting the Solicitor General in formulating positions of the United States in cases before the Supreme Court in which our client agencies were parties or otherwise had important interests. In addition, the Division has played, and will continue to play, a significant role in defending EPA actions to address climate change. Over the past year, EPA has begun to develop a program under the Clean Air Act to regulate greenhouse gas emissions, which contribute to global climate change. Among other things, the agency: (1) found under the Clean Air Act that greenhouse gas emissions endanger public health and welfare; (2) established greenhouse gas emission standards for light-duty motor vehicles starting with the 2012 model year; (3) promulgated regulations specifying a phased approach for regulation of stationary sources of greenhouse gases; and (4) took various actions to ensure that all states have adequate authority to issue required permits to those stationary sources of greenhouse gas emissions. Several industry groups, states, members of Congress, and the U.S. Chamber of Commerce challenged EPA's actions by filing petitions for review in federal courts of appeals that will be heard next year.

The Division also had notable achievements in connection with a broad range of issues involving Indian tribes and supporting tribal sovereignty. In early 2010, for example, the efforts of Division attorneys and lawyers from other federal agencies to resolve longstanding disputes over water use in the Klamath Basin culminated in the signing of two historic agreements. At the reception the night before the agreements were signed, I observed corporate officers, farmers, fisherman, environmentalists, and tribal leaders standing side-by-side, when before, they stood toe-to-toe. As another example, in a 2010 case involving the Saginaw Chippewa Indian tribe and the State of Michigan, the United States, Michigan, and local governments negotiated a historic settlement recognizing the Isabella Reservation in south central Michigan as Indian Country, as well as intergovernmental memoranda of agreement regarding the manner in

which the tribe, state, and local governments will operate and interact on a day-to-day basis. These agreements are examples of what can be accomplished when individuals and groups with varied interests commit to resolving conflicts. We will continue to explore bold and creative ways to settle conflicts that have defied resolution, despite decades of costly litigation.

Finally, during this past year, the Division played an instrumental role in supporting the federal response to, and investigation of, the catastrophic oil spill in the Gulf of Mexico. On April 20, 2010, an explosion and fire destroyed the Deepwater Horizon offshore drilling rig that was located in the Gulf of Mexico, approximately 40 miles from the Mississippi River delta. The incident claimed the lives of 11 rig workers. It also marked the beginning of a massive oil spill—the largest in U.S. history—that would take months to contain and that is expected to have long-lasting and devastating impacts on natural resources in the Gulf of Mexico. From the outset, Attorney General Holder, Assistant Attorney General Tony West, who heads the Civil Division, and I traveled numerous times to the Gulf. We have seen the devastation caused by the oil spill, and have heard the despair of local citizens whose way of life has been threatened and possibly changed forever.

In December of last year, the Department of Justice filed a lawsuit against nine defendants, including BP, Transocean, and others, in the Gulf oil spill multi-district litigation proceeding. The United States' complaint asks the court to impose civil penalties under the Clean Water Act. It also asks the court to declare eight of the defendants liable without limitation under the Oil Pollution Act of 1990 for government removal costs, economic damages, and damages to natural resources. With our colleagues in the Civil Division, we have taken a critical step to ensure that those responsible for the oil spill will be held accountable to the fullest extent of the law. The Department's civil and criminal investigations are ongoing.

The Division's work in response to the oil spill is not limited to the Department's civil enforcement action and ongoing investigations. Lawyers in almost every section of the Division work

While today's civil action marks a critical step forward, it is not a final step. Both our criminal and civil investigations are continuing. And our work to ensure that the American taxpayers are not forced to bear the costs of restoring the gulf area – and its economy – goes on. As I have said from the beginning, as our investigations continue, we will not hesitate to take whatever steps are necessary to hold accountable those responsible for this spill.

—Attorney General Eric Holder
December 15, 2010

on matters relating to the oil spill. The Division supported the interagency response to the spill and continues to defend a number of lawsuits filed against federal agencies. These and other actions by the government are critical to our efforts to avoid another similar disaster, and we will defend challenges to these actions.

Deepwater Horizon has become the Division's top priority and will remain so for the foreseeable future. Despite this new challenge, we remain focused on our core mission: protecting human health and the environment. And, while doing so, we will continue to enjoy serving the American people. For the second year in a row, the Division was ranked the "Best Place to Work" in the government. This is likely due in no small part to the varied, challenging, and important work that we all do in the Division, but also to the collegiality, expertise, dedication, and professionalism of the Division's employees. They are a vital part of the work that we do in service of the American people, and I am honored to serve with them.

Ignacia S. Moreno

Assistant Attorney General

Environment and Natural Resources Division

April 28, 2011



We have an obligation to investigate what went wrong and to determine what reforms are needed so that we never have to experience a crisis like this again. If the laws on our books are insufficient to prevent such a spill, the laws must change. If oversight was inadequate to enforce these laws, oversight has to be reformed. If our laws were broken, leading to this death and destruction, my solemn pledge is that we will bring those responsible to justice on behalf of the victims of this catastrophe and the people of the Gulf region.

—President Barack Obama, June 1, 2010

AN INTRODUCTION TO 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

The Division has a main office in Washington, D.C., and field offices in Anchorage, Boston, Denver, Sacramento, San Francisco, and Seattle. ENRD has a staff of almost 700, more than 400 of whom are attorneys. The Division is organized into nine litigating sections plus the Office of the Assistant Attorney General and the Executive Office.

The Division has responsibility for cases involving more than 150 statutes and represents virtually every federal agency in courts all over the United States and its territories and possessions. Our litigation docket contains more than 7,000 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 protection laws. In addition, ENRD litigates cases concerning Indian rights and claims.

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 Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), the Safe Drinking Water Act, and the Lead Hazard Reduction 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). The ENRD sections that carry out this work are the Environmental Crimes Section, the Environmental Enforcement Section, and the Environmental Defense Section.

A substantial portion of the Division's work includes litigation under a plethora of statutes related to the management of public lands and associated natural and cultural resources. All varieties of public lands are affected by ENRD's litigation docket, ranging from entire ecosystems,

such as the nation's most significant sub-tropical wetlands (the Everglades) and the nation's largest rain forest (the Tongass), to individual rangelands or wildlife refuges. 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 management decisions affecting economic, recreational, and religious uses of the national parks and national forests; and actions to recover royalties and revenues from exploitation of natural resources. The Division represents all the land management agencies of the United States including, for instance, the Forest Service, the National Park Service, the Bureau of Land Management (BLM), the Corps, the Fish and Wildlife Service (FWS), the Department of Transportation, and the Department of Defense. 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, and the Marine Mammal Protection Act (MMPA), which protects animals such as whales, seals, and dolphins. The Environmental Crimes Section also brings criminal prosecutions under these laws against, for example, people who are found smuggling wildlife and plants into the United States. The main federal agencies that ENRD represents in this area are FWS and the National Marine Fisheries Service (NMFS).

Division cases frequently involve allegations that a federal program or action violates constitutional provisions or environmental statutes. Examples include regulatory takings cases, in which the plaintiff claims he or she has been deprived of property without just compensation by a federal program or activity, or suits alleging that a federal agency has failed to comply with the National Environmental Policy Act (NEPA) by, for instance, failing to issue an Environmental Impact Statement. Both takings and NEPA cases can affect vital federal programs such as the nation's defense capabilities (including military preparedness exercises, weapons programs, and military research), National Aeronautics and Space Administration programs, recombinant DNA research, and beneficial recreational opportunities such as the rails-to-trails program. These cases also involve challenges to regulations promulgated to implement the nation's anti-pollution



ENRD MISSION

The mission of the Environment and Natural Resources Division is, through litigation in the federal and state courts, to safeguard and enhance the American environment; acquire and manage public lands and natural resources; and protect and manage Indian rights and property.



statutes, such as the CAA and the 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 share responsibility for handling these cases.



Another portion of the Division's caseload consists of non-discretionary 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 against the United States on grounds that the United States has failed to live up to its obligations to the tribes. The main federal agency that the Division represents in connection with this work is the Bureau of Indian Affairs in the Department of the Interior.



The Appellate Section handles the initial appeals of all cases litigated by Division attorneys in the trial courts, and works closely with the Department of Justice's Office of the Solicitor General on ENRD cases that reach the U.S. Supreme Court. In addition, the Division supports the work of the Assistant Attorney General in the development of policy concerning the enforcement of the nation's environmental laws, reviewing and commenting on legislation that would affect the work of the Division, reviewing litigation filed under the various citizen-suit provisions in the environmental laws, and evaluating and responding to requests that the United States participate as an amicus in various matters. Most of this work is handled by the Law and Policy Section.



ENRD CLIENT AGENCIES

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

<i>United States Agency for International Development (USAID)</i>	<i>www.usaid.gov</i>
<i>United States Department of Agriculture (USDA)</i>	<i>www.usda.gov</i>
<i>United States Forest Service (USFS)</i>	<i>www.fs.fed.us</i>
<i>United States Department of Commerce:</i>	
<i>National Marine Fisheries Service (NMFS)</i>	<i>www.nmfs.noaa.gov</i>
<i>National Oceanic and Atmospheric Administration (NOAA)</i>	<i>www.noaa.gov</i>
<i>United States Department of Defense (DOD)</i>	<i>www.defense.gov</i>
<i>United States Army Corps of Engineers (USACE)</i>	<i>www.usace.army.mil</i>
<i>United States Marine Corps</i>	<i>www.marines.com</i>
<i>United States Navy</i>	<i>www.navy.mil</i>
<i>United States Department of Energy (DOE)</i>	<i>www.energy.gov</i>
<i>Environmental Protection Agency (EPA)</i>	<i>www.epa.gov</i>
<i>General Services Administration (GSA)</i>	<i>www.gsa.gov</i>
<i>United States Geological Survey (USGS)</i>	<i>www.usgs.gov</i>
<i>United States Department of Homeland Security (DHS)</i>	<i>www.dhs.gov</i>
<i>United States Customs and Border Protection (CBP)</i>	<i>www.cbp.gov</i>
<i>Federal Emergency Management Agency (FEMA)</i>	<i>www.fema.gov</i>
<i>United States Coast Guard (USCG)</i>	<i>www.uscg.mil</i>
<i>United States Department of Housing and Urban Development</i>	<i>www.hud.gov</i>
<i>United States Department of the Interior (DOI)</i>	<i>www.doi.gov</i>
<i>Bureau of Indian Affairs (BIA)</i>	<i>www.bia.gov</i>
<i>Bureau of Land Management (BLM)</i>	<i>www.blm.gov</i>
<i>Bureau of Reclamation (BOR)</i>	<i>www.usbr.gov</i>
<i>National Park Service (NPS)</i>	<i>www.nps.gov</i>
<i>United States Fish and Wildlife Service (FWS)</i>	<i>www.fws.gov</i>
<i>National Aeronautics and Space Administration (NASA)</i>	<i>www.nasa.gov</i>
<i>Nuclear Regulatory Commission (NRC)</i>	<i>www.nrc.gov</i>
<i>United States Department of State</i>	<i>www.state.gov</i>
<i>United States Department of Transportation (DOT)</i>	<i>www.dot.gov</i>
<i>United States Maritime Administration</i>	<i>www.marad.dot.gov</i>
<i>United States Department of Treasury</i>	<i>www.treasury.gov</i>
<i>United States Department of Veterans Affairs (VA)</i>	<i>www.va.gov</i>

ENVIRONMENT AND NATURAL RESOURCES DIVISION PRIORITIES

In fiscal year 2010, the Division achieved significant victories for the American people in all our practice areas. The remaining chapters of this report summarize key accomplishments thematically: 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; criminally enforcing the nation's pollution and wildlife laws; defending vital federal programs and interests; promoting national security and military preparedness; protecting Indian resources and resolving Indian issues; and supporting the Division's litigators.

This chapter briefly describes the six overarching work priorities of the Division reflected across the report. The priorities are: (1) supporting the federal government's efforts to protect the environment and natural resources; (2) environmental justice; (3) Indian Country; (4) working with U.S. Attorneys, states, tribes, and local government; (5) national security; and (6) addressing domestic impacts of global pollution and environmental violations. Environmental justice, which is a top priority of this Administration, is described in greater detail at the conclusion of this chapter.



OVERVIEW OF ENRD PRIORITIES

Supporting the Federal Government's Efforts to Protect the Environment and Natural Resources

This priority reflects ENRD's firm commitment to fulfilling the core missions of enforcement (civil and criminal), defense, and stewardship. Strong enforcement of civil and criminal environmental laws, vigorous defense of federal programs and interests, and effective stewardship of public lands and natural resources are critical to ensure a healthy and prosperous United States. The next five chapters of this report illustrate ENRD's work in this priority area during fiscal year 2010.

Indian Country

The United States holds approximately 60 million acres of land in trust for tribes and their members. The Departments of the Interior and Justice, working with tribes, seek to protect those lands and associated resources from trespass, impairment, or encumbrance. The Division is increasing outreach to tribal leaders and communities to better understand their concerns and work more closely with them in carrying out these important responsibilities.

Division lawyers will continue to work with other federal agencies in order to manage the United States' obligations to tribes with the utmost care and respect. We seek to identify ways

to settle conflicts that have defied resolution despite decades of costly litigation. In particular, the Department, with the Departments of the Interior and Treasury, is exploring opportunities for resolution of tribal trust cases in a fair and expeditious manner. The Environment and Natural Resources Division is also working to increase affirmative litigation to protect tribal rights and re-



Bureau of Indian Affairs Photo

sources and to identify opportunities for the Department of Justice to participate as amicus in support of tribal governmental authority and tribal court jurisdiction, with a goal of strengthening tribal governments and tribal courts as institutions.

Environmental conditions in tribal communities often lag behind the rest of the nation. The Division is working to improve environmental compliance in and around Indian Country. We are collaborating with EPA to address this common concern more efficiently and effectively.

The cases described in the chapters entitled “Protecting Indian Resources and Resolving Indian Issues” and “Promoting Responsible Stewardship of America’s Wildlife and Natural Resources,” in particular, recount ENRD’s work last year to further this priority.

Working with U.S. Attorneys, States, Tribes, and Local Government

The Division seeks to enhance existing partnerships and develop strong new relationships with U.S. Attorneys across the country and with our counterparts in state, tribal, and local government. These partnerships are critical to our success and allow us to build a base of collective knowledge, work together to solve difficult problems, and allocate resources as efficiently as possible. Since January 2009, about 30 percent of the Division’s civil environmental enforcement actions were brought with states and/or local government. We are building on the success of past outreach efforts to establish work groups, task forces, and other processes to further enhance joint enforcement opportunities. All chapters of this report reflect this Division priority.



Fort Belknap Indian Community President Tracy King speaks to ENRD leadership and U.S. Attorneys at a 2010 listening conference in Missoula, Montana.

National Security

The Environment and Natural Resources Division can make a unique and important contribution to national security while ensuring robust compliance with the country's environmental and natural resources laws. Increasingly, the Division is responsible for defending agency actions that support the security of the United States. We promote safe disposal of high-level nuclear waste and obsolete chemical weapons. We defend against challenges to critical training programs that ensure military preparedness. We acquire the lands needed to fulfill critical military and homeland security functions. See the chapter of this report entitled "Promoting National Security and Military Preparedness" for examples of ENRD actions in fiscal year 2010 advancing this priority.

Addressing Domestic Impacts of Global Pollution and Environmental Violations

The Division supports the Administration's commitments to combat international crime, to encourage the rule of law abroad, to build the environmental enforcement capacity of major trade partners, and to better address environmental issues that have global impacts, such as international organized crime and climate change. In accordance with the Department of Justice's strategic plan, we recognize that we must build relationships and encourage cooperation with our counterparts abroad to combat environmental and natural resource crimes that extend beyond our borders. To that end, for a number of years, the Division has conducted prosecutor and judicial trainings to build relationships and enforcement capacity in other countries to lay the foundation for effective enforcement partnerships. We are actively seeking out opportunities to successfully prosecute U.S. environmental or natural resource crimes that involve foreign evidence or assistance or that rely on underlying foreign statutes. The Division is working to ensure that environmental enforcement and other Division priorities are considered in U.S. policy development on international issues and in international trade agreement and treaty negotiations. Examples of ENRD work under this priority are contained in the chapters of this report entitled "Criminally Enforcing Our Nation's Pollution and Wildlife Laws" and "Defending Vital Federal Programs and Interests." And, to further leverage our resources, we are engaging and coordinating with other governmental partners with international portfolios and expertise, such as EPA, the Department of State, the Office of United States Trade Representative, and the United States Agency for International Development.



Spotlight on Environmental Justice

U.S. environmental laws and protections extend to all Americans, regardless of race, ethnicity, or socioeconomic status. The burden of pollution in the United States, however, has fallen disproportionately on low-income and minority communities. Sources of pollution are frequently located in or near these populations, and such communities have often expressed a concern that they have relatively little say in the decisions that affect their health and livelihood. The critical challenge for us is to find ways to reduce these disproportionate pollution burdens where they exist, to conduct our work so as to avoid creating or contributing to such burdens in the future, and to take steps to meaningfully include these communities in decisions regarding the federal programs, policies, and activities that affect them.

Environmental justice was first identified as an important public policy priority for the federal government in the Clinton Administration, when Executive Order 12898 was issued. Building on this history, environmental justice is a top priority for this Administration. The federal commitment to this issue was highlighted at a September

2010 cabinet-level meeting of the Interagency Working Group on Environmental Justice, attended by Attorney General Eric Holder, EPA Administrator Lisa Jackson, Council on Environmental Quality Chair Nancy Sutley, Interior Secretary Ken Salazar, Housing and Urban Development Secretary Shaun Donovan, and Transportation Secretary Ray LaHood, among others. It was the first time this group had met at this level in a decade.

Additionally, last December, the White House convened a forum on environmental justice attended by numerous cabinet officials, environmental justice activists, and community representatives, among others. The Interagency Working Group on Environmental Justice has already held several regional listening sessions as a followup to the September Principals' meeting and the December White House forum, and plans to hold several additional regional listening sessions over the course of 2011. ENRD has actively participated in these interagency efforts, and will continue to do so.



On December 15, 2010, the Obama Administration hosted the White House Forum on Environmental Justice.

The Department of Justice is committed to bringing environmental justice principles to bear wherever it can, and is guided by its 1995 *Department of Justice Guidance Concerning Environmental Justice*. The Environment and Natural Resources Division, in particular, has been aggressively exploring ways to integrate environmental justice considerations into the full range of work that we do. These efforts have included both elements of increased engagement and outreach, and efforts to achieve outcomes that more directly address the impacts that affect and concern communities.

To help enhance our understanding of community concerns, ENRD has met with community and environmental justice leaders, participated in public events, and visited communities affected by pollution. For example, in February 2010, the Assistant Attorney General for ENRD invited environmental justice advocates and community leaders to meet with her and with senior representatives from each ENRD section to discuss environmental justice issues.

In April 2010, the Assistant Attorneys General for ENRD and Civil Rights met with environmental justice advocates to hear their concerns and engage in further dialogue, including about administration and enforcement of Title VI of the Civil Rights Act in the context of environmental justice. The Assistant Attorneys General also visited communities in Atlanta to hear about their environmental concerns, and held an environmental justice listening session at Clark Atlanta University. Other ENRD representatives have also participated in numerous events, as panelists, speakers, and faculty, addressing

issues related to environmental justice.

The Division's outreach has also included engagement with representatives of business and industry. For example, the Assistant Attorney General for ENRD met with the American Bar Association and the Corporate Environmental Enforcement Council to discuss the Division's enforcement agenda, which includes environmental justice, and plans to convene a corporate roundtable specifically on environmental justice in the coming months.

In addition to outreach and public engagements, the Division has been hard at work examining how we conduct our day-to-day business, to ensure that environmental justice considerations are being fully integrated into the work that we do. To this end, we have established a cross-Divisional workgroup that is looking at creative ways to identify and address the needs of communities that have been disproportionately affected by pollution. To ensure that these environmental justice principles are appropriately implemented, in both the enforcement and non-enforcement contexts, each of the Division's sections has developed, and continues to refine, its own environmental justice plan. Additionally, ENRD and the Civil Rights Division are coordinating in unprecedented ways to make sure that our environmental justice-related activities are mutually supportive.

Management of the Division's civil enforcement docket presents a unique opportunity to address the needs of communities that have been disproportionately affected by pollution. ENRD is collaborating with EPA on the best approaches to do this. Two

approaches we have been exploring are: (1) expanding outreach to affected communities; and (2) seeking creative solutions that will have a positive and discernable outcome in affected communities.

Earlier outreach to affected communities, if conducted with a sensitivity to issues of confidentiality and with careful management of expectations, can be a powerful and positive tool in connection with civil environmental litigation. Talking to a community allows us to hear real concerns and to determine if those concerns can be addressed through an environmental enforcement action. Outreach can help develop facts, determine the scope and the degree of a violation, identify witnesses, and pinpoint harms. It can also provide information needed to craft remedies that provide the most meaningful, immediate, and appropriate relief. Outreach can serve to educate the affected community about the case, fostering an atmosphere of trust and creating a platform for open and effective communication between the community and the parties.

Through outcome assessment, the Division evaluates all aspects of potential relief with an eye toward determining how to address the impacts to a community from a violation. Three types of relief may further the goal of environmental justice:

--First, in some cases, traditional injunctive relief may be tailored to the needs of the community. Traditional injunctive relief requires a polluter to come into compliance with the law. When a polluter is required to perform many different actions over an ex-

tended period of time to achieve compliance, it is sometimes possible to design injunctive relief to allow the most severely impacted communities to realize benefits from the settlement sooner. We can do this, for example, by requiring that operational modifications be implemented in phases or by requiring certain projects to be completed before others.

--Second, while our enforcement actions cannot address all disproportionate burdens, enhanced injunctive relief may be available if supported by facts. This relief goes beyond mere forward-looking compliance with the law to mitigate the impacts on the public health or environment caused by a defendant's past violations.

--Third, a defendant can agree to perform a supplemental environmental project, which we refer to as a SEP. 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, but that the defendant is not otherwise legally required to perform.

Several recent cases illustrate how we have successfully incorporated environmental justice into the diverse ENRD docket and employed the principles of outreach and outcome in practical and meaningful ways. While two of the cases were resolved in 2011, they reflect the Division's continuing commitment to furthering the cause of environmental justice.

Settlement of an enforcement action against Kansas City last year requires the city to

spend \$2.5 billion over the next 25 years to make major, long-needed improvements to its sewage collection and treatment systems. The agreement will improve public health and the environment across the city, but it also includes three aspects of relief that are tailored to address the impacts of the violations on disproportionately burdened communities.

--First, Kansas City's sewer system is in greatest need of repair in the city's urban core. Decaying sewer lines and other problems cause sewage to back up into the basements of homes in this vulnerable part of the city. The settlement addresses this problem by prioritizing sewer rehabilitation projects in the urban core. The projects will be expedited to provide more immediate relief to residents in this area.

--Second, the settlement requires the city to take early action to reduce overflows of untreated sewage into the Blue River, which runs through the urban core.

--Third, the city will spend \$1.6 million to implement a voluntary sewer connection and septic tank closure program. This program will provide funding to encourage and assist low-income residents to close their septic tanks and connect to the public sewer.

All three aspects of the settlement were the product of community outreach. Representatives from the city and EPA met with community groups, organizers, and individuals to learn about local problems and needs. These meetings helped us shape the settlement to advance the principles of environmental justice.

Barrio De Colores v. U.S. Customs and Bor-

der Protection is an action brought under NEPA by Barrio De Colores, an association of Hispanic residents in the City of Laredo, Texas. The association challenged the U.S. Customs and Border Protection's (CBP's) environmental assessment for removal and control of Carrizo cane within a 16.1 mile corridor along the Rio Grande River using herbicides, including aerial spraying by helicopter. Among other claims, Barrio De Colores alleged that CBP failed to adequately notify the public in both English and Spanish of their right to participate in the environmental review process. As part of the settlement agreement disposing of the case, CBP agreed to discontinue aerial spraying and to limit a burn and herbicide method of removal to designated sites only, with public notice in local newspapers in English and Spanish. In addition, CBP agreed to make particular commitments for any additional



***Arundo donax*, commonly known as Carrizo cane or giant reed, is a non-native robust perennial grass that grows from about 9 feet to more than 27 feet tall. It represents a hazard for U.S. Customs and Border Protection's Border Patrol by limiting the effectiveness of its personnel, operations, and technology. (From CBP Website (http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors/laredo_sector_tx/carrizo_removal/about/affect_cane.xml))**

cane control and removal outside of the 16.1-mile corridor for the next five years. These commitments include holding a scoping meeting, providing a 45-day comment period on draft environmental analyses, and providing a Spanish version of the executive summary of any draft analysis. The agency also agreed to hold a meeting with Barrio De Colores to provide information about the project in English and Spanish. This meeting was held on July 7, 2010 in the Barrio De Colores neighborhood and was considered to be a success by both Barrio De Colores and CBP.

The United States also concluded a company-wide settlement in early 2010 with Saint-Gobain Containers, Inc., which will benefit environmental justice communities downwind of the addressed facilities. Under the consent decree, the company, the nation's second largest container glass manufacturer, agreed to install pollution control equipment at an estimated cost of \$112 million to reduce emissions of nitrogen oxide (NO_x), sulfur dioxide (SO₂), and particulate matter (PM) by approximately 6,000 tons each year. NO_x, SO₂, and PM can trigger respiratory difficulties and asthma, and cause environmental harms such as acid rain, visibility impairments, and water quality impacts. The settlement covers 15 plants. As part of the settlement, Saint-Gobain agreed to pay a \$2.25 million civil penalty to resolve its alleged violations of the CAA's new source review regulations. Of the \$2.25 million civil penalty, the company paid \$1.15 million to the United States and \$1.1 million to the 10 states and 2 local

regulatory agencies that joined the case. Saint-Gobain agreed to implement further pollution controls, including the installation of the first-ever selective catalytic reduction system at a container glass plant in the United States. Saint-Gobain will also install continuous emission monitoring systems at all of their glass plants.

Another settlement, recently reached with Murphy Oil to resolve CAA and other violations at one of Murphy Oil's refineries, similarly included important community-focused components. First, Murphy Oil will have to meet stringent pollution control requirements if it expands certain operations. Second, the settlement requires Murphy Oil to construct and maintain an air monitor between its refinery and the local neighborhood and to continuously monitor levels of SO₂, PM, and volatile organic compounds. Volatile organic compounds can form ground-level ozone. Ozone is also considered one of the most harmful air pollutants to human health and the environment. Third, Murphy Oil must post the air monitoring data on a public Internet website. This is the first refinery settlement to require this kind of monitoring and the disclosure of data on a publicly-available website.

At the end of January 2011, the United States reached agreement with a food processing company, Orval Kent Food Company, Inc., to settle allegations that its Baxter Springs, Kansas processing facility overloaded the city's wastewater treatment system with millions of gallons of industrial wastewater, at times causing pollution in the Spring River in Kansas and Oklahoma.

This river flows through the lands of the Shawnee Tribe of Eastern Oklahoma. As part of the settlement, the company will spend at least \$32,500 on a project to restock fish in the Spring River watershed. Residents of Baxter Springs, tribal members, and other communities downstream use the Spring River for fishing and recreation. This project was designed in consultation with the Shawnee Tribe.

In the future, ENRD will continue outreach to communities and listen to their concerns. The Division will work with business and industry and support their leadership on environmental justice. Environmental justice will continue to be an important part of our everyday work, and we will look for opportunities to address community concerns in all that we do.

Environment and Natural Resources and Civil Rights Divisions
Environmental Justice Town Hall Meeting:
December 13, 2010



PROTECTING OUR NATION'S AIR, LAND, AND WATER

Investigating the Deepwater Horizon Oil Spill in the Gulf of Mexico and Initiating Civil Affirmative Litigation

Immediately following the explosion and fire that destroyed the Deepwater Horizon offshore drilling rig in the Gulf of Mexico on April 20, 2010 and triggered a massive oil spill that took approximately three months to contain, 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 this matter. In December, as part of the multi-district litigation in the Eastern District of Louisiana, we brought suit against BP, Anadarko, Moex, and Transocean for civil penalties under the CWA and a declaration of liability under the Oil Pollution Act. The pretrial phase of this litigation is currently expected to continue through at least early 2012.

The United States intends to prove that violations of federal safety and operational regulations caused or contributed to the oil spill and that eight defendants (the non-insurers) are jointly and severally liable, without limitation, under the Oil Pollution Act for government removal costs, economic losses, and damage to natural resources due to the oil spill. The United States seeks civil penalties under the CWA, which prohibits the unauthorized discharge of oil into the nation's waters. We allege that the defendants named in this lawsuit were in violation of the act throughout the months that oil gushed into the Gulf of Mexico. The federal civil investigation continues. Additional claims may be brought in the future against named and/or new defendants.

Obtaining Company-Wide Relief for Violations of Multiple Environmental Statutes

Company-wide 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 not in violation, 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 a range of facilities benefit from pollutant reduction and, where appropriate, environmentally beneficial projects.

During fiscal year 2010, the Division obtained a significant company-wide settlement in *United States v. McWane, Inc.* McWane operates iron and brass foundries, and various valve and tank manufacturing facilities across the nation. The settlement resolves more than 400 civil violations of the CAA, CWA, Emergency Planning and Community Right-to-Know Act, CERCLA,

RCRA, the Safe Drinking Water Act, and the Toxic Substances Control Act, as well as state environmental laws. During the pendency of the case, McWane developed and implemented new company-wide environmental management systems, and identified, documented, and corrected all environmental violations at all facilities at a cost of more than \$7 million. The company also agreed to pay a civil penalty of \$4 million, which the States of Alabama and Iowa will also share, and to spend more than \$9 million on SEPs.

This is a comprehensive settlement that brings McWane into full environmental compliance at 28 facilities nationwide, and imposes a penalty on the company for its civil environmental violations at those facilities over the past decade. As a result of this agreement, McWane has completely re-engineered its environmental management systems to ensure that it remains in compliance, and has committed over \$9 million to environmental projects that will remove significant amounts of pollutants from the environment and benefit the surrounding communities.

—Ignacia S. Moreno
[United States v. McWane](#) Press Release

Reducing Air Pollution from Power Plants

The Environment and Natural Resources 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 the elderly, the young, and asthma sufferers. Through fiscal year 2010, 18 of these matters settled on terms that will result in reductions of over 2 million tons of SO₂ and NO_x each year, once the more than \$12 billion in required pollution controls are fully functioning.

Last year, the Division obtained two more settlements under this initiative in *United States v. Cinergy Corp.* and *United States v. Westar Energy*. Under the *Cinergy* consent decree, Duke Energy Corporation, the successor to Cinergy Corporation, will install and operate \$85 million worth of air pollution controls at its Gallagher Generating Station in New Albany, Indiana. Under the *Westar* consent decree, that company will install \$500 million worth of air pollution controls at its Jeffrey Energy Center plant near Topeka, Kansas. When fully implemented, these air pollution controls and other measures will collectively reduce air pollution by more than 115,000 tons every year compared with pre-settlement emissions. Duke and Westar, respectively, also paid civil penalties of \$1.75 million and \$3 million, and will spend \$6.25 million and \$6 million on projects to mitigate the adverse effects of past excess emissions.

Ensuring the Integrity of Municipal Wastewater Treatment Systems

The Division has made it a priority to bring cases nationwide to improve municipal wastewater and stormwater treatment and collection. Since January 2006, courts have entered more than 40 settlements in these cases, requiring long-term control measures estimated to cost violators approximately \$18 billion.

These cases often involve one of the most pressing infrastructure issues in the nation's cities-- discharges of untreated sewage from aging collection systems. This infrastructure issue particularly affects older urban areas, where low-income and minority communities often live. Raw sewage contains pathogens that threaten public health. Discharges of raw sewage may also lead to beach closures as well as public advisories against consumption of fish. Clean Water Act enforcement also protects national treasures like the Chesapeake Bay.

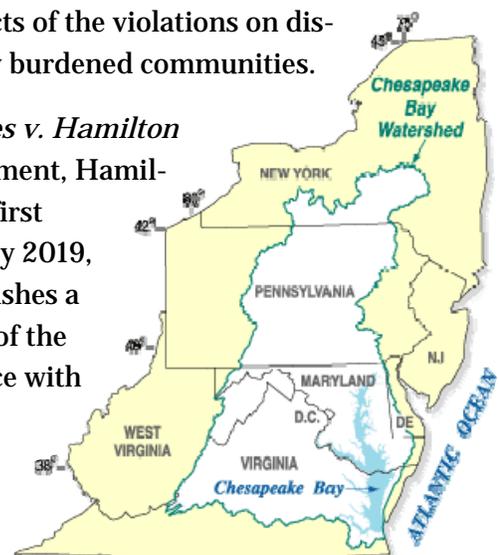
Twelve consent decrees, or amendments to previously entered decrees, with municipalities or regional sewer districts were entered in fiscal year 2010. Collectively, they provide for the expenditure of more than \$4.8 billion in improvements, the payment of \$2.3 million in civil penalties, and the performance of SEPs valued at more than \$1.8 million. A few examples are the following cases:



Kansas City, Missouri

--*United States v. City of Kansas City (Missouri)* resolved CWA violations at one of the nation's largest sewer systems. Under the terms of the consent decree, Kansas City agreed to make extensive improvements to its sewer systems, at a cost estimated to exceed \$2.5 billion over 25 years, to eliminate unauthorized overflows of untreated raw sewage and to reduce pollution levels in urban stormwater. The city will also pay a \$600,000 civil penalty and spend \$1.6 million on SEPs to implement a voluntary sewer connection and septic tank closure program. As discussed previously, the relief in this case was tailored to address the impacts of the violations on disproportionately burdened communities.

--A district court entered an amendment in *United States v. Hamilton County* to two 2004 consent decrees. Under the amendment, Hamilton County and the City of Cincinnati will complete the first phase of an approved Wet Weather Improvement Plan by 2019, at an estimated cost of \$1.3 billion. The plan also establishes a process for determining the schedule for the remainder of the projects required to bring the defendants into compliance with the CWA.



--In *United States v. Hampton Roads Sanitation Dist.*, the district agreed to pay a \$900,000 civil penalty and to take corrective actions to reduce sanitary sewer overflows from its collection system and nine sewage treatment plants that have polluted the Chesapeake Bay and its tributaries in violation of the CWA. Under the consent decree, the district, working with 13 of the counties and cities in Virginia it serves, is required to develop and implement a regional plan to ensure that its sewer system has adequate capacity to handle flows from severe storms and to prevent overflows of sewage. As interim measures, it will make major upgrades and improvements to the system's infrastructure. The total cost of the interim measures and regional plan is expected to be about \$400 million.

--Consent decrees entered in *United States v. City of Duluth* and *United States v. City of Jeffersonville* require those municipalities to spend \$130 million and \$125 million, respectively, to make improvements to their wastewater collection systems to eliminate unauthorized discharges of sewage into local waterways.

--To resolve longstanding violations of the CWA and the Safe Drinking Water Act, the Puerto Rico Aqueduct and Sewer Authority (PRASA) entered into a consent decree requiring it to implement major capital improvements and upgrades needed to manage pollution from 126 drinking water treatment plants. The work is estimated to cost more than \$195 million. Most of the drinking water treatment plants serve populations in low-income communities.

Protecting the Nation's Waters and Wetlands

In *Arc Ecology v. U.S. Maritime Admin.*, ENRD negotiated a settlement that will lead to the maintenance and ultimate disposal of 57 deteriorating reserve vessels anchored in Suisun Bay near San Francisco. The consent decree requires the U.S. Maritime Administration to clean all the vessels within two years and remove all vessels for disposal by September 30, 2017.

The district court dismissed, on jurisdictional grounds, a challenge to a determination by EPA and the Corps that two reaches of the Santa Cruz River in Arizona are traditional navigable waters in *National Ass'n of Home Builders v. EPA*. The agencies' determination was important to preserving CWA protection for waters in the arid west.

Reducing Air and Water Pollution at Other Diverse Facilities

Last year, the Division improved the nation's air quality by concluding a number of civil enforcement actions against industrial facilities. We negotiated two important settlements under the New Source Review provisions of the CAA to reduce air emissions from container glass and Portland cement plants throughout the country. The Division obtained the third settlement, and first company-wide one, in the cement kiln enforcement initiative with the entry of a consent decree in *United States v. LaFarge North America, Inc.* The settlement with LaFarge, the nation's second-largest manufacturer of Portland cement, covers all Portland cement plants owned by LaFarge North America and two of its subsidiaries. A consent decree in *United*

States v. Saint-Gobain Containers, Inc., covers 15 domestic plants owned by Saint-Gobain, the nation's second-largest glass manufacturer. These two settlements are expected to result in the reduction of a combined 41,000 tons of SO₂, NO_x, and PM each year, once the required controls are installed and operating.

LaFarge will install and implement control technologies with an expected cost of up to \$170 million at its cement plants and thereby reduce emissions of NO_x by more than 9,000 tons and SO₂ by more than 26,000 tons per year. In addition, LaFarge agreed to pay a \$5 million civil penalty, \$3.4 million to the United States and \$1.7 million to the 13 participating states and agencies.



Glass Bottles Manufactured by Saint-Gobain

Photo Courtesy of Pierre-Alain Dorange

Saint-Gobain will install pollution control equipment at an estimated cost of \$112 million to reduce emissions of NO_x, SO₂, and PM by approximately 6,000 tons each year. In addition, the company agreed to pay a \$2.25 million civil penalty, \$1.15 million to the United States and \$1.1 million to the 10 states and 2 local regulatory agencies joining the case.

A consent decree in *United States v. Mosaic Fertilizer, L.L.C.*, is the sixth nationwide compliance agreement in a CAA initiative to improve compliance among acid production manufacturers. It resolves claims that Mosaic violated the CAA when

it modified a facility without obtaining pre-construction permits and installing required pollution control equipment. Mosaic, which produces sulfuric acid in connection with the manufacture of fertilizer, will install state-of-the-art pollution control equipment with an estimated cost of \$30 million, at its production facility in Uncle Sam, Louisiana. The decree also requires the company to upgrade existing controls and make multiple modifications to its operating procedures to meet new, lower SO₂ emission limits at the facility. Mosaic also agreed that it will permanently cease sulfuric acid production at its plant in Bartow, Florida. These measures are expected to eliminate more than 7,600 tons of SO₂ annually from the two plants. Mosaic will also pay a civil penalty of \$2.4 million to resolve the alleged violations.

As part of an ongoing effort to ensure that all imported vehicles and engines comply with CAA requirements, the Division reached an agreement in *United States v. The Pep Boys - Manny, Moe & Jack*, under which the defendants resolved allegations that they illegally imported and sold vehicles and engines from 2004 through 2009. The consent decree requires the defendants to pay \$5 million in civil penalties, to export or destroy over 1,300 non-compliant vehicles and engines, and to mitigate the adverse environmental effects of equipment already sold

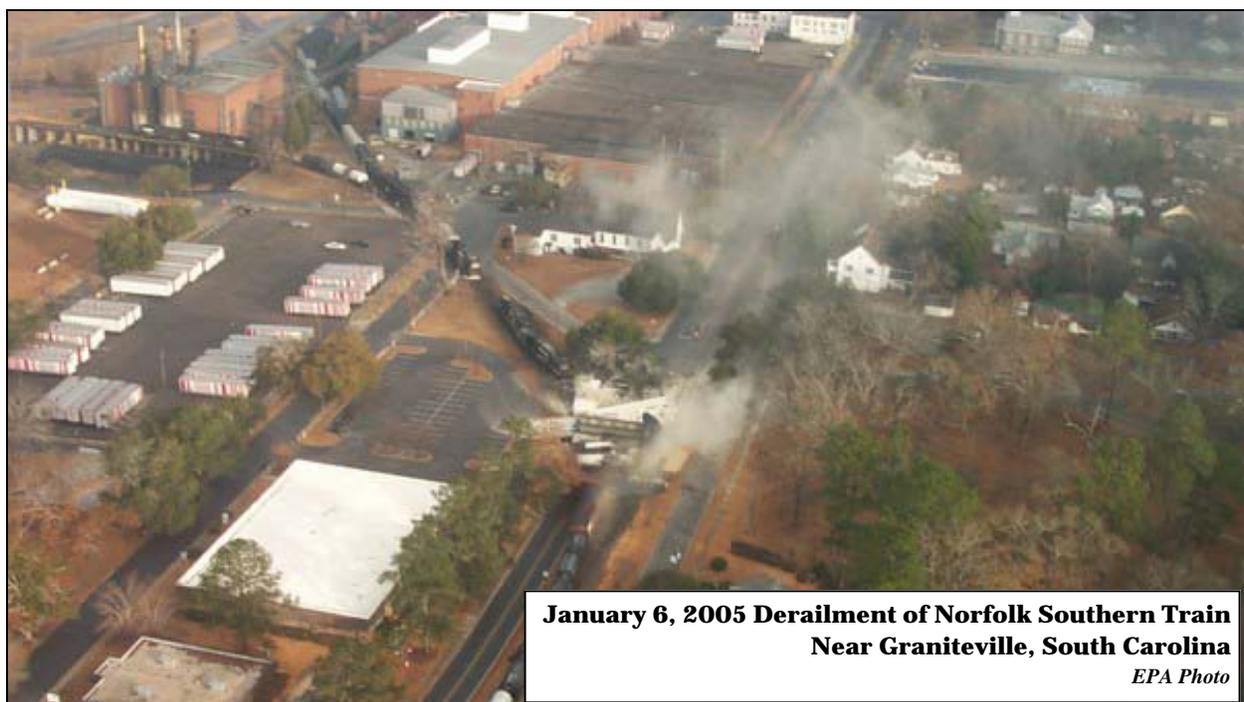
to consumers, which is estimated at more than 7,000 tons of excess emissions. This is the largest vehicle and engine importation case brought to date under the CAA, both in terms of the number of vehicles and engines imported and the penalty paid.

The Division also improved the nation's water quality by concluding a number of civil enforcement actions against industrial facilities. Among the industries agreeing to settle their non-compliance with the CWA are two pipelines, a railroad, and a slaughterhouse:

--Injunctive relief was obtained from two pipeline owners and/or operators for civil violations of the CWA resulting from unauthorized spills into waters of the United States. District courts in Texas and California entered consent decrees in *United States v. Plains All American Pipeline, L.P.* and *United States v. Pacific Pipeline Systems, L.L.C.*, respectively. Plains resolved claims in connection with 10 unauthorized discharges of crude oil occurring in the States of Texas, Louisiana, Kansas, and Oklahoma. Pacific also resolved claims regarding a discharge of oil into Pyramid Lake, north of Los Angeles, California, when the defendant's oil pipeline ruptured. The defendants are undertaking corrective measures estimated to cost \$41 million and \$11.5 million, respectively, to prevent future spills. Collectively, the companies will pay civil penalties totaling \$4.55 million.



--A consent decree entered in *United States v. Norfolk S. Railway Co.* resolved claims relating to a catastrophic train derailment and chlorine spill in Graniteville, South Carolina, causing human fatalities and the death of hundreds of fish in nearby Horse Creek. Under the decree,



**January 6, 2005 Derailment of Norfolk Southern Train
Near Graniteville, South Carolina**
EPA Photo

Norfolk Southern will pay civil penalties of \$4 million, restock fish, and take additional actions to improve water quality in the impacted waters.

--In *United States v. Washington Beef, L.L.C.*, the company will pay a \$750,000 civil penalty and install new wastewater treatment equipment with an estimated cost of \$3 million to resolve allegations of multiple discharges of slaughterhouse wastes from its facility in Toppenish, Washington, to a tributary of the Yakima River.

Ensuring the Safe Treatment, Storage, and Disposal of Waste

According to EPA's Toxic Release Inventory, mining and mineral processing generate more hazardous and toxic waste than any other industrial sector. In fiscal year 2010, the Division concluded the first settlement under EPA's National Enforcement Priority for Mining and Mineral Processing in *United States v. CF Indus., Inc.* The consent decree resolves claims of RCRA violations at the company's Plant City, Florida phosphoric acid and fertilizer manufacturing plant and addresses the practice of commingling hazardous wastes with wastes that are



Management of hazardous waste from mining and mineral processing is a serious matter. The companies targeted in the National Enforcement Initiative for Mining and Mineral Processing cannot proceed with business as usual.

—Ignacia S. Moreno
[United States v. CF Industries Press Release](#)

exempt from regulation in the phosphoric acid production industry. The goals of the priority are to avoid environmental contamination and disasters, and to establish financial assurance to effectively fund all closure and remedial obligations at mining and mineral processing facilities. The settlement requires the company to cease commingling its wastes and operate prospectively according to a stringent set of requirements, to pay \$701,050 in civil penalties, and to provide financial assurance to cover the \$163.5 million needed to fund all closure and long-term care obligations after the facility's useful life ends.

The United States sued U.S. Magnesium Corp., seeking civil penalties and injunctive relief for violations of RCRA at its magnesium production plant in Rawley, Utah. The company asserted that the relevant wastes generated at its plant were exempt from RCRA under an EPA regulation providing that certain hazardous wastes could be treated as non-hazardous if generated through certain mining process operations. EPA argued that the wastes at issue were outside the scope of the regulatory exemption because they were not generated by "mineral processing," but instead were the products of the defendant's efforts to recover useful products from its waste stream. The district court granted summary judgment to the company. The Tenth

Circuit reversed and remanded for further proceedings in *United States v. U.S. Magnesium Corp.* The Court of Appeals held that even if EPA earlier had a different interpretation of the regulation which would have exempted the company's operations, EPA could change its interpretation at any time. Furthermore, although such a change might provide a defense to a claim for civil penalties, it would not provide a defense to a claim for injunctive relief.

There are approximately 600,000 underground storage tanks (USTs) nationwide that store petroleum or hazardous substances. One of the greatest potential threats from a leaking UST is contamination of groundwater, the source of drinking water for nearly half of all Americans. Shortly after trial began, the Division secured the agreement of the defendants in *United States v. Duncan Petroleum Corp.*, to pay a \$2 million civil penalty to resolve RCRA underground storage violations at 17 gas stations in Maryland.

The district court entered a consent decree in *United States v. Rineco Chemical Indus., Inc.*, settling ENRD's claims that Rineco failed to obtain a RCRA permit for its ownership and operation of a hazardous waste management facility. Under the decree, Rineco agreed to pay a civil penalty of \$1.35 million, to apply for the required permit, to take action to control emissions and other corrective measures, and to establish financial assurances for facility operations.



Abandoned Gas Station and Tanks

EPA Photos

In fiscal year 2010, the Division secured agreements with industrial defendants under the **Clean Air Act** to spend an estimated **\$1.2 billion** on corrective measures to reduce harmful air emissions, to pay **\$40.8 million** in civil penalties, and to perform **\$12.4 million** in mitigation projects to offset the harm caused by their unlawful emissions.

In fiscal year 2010, the Division settled cases with industrial defendants under the **Clean Water Act** valued at more than **\$313 million** in injunctive relief, **\$21 million** in civil penalties, and **\$3.5 million** in supplemental environmental projects.

ENSURING CLEANUP OF OIL AND SUPERFUND WASTE

In fiscal year 2010, the Division secured the commitment of responsible parties to clean up hazardous waste sites at costs estimated in excess of

\$753 million;

and recovered approximately **\$643 million** for the Superfund to finance future cleanups and more than **\$182 million** in Natural Resource Damages.



pleted cleanup work and to fund future cleanup work at the Monitor Devices/Intercircuits Superfund Site in Monmouth County, New Jersey.

--In *United States v. Allen Greig, Inc.*, more than 80 settling parties agreed to fund and/or perform a groundwater remedy at the Hows Corner Superfund Site, a former waste oil storage and transfer facility in Plymouth, Maine. The remedy, which is expected to take 100 years to complete, is estimated to cost almost \$15 million.

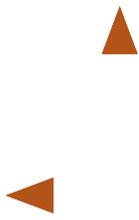
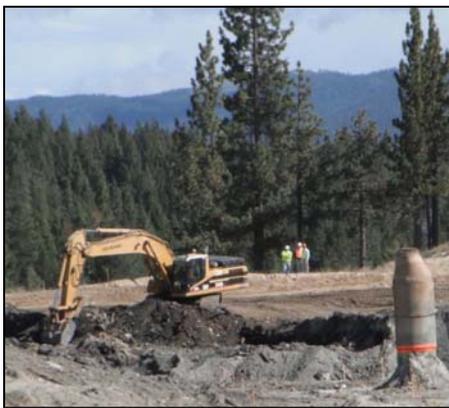
--Through a series of partial consent decrees entered during fiscal year 2010 in *United States v. El Dorado County*, the Division recovered more than \$5.5 million toward cleanup costs, and secured the agreement of one party to perform the first phase of cleanup, estimated to cost \$7.2 million, at the Meyers Landfill Superfund Site, located on Forest Service land in Meyers, Cali-

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 cleanup costs. We also recover Natural Resource Damages (NRD) on behalf of federal trustee agencies.

In fiscal year 2010, we concluded a number of settlements requiring responsible parties to reimburse the United States for cleanup costs, to undertake the cleanup work themselves, or both. Examples include the following cases:

--Pursuant to a consent decree in *United States v. Wall Herald Corp.*, the Division recovered almost \$20 million to reimburse EPA for com-



**Hows Corner
Superfund Site
Plymouth,
Maine**
EPA Diagram

**Remedial Action at Meyers Landfill,
South Lake Tahoe,
California**
U.S. Forest Service Photo

fornia, just outside the City of South Lake Tahoe.

In *United States v. Horsehead Indus., Inc.*, the defendants agreed to resolve NRD claims in connection with the Palmerton Zinc Superfund Site in Carbon County, Pennsylvania, by payment of \$12 million and transfer of approximately 1,200 acres of property, valued at \$8.72 million, to the Commonwealth of Pennsylvania Game Commission. The property contains habitat that is comparable to what would have existed on the lands comprising the Superfund site if not contaminated by the defendants. This is the largest NRD recovery ever in Pennsylvania.

Litigating the Constitutionality of the Superfund Law

The Division achieved an important victory in *General Elec. Co. v. Jackson*. The D.C. Circuit affirmed the district court's grant of summary judgment to the United States, holding that EPA's administration of its unilateral administrative order (UAO) authority under CERCLA comports with the Due Process Clause of the U.S. Constitution. The Court of Appeals rejected the company's facial challenge to the law because it had not shown that UAOs deprive recipients of property before giving them a chance to be heard. The appellate court also held that neither CERCLA's jurisdiction-channeling provisions nor Article III standing principles barred GE's "pattern and practice" claim; however, the claim also failed on the merits because GE failed to show that UAOs deprive recipients of property without a hearing.

Unilateral administrative order authority is a potent tool in achieving prompt cleanup of hazardous waste sites around the country. These orders have resulted in over \$6.5 billion in work or funds for EPA. Historically, use of this authority has provided incentive for responsible parties to settle with the government and perform or fund about 70 percent of all Superfund site cleanups. The Division's success in this case has preserved EPA's ability to continue to use UAOs to efficiently secure work and funding for the cleanup of contaminated properties. The decision may also strengthen the United States' legal position in defending against similar constitutional challenges to unilateral orders issued under other environmental statutes.

Protecting the Public Fisc Against Excessive Claims

The Division also defends lawsuits aimed at interfering with cleanup actions by EPA and other federal agencies. Federal agencies are frequently sued for their activities at contaminated sites that are being remediated. In *Raytheon Aircraft Co. v. United States*, the Tenth Circuit affirmed the district court's judgment, which awarded approximately \$3.2 million in response costs to the United States. Raytheon brought suit under CERCLA, alleging cost recovery and contribution claims related to the removal of trichloroethylene (TCE) at the Herrington Air Field in Kansas, which was operated by the Army Air Corps during World War II. The United States counterclaimed to recover EPA's costs of removing TCE discharged by Raytheon's predecessor, Beech Aircraft, when that company operated the facility during the Korean War. After a 10-day trial, the district court ruled for the United States on all claims, finding it undisputed that Raytheon had used TCE in vapor degreasers in two hangars at the Air Field, and finding it more likely than not that Raytheon had released TCE in its use and maintenance of the degreasers and disposal of TCE. The court also found that Raytheon had not met its burden to show that the Army had used TCE at Herrington or that it needed TCE for the limited aircraft maintenance conducted there. Affirming the favorable judgment in its entirety, the Tenth Circuit found that the district court had not clearly erred in finding that Raytheon failed to meet the evidentiary burden to prove its case.

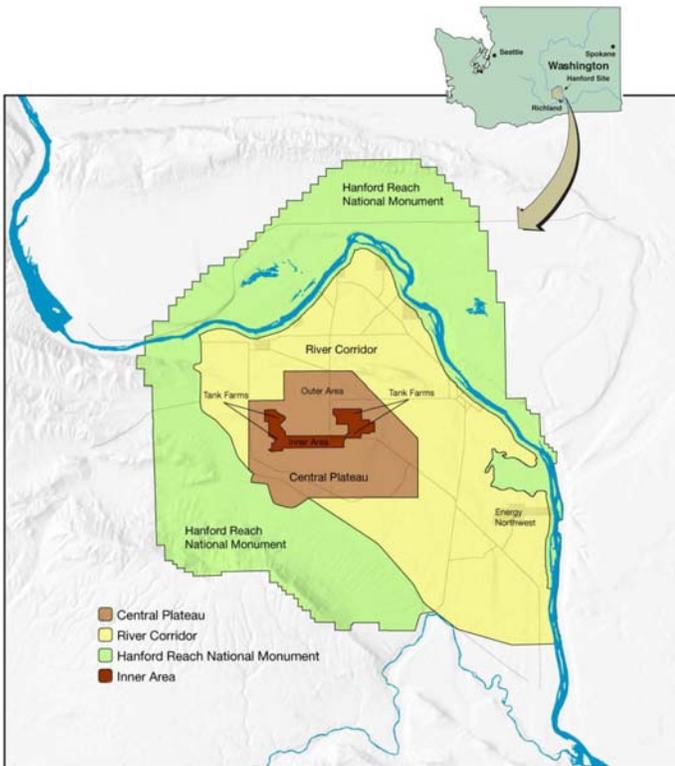
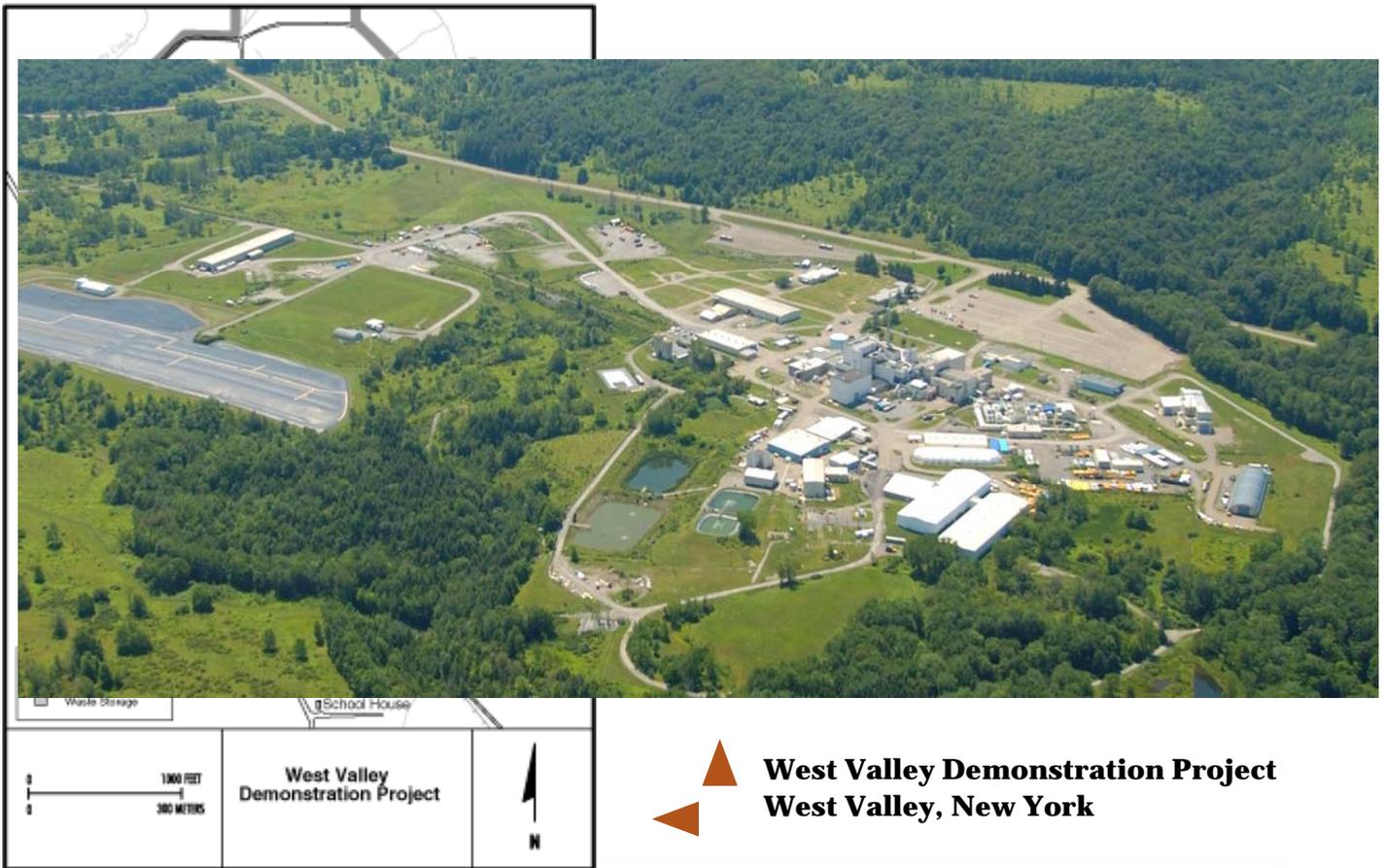
Following a four-week trial, ENRD obtained a largely favorable decision in *Litgo New Jersey, Inc. v. Mauriello*, a case brought by the owner of the former Somerville Iron Works Site in Somerville, New Jersey. The court found that the plaintiff failed to prove its allegations that the United States' involvement at the site during World War II gave rise to liability, but concluded that the United States was liable based on transshipments of waste to the site in the 1980s. Nevertheless, the court found that, as an equitable matter, the United States should bear no more than three percent of the cleanup costs at the site, and based on our counter-claim, that the current owner should bear at least 65 percent of those costs.

The Division settles claims seeking to impose liability for cleanup on federal agencies where a fair apportionment of costs can be reached. In fiscal year 2010, these included such multi-million dollar settlements as *R.E. Goodson Construction Co. v. United States* (response costs for the removal of ordnance at two parcels located at the former Conway Bombing and Gunnery Range in Conway, South Carolina); *Alaska R.R. Corp. v. U.S. Dep't of Transp.* (liability for past and future costs of responding to environmental contamination at the Anchorage Terminal Reserve Site); *In re Fort Worth* (claim for costs arising from the disposal of polychlorinated biphenyls (PCBs) and heavy metals at the former Riverside Wastewater Treatment Plant Site in Fort Worth, Texas); *U.S. Home Corp. v. General Services Admin.* (response costs incurred on a site in Edison Township, New Jersey, that was part of the Army's former Raritan Arsenal); *City of Fresno v. United States* (costs of remediation of a chlorinated volatile organic compound plume at the Fresno-Yosemite International Airport Site in Fresno, California); and *Westinghouse Elec. Co. v. United States* (cleanup costs at a nuclear fuel processing facility in Hematite, Missouri).

In addition, in *New York v. United States*, the Division negotiated a consent decree that determines a division of responsibility between the United States and the State of New York for costs of environmental remediation that will be incurred at the West Valley Nuclear Services Center in New York under the West Valley Demonstration Project Act and CERCLA. In *Washington v. U.S. Dep't of Energy*, we also concluded two landmark consent decrees and a revision to a federal facility agreement. Together, those documents will govern the Department of Energy's retrieval and treatment of mixed hazardous waste stored in single-shell tanks at the Hanford Nuclear Reservation in eastern Washington State (*see p. 36*).

Enforcing Cleanup Obligations in Bankruptcy Cases

We are increasingly filing claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. In fiscal year 2010, the Division secured the greatest commitments ever of responsible parties to clean up hazardous waste sites, of recoveries for the Superfund, and of damages for injuries to natural resources, in the context of several bankruptcy proceedings.



In the largest recovery of money for hazardous waste cleanup ever, debtor American Smelting and Refining Company, L.L.C. (Asarco) paid \$1.79 billion pursuant to its confirmed bankruptcy reorganization in *In re ASARCO, L.L.C.* The Division, in coordination and collaboration with 19 states, completed a four-year trek through the courts when the final plan of reorganization was confirmed by the bankruptcy court in the Southern District of Texas in November 2009 and consummated in December 2009. The plan incorporated the environmental settlements previously approved by the bankruptcy court. The United States received \$776 million, which will be used to fund cleanups at more than 35 different sites; the Coeur d'Alene Work Trust was paid \$436 million to fund cleanup and restoration work in Idaho's Coeur d'Alene Basin; 3 custodial trusts were paid a total of approximately \$261 million to fund cleanup and restoration work at 24 sites in 13 states; and payments totaling in excess of \$321 million were paid to 14 states to fund environmental settlement obligations at over 36 individual sites.

On April 23, 2010, the bankruptcy court approved a settlement between the debtors and the United States in *In re Lyondell Chemical Co.* Under the settlement, the United States received allowed general unsecured claims exceeding \$1 billion in connection with 11 contaminated waste sites, and the debtors also paid about \$160 million to resolve their obligations at 15 sites.

In the settlement of the *In re Chemtura Corp.* bankruptcy proceeding, the United States will receive \$17 million in connection with 19 sites and \$9 million to resolve the debtors' work obligations under administrative and judicial orders at 8 of the 19 sites. The agreement further provides that an earlier agreement by the debtors to perform work at the Laurel Park, Inc. Superfund Site in Connecticut will not be impaired by the bankruptcy.

Nineteen *Chemtura* Sites:

- Beacon Heights Landfill Superfund Site, Beacon Falls, Conn.
- Bio-Lab, Inc. Facility, Conyers, Ga.
- Central Chemical Superfund Site, Hagerstown, Md.
- Cleve Reber Superfund Site, Sorrento, La.
- Cooper Drum Co. Superfund Site, South Gate, Calif.
- Delaware Sand & Gravel Landfill Superfund Site, New Castle, Del.
- Diamond Alkali Superfund Site, Lower Passaic River Area, N.J.
- Gowanus Canal Superfund Site, Brooklyn, N.Y.
- Great Lakes Chemical Corp. Site, El Dorado, Ark.
- Halby Chemical Superfund Site, Wilmington, Del.
- Interstate Lead Co. Superfund Site, Leeds, Ala.
- Jadco-Hughes Facility Superfund Site, Belmont, N.C.
- Landia Superfund Site, Lakeland, Fla.
- Laurel Park Inc. Superfund Site, Naugatuck, Conn.
- LWD Site, Calvert City, Ky.
- Malone Service Co. Superfund Site, Texas City, Tex.
- Red Panther Pesticide Superfund Site, Clarksdale, Miss.
- Stauffer-LeMoyné Superfund Site, LeMoyné, Ala.
- Stoney Creek Technologies Superfund Site, Delaware County, Pa.

— EPA Fact Sheet

PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S WILDLIFE AND NATURAL RESOURCES

Managing the Variety of Resources in the Klamath River Basin

The Klamath River Basin runs from southern Oregon, through northern California, to the Pacific Ocean. The basin is home to four Indian tribes, important federal irrigation projects, and National Wildlife Refuges crucial to migratory waterfowl, and is a historically large producer of salmon. Over the past three decades, it has been the subject of intense litigation over natural resources. The litigation has encompassed water rights adjudications for both tribal and federal lands, important issues under the ESA, and the operation of the Bureau of Reclamation's (BOR) Klamath Project. Civil unrest occurred in summer 2001 over federal ESA actions and, as a result, federal marshals were assigned to protect the BOR project facilities for many weeks.



Klamath Basin National Wildlife Refuge

U.S. Fish and Wildlife Service Photo

The Division worked closely with the Department of the Interior and other federal agencies to draft and negotiate a global settlement regarding the fish, water, and hydropower resources of the Klamath River Basin in Oregon and California. These efforts led to two far-reaching agreements--the Klamath Basin Restoration Agreement (KBRA) and the Klamath Hydropower Settlement Agreement (KHSA)--that were signed on February 18, 2010. Secretary of the Interior Salazar, the Governors of California and Oregon, the Chairs of the Klamath, Yurok, and Karuk Tribes, leaders of environmental groups, the President of PacifiCorp (the owner of a hydroelectric project on the Klamath River), and representatives of the Klamath Basin Water Users Association all participated in the signing ceremony.

The KBRA seeks to reduce the potential for future conflicts in various ways, including by addressing the relative proportions of water available to various stakeholders; improving fish habitat; and purchasing and retiring farmland in the basin, thereby reducing irrigation demands. The KHSA provides a framework for the stakeholders to collaborate on environmental

and economic studies assessing the potential for removal of four PacifiCorp dams. Based on these studies, the United States will decide by 2012 whether to remove the dams. If removal is selected, the dams would be targeted for removal by 2020. The agreements contemplate that removal would be funded by PacifiCorp ratepayers and the State of California. Legislative ratification will be necessary for this to become effective. The overall effect of these agreements will be to reduce water use in the basin and to increase populations of threatened and endangered fish species.

Defending the Federal Columbia River Power System’s Protection of Endangered Salmon

The Federal Columbia River Power System (FCRPS) is managed by the Corps and the BOR. It operates 31 dams in the Columbia River Basin that, through the Bonneville Power Administration, provide the Pacific Northwest with over 50 percent of its electrical power. Two cases, *National Wildlife Fed’n v. National Marine Fisheries Service* and *American Rivers v. NOAA*, challenge the 2008 biological opinion issued by NMFS under the ESA, specifying operating parameters for the FCRPS to protect the Columbia River Basin’s species of anadromous fish, including endangered wild salmon.

The 2008 biological opinion was issued following a court-ordered remand of NMFS’s 2004



biological opinion in this matter. The 2008 biological opinion is the subject of the current litigation in which summary judgment briefing and argument extended from 2008 to 2010. In 2009, after a comprehensive six-month review of the biological opinion by the then-new Administration, NOAA issued an Adaptive Management Implementation Plan (AMIP) to further implement and strengthen the

Thirteen runs of Columbia River salmon and steelhead plus resident bull trout and Kootenai River white sturgeon are listed under the Endangered Species Act. The salmon and steelhead listings include nine runs in the mainstem Columbia and Willamette Rivers and four in the Snake River. Bull trout populations are listed in several parts of Idaho and Montana.

Bonneville Power Administration Map and Fact Sheet

biological opinion. In 2010, ENRD attorneys guided the agencies through a re-initiation of ESA consultation to formally incorporate the AMIP into the biological opinion and advised the district court of the completion of that process in May 2010. The 2008 biological opinion as implemented through the AMIP is the most comprehensive plan for salmon recovery ever adopted in the region.

Litigating the Polar Bear Listing Decision



U.S. Fish and Wildlife Service Photo

In May 2008, the FWS listed the Polar Bear as a threatened species under the ESA, based on the loss of sea ice habitat due to Arctic warming caused by man-made climate change. By fall 2008, 10 suits challenging the listing had been filed by environmental groups, oil and gas industry representatives, and the State of Alaska. The Environment and Natural Resources Division successfully supported a multi-district panel's consolidation of the cases in the district court in Washington, D.C., as *In re Polar Bear Endangered Species Litigation*.

In 2010, a team of ENRD lawyers handled the defense of this decision on multiple fronts: challenges to FWS's decision to list the Polar Bear as a threatened species under the ESA, to an accompanying ESA section 4(d) rule outlining certain conditions regarding application of the rule, and to FWS's denial of permits to import Polar Bear trophies. Over a four-month period, ENRD filed more than 300 pages of summary judgment briefing in defense of the rules.

The crux of the claims is the legitimacy of the findings of the Intergovernmental Panel on Climate Change and related work by the U.S. Geological Survey, on which the listing determination is based.

Balancing Species Protection and Other Water Uses

As in past years, the Division was called upon to handle litigation addressing the balance between the competing needs of species and other water users such as agricultural, municipal, industrial, and tribal interests. The Division successfully handled a number of these cases.

The Central Valley Project (CVP) in California is the largest federal water management project in the United States, providing power and drinking water for about 30 million people and supporting over \$10 billion in agricultural interests in more than 200 water districts. At the same time, the operation of the CVP affects several species of fish that inhabit the California Bay Delta and are listed as either endangered or threatened under the ESA, including the Delta Smelt and several species of salmon. In 2008 and 2009, respectively, FWS and NMFS issued biological opinions setting forth operating parameters for the system intended to ensure adequate water supply while still providing needed protections for these fish species. Multiple water users and agricultural interests challenged these biological opinions in *San Luis & Delta-*

Mendota Water Auth. v. Salazar and *San Luis & Delta-Mendota Water Auth. v. Locke*. In 2010, Division attorneys defended these decisions in multiple emergency motions proceedings, including in several evidentiary proceedings involving extensive and highly complex competing expert testimony. They also produced hundreds of pages of summary judgment briefing in defense of the decisions. In the end, the biological opinions were implemented in large part as set forth by the agencies.

In *re Tri-State Water Rights Litigation* is multi-district litigation involving a long-standing water dispute among the States of Florida, Georgia, and Alabama with regard to the Corps' operations in the Apalachicola-Chattahoochee Flint Basin and the effects of those operations on ESA-listed mussel species. During 2010, ENRD attorneys briefed and argued the defense of FWS's biological opinion addressing the effects of these operations on the mussel species and obtained judgment in the agencies' favor on all ESA claims in this litigation.



Bureau of Reclamation Map



Glen Canyon Dam

Bureau of Reclamation Photo

The Bureau of Reclamation operates the Glen Canyon Dam on the Colorado River for multiple purposes, including recreational and water supply needs. In recent years, BOR adopted an updated operating plan to continue to provide for those needs while also protecting the Humpback Chub, an endangered fish. In *Grand Canyon Trust v. BOR*, ENRD attorneys successfully defended this plan of operations, obtaining a judgment upholding the plan in large measure.

Defending the Constitutionality of the ESA

As noted above, FWS issued biological opinions setting forth operating parameters for the CVP in California intended to ensure adequate water supply while providing needed protections for the threatened fish species, including a wholly intrastate species, the Delta Smelt. In *In re Consolidated Delta Smelt Cases*, a group of agricultural interests challenged FWS authority to do so, arguing that application of the ESA to a purely intrastate species exceeds the federal government's power under the Commerce Clause in violation of the U.S. Constitution. The Environment and Natural Resources Division successfully defeated this challenge and defended the act's constitutionality. The district court concluded in line with several other courts that the ESA was a valid exercise of congressional power under the Commerce Clause.

Litigating FWS Critical Habitat Designations for Listed Species

When a species is listed as endangered or threatened under the ESA, the act also requires FWS to designate critical habitat comprised of those geographic areas containing physical and biological features essential to the conservation of the species. During this process, FWS must also consider economic and other impacts of the critical habitat designation and may exclude areas from the designation if it determines the benefits of exclusion outweigh the benefits of inclusion. As these designations often encompass private property, they are considered controversial and subject to judicial challenge. The Environment and Natural Resources Division successfully defended several such challenges this year:



USFWS Photo

--In *Arizona Cattle Growers Ass'n v. Salazar*, the Ninth Circuit affirmed the district court's grant of summary judgment to FWS in a challenge to the agency's designation of 8.6 million acres of land as critical habitat for the threatened Mexican Spotted Owl. The instant rule, promulgated in 2004, was the agency's third attempt to designate critical habitat for the owl. The Court of Appeals rejected the association's assertion that the Service treated too much land as "occupied," adopting the Service's reasoning that land could be deemed occupied if the land is susceptible for use by the owl. The court also approved the Service's method for assessing economic impacts from the critical habitat designation. Here, the Service only assessed economic impacts directly resulting from the designation of critical habitat. It excluded consideration of economic impacts attributable to the listing of the owl under the ESA.

--Summary judgment was also affirmed in *Home Builders Ass'n of California v. U.S. Fish & Wildlife Service* in favor of the FWS on challenges to its designation of 850,000 acres of land as critical habitat for 15 endangered and threatened species that inhabit vernal pools, a unique wetland ecosystem that exists only temporarily. The Ninth Circuit concluded that the Service had no obligation to predict when the species would be conserved and would no longer need the protection of the ESA prior to designating critical habitat. It also ruled that in determining the economic impacts of the designation, the Service did not have to consider the costs of complying with other federal and state environmental statutes and that the Service could designate

as critical habitat areas that did not simultaneously contain all of the physical or biological features essential to the conservation of the species.

--In *Otay Mesa Property v. DOI*, the court upheld the inclusion of a 143-acre tract in San Diego owned by 3 corporations in the designated critical habitat for the San Diego Fairy Shrimp, an endangered species.



Vernal Pool

EPA Photo

--In a pair of consolidated cases, *Maddalena v. FWS* and *Center for Biological Diversity v. FWS*, off-road vehicle users and environmental advocacy groups challenged FWS's revised designation of critical habitat for a threatened desert plant known as the Peirson's Milk Vetch, which lives in a popular off-road vehicle recreation area in the United States. The off-road vehicle users claimed that the designation was over inclusive while the environmental advocacy groups argued it was under inclusive. The court granted ENRD's motion for summary judgment in its entirety and denied both sets of plaintiffs' motions for summary judgment.

--The court upheld a critical habitat designation for the wintering population of Piping Plovers in Cape Hatteras, North Carolina, against claims that the designation was over inclusive in *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*.



Courtesy of Nebraska Game and Parks Commission

Designating Experimental Populations Under the ESA

In *Forest Guardians v. U.S. Fish and Wildlife Service*, the Tenth Circuit affirmed the district court's judgment for the FWS in a challenge to the Service's designation of a non-essential, experimental population of the endangered Northern Aplomado Falcon in Arizona and New Mexico under section 10(j) of the ESA. The appellate court found that substantial evidence supported the Service's conclusion that a naturally occurring falcon population does not exist in the experimental area. The court also concluded that the Service had not violated NEPA by predetermining the outcome of its environmental analysis.

Defending the ESA Ban on Importing Listed Species

The Endangered Species Act prohibits the importation into the United States of species listed as endangered in the United States or under the Convention on International Trade in Endangered Species (CITES) absent a valid permit. In 2010, ENRD handled several challenges to forfeiture actions arising from importation without permits and to denial of import permits. In *Conservation Force v. Salazar*, the plaintiffs attempted to import sport-hunted leopard trophies from Namibia and Zambia with defective or missing export permits in violation of CITES

and the ESA. The Fish and Wildlife Service seized and administratively forfeited the plaintiffs' trophies. The plaintiffs then challenged the forfeiture on a variety of grounds. After briefing and argument by ENRD attorneys, the court upheld the forfeiture action and dismissed all claims with prejudice. In another case also styled *Conservation Force v. Salazar*, the court dismissed for lack of jurisdiction challenges to FWS's alleged failure to process the plaintiffs' applications for permits to import sport-hunted wood bison trophies.

Balancing Species Protection and Other Resources Demands on Forest Lands

Under several statutes, the Forest Service is directed to manage national forests for multiple resource development and other uses. At the same time, it is also required to provide for species protection and conservation. These competing mandates often lead to litigation. The Division successfully defended decisions of the Forest Service balancing these demands in several cases in 2010:

--In *League of Wilderness Defenders v. Allen*, the Ninth Circuit reversed the district court's grant of summary judgment to the plaintiffs. The district court had enjoined the Forest Service from carrying out the Five Buttes Project, which is designed to reduce fuel loadings and fire risk and to improve habitat in the Deschutes National Forest in Oregon. The Court of Appeals



Deschutes National Forest

U.S. Forest Service Photo

majority found that the Forest Service had permissibly determined that the Northwest Forest Plan permitted limited commercial timber harvest in a late-successional reserve where such thinning would clearly result in greater long-term maintenance of habitat and was clearly needed to reduce risks of fire and disease. The majority concluded that the Forest Service had properly balanced the benefits of such risk reduction against the possible harm to Northern Spotted Owls, and found that this balancing “goes to the very heart of the Forest Service’s expertise” to which a reviewing court must defer. The appellate panel also upheld the Service’s environmental review under NEPA, finding that the Service had adequately considered and responded to alternative views about the project’s potential environmental consequences.

--The Division secured dissolution of an injunction in *Swan View Coalition v. Barbouletos*, after FWS issued a valid biological opinion addressing the effects of snowmobiling activities on listed Grizzly Bears in the Flathead National Forest.



--In *Ark Initiative v. U.S. Forest Service*, the court found that the Forest Service had properly discharged its duties in addressing an amendment to a master plan for the Snowmass Ski Area in Colorado.



Flathead National Forest U.S. Forest Service Photos

Defending NMFS Ocean Harvest Management

The Magnuson-Stevens Fishery Conservation and Management Act charges NMFS with the difficult task of managing ocean commercial fishing to provide for conservation and sustainable fishing while, at the same time, optimizing yield. In 2010, ENRD successfully defended NMFS’s balancing of these often-competing objectives. In *General Category Scallop Fishermen v. Locke*, the court upheld NOAA’s methodology for determining eligibility for permits and limiting access to the Scallop Fishery in the Atlantic Ocean. In *Oceana v. Locke*, the court rejected challenges to the NMFS standard by-catch reporting methodology that set the rules for the reporting of fishing by-catch in 13 federal fisheries in the northeast. In *Van Valin v. Locke*, the court upheld certain catch limits on fishing charter vessels imposed under the Northern Pacific Halibut Act of 1982 intended to protect the Pacific Halibut Fishery. In *Gulf Restoration Network v. NMFS*, ENRD obtained dismissal of a challenge to the Gulf Council’s Fishery Management Plan for regulating offshore marine aquaculture in the Gulf of Mexico.

Equally important to successful fishery management is ensuring that violators of fishing regulations are held accountable for violations so that a fair playing field is maintained for all involved in the fishery. For example, in *Gonzalez v. Dep’t of Commerce*, ENRD attorneys suc-

The **Magnuson-Stevens Act** created eight regional **Fishery Management Councils**, with membership from commercial and recreational fisheries, academics, the conservation community, states, tribes, and other stakeholders.

The councils work with the **National Marine Fisheries Service** to compile scientific findings about fisheries in their region, along with historic and statistical data and current concerns, and incorporate them into **Fishery Management Plans**.



cessfully defended NMFS permit sanctions for fishery violations in the Shrimp Trawl Fishery in the Gulf of Mexico. In *Duckworth v. Gutierrez*, the court upheld NMFS's penalty assessment of \$100,000 and permit suspension for violations occurring in the American Lobster Fishery.

Securing Critical Water Rights and Water Supplies

The United States brought suit against the Truckee-Carson Irrigation District and other water users alleging that they diverted water in excess of specified operating criteria from the Truckee River into the Newlands Reclamation Project in Nevada between 1973 and 1987. The unlawful diversions reduced flows to the lower Truckee River and Pyramid Lake, home of the Pyramid Lake Paiute Tribe and two species of endangered and threatened fish. The district court held that the irrigation district had diverted more water than allowed, but awarded far less water than the United States sought. All sides appealed. In *United States v. Truckee-Carson Irrigation Dist.*, the Ninth Circuit rejected the irrigation district's challenges to the district court's rulings allowing the United States to recover water. The appellate court also reversed on the three issues appealed by the United States with regard to the amount of water awarded, holding that the district court: (1) clearly erred in making across-the-board reductions based on the margin of error in the canal gauge readings; (2) clearly erred in denying recovery for water that

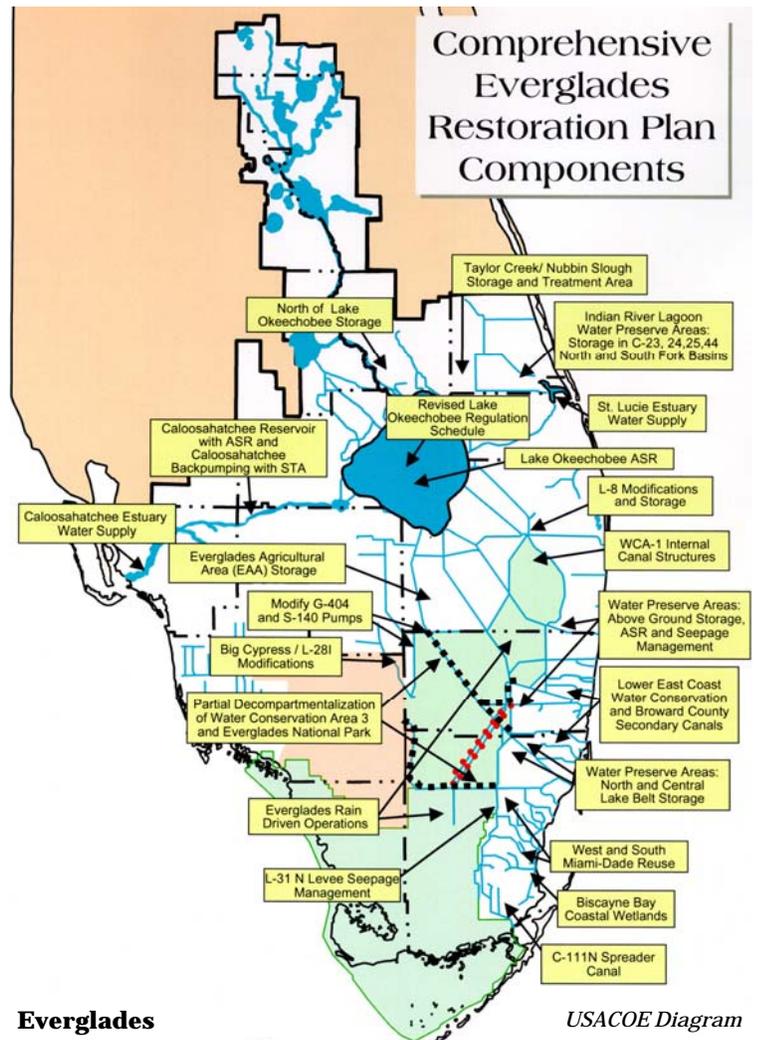


Truckee River Map Courtesy of K. Musser

was spilled from the reservoir and not put to beneficial use during 1981-1984; and (3) abused its discretion in denying pre-judgment interest based on the United States' purported delay in filing suit and inadvertent destruction of certain documents. The Ninth Circuit remanded the case to the district court for further proceedings in accordance with its opinion. This decision will effectuate relief mandated by Congress through the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 to encourage settlement of litigation and pending claims, to fulfill trust obligations to the tribe, and to promote the recovery of the unique fish populations of Pyramid Lake in Nevada.

Restoring Critical Natural Resources and Ecosystems

In *United States v. South Florida Water Mgmt. District*, a special master issued a report recommending that the district court grant a July 2010 motion filed by the United States to enforce the 1992 consent decree entered in this case with the Florida Department of Environmental Protection and the South Florida Water Management District concerning phosphorus pollution from agricultural runoff in the Everglades. The special master agreed with the federal government that the State of Florida must enforce stricter limits on phosphorus pollution in water discharged to the Loxahatchee National Wildlife Refuge, and must achieve compliance with "Class III" water quality standards throughout the refuge. This decision will promote the United States' efforts to restore water quality needed to protect natural populations of flora and fauna in Everglades National Park and elsewhere in the remaining Florida Everglades. This cleanup



is a critical component of the largest ecosystem restoration effort in human history--the Comprehensive Everglades Restoration Plan, approved by Congress in 2000, with a cost of \$7.8 billion over 20 years, to be funded jointly by the United States and the State of Florida.

The United States also brought several condemnation actions in district court in Florida to acquire lands on behalf of the National Park Service for expansion of Everglades National Park. The Division exercises the federal government's power of eminent domain to acquire land for public purposes and secure the Fifth Amendment guarantee of just compensation in amounts that are fair to property owners and to taxpayers. In *United States v. 567 Acres of Land in Dade County*, the district court approved the parties' stipulation setting just compensation at \$1.2 million for 2 adjacent 567-acre tracts on the eastern edge of Everglades National Park (approximately \$1,058 per acre). The landowners originally asserted a value exceeding \$3.7 million (approximately \$3,300 per acre). In four separate actions for condemnation of a total of approximately 950 acres of land, the district court ordered compensation of \$1,573,000--the value advocated by the United States' appraiser--following a multi-day trial in January 2010. The landowners had claimed just compensation of \$6,831,795.



Everglades

CERP Photo

We also filed seven new cases to acquire lands in Miami-Dade County, Florida, for Everglades National Park on behalf of the National Park Service. Total estimated just compensation was only \$2,800; all were for the purpose of clearing title to very small tracts of land.

Three new cases were filed to acquire lands located in Collier County, Florida, for Big Cypress National Preserve on behalf of the National Park Service. Total estimated just compensation was \$88,550.

Litigating Federal Land Management Programs and Policies

The federal government manages vast swaths of land for a variety of purposes, including timber management in national forests, recreation in national parks, and resource development on public lands. Land management programs and policies often are the focus of competing interests for the use of public lands and become the subject of litigation. In fiscal year 2010, the Division continued to successfully defend the wide-ranging forest management activities of the Forest Service and BLM:

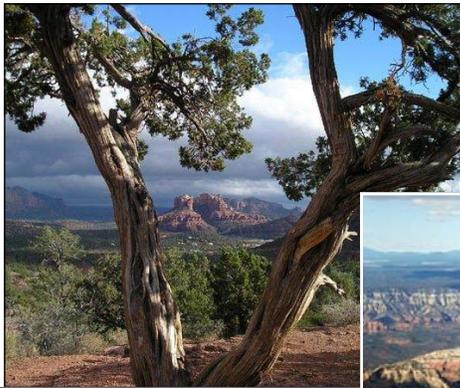
--In *Center for Biological Diversity v. U.S. Forest Service*, ENRD prevailed in its defense of the Warm Fire Recovery Project on the Kaibab National Forest near the Grand Canyon, which allowed the Forest Service's recovery effort to proceed after more than 39,000 acres of the for-

est burned in 2006. The court also determined that the Forest Service had adequately considered potential effects on the threatened Mexican Spotted Owl and its critical habitat.

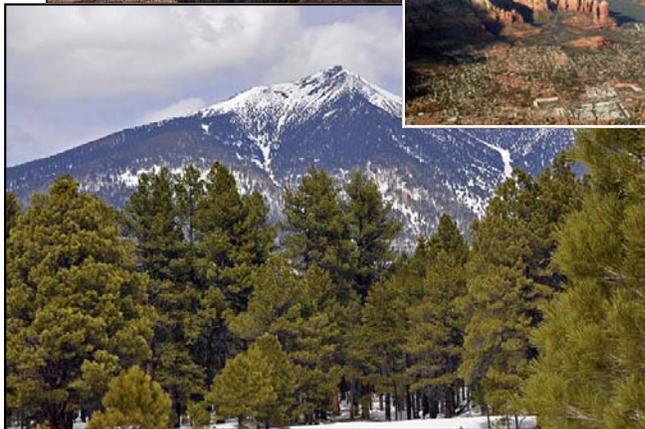


--The Division successfully opposed challenges in *Klamath-Siskiyou Wildlands Center v. Grantham* to a timber salvage sale designed to address conditions following a devastating forest fire in the Klamath National Forest. The project also provided needed jobs in an economically distressed area.

--In *Save the Peaks Coalition v. United States Forest Service*, the court rejected a challenge to the Forest Service's decision to allow the installation and use of snowmaking facilities using reclaimed wastewater in the Coconino National Forest in Arizona, an area of the country where water conservation is at a premium.



Coconino Forest is one of the most diverse National Forests in the country, with landscapes ranging from the famous Red Rocks of Sedona to Ponderosa Pine forests to alpine tundra.
U.S. Forest Service Photos



--The Division also successfully defended the Forest Service’s imposition of user fees for high impact areas of forests under the Federal Lands Recreation Enhancement Act (REA). The plaintiffs in *Adams v. U.S. Forest Service* and *Sherer v. U.S. Forest Service* challenged user fees collected by the Forest Service under its REA authority, and in both cases the district court affirmed the agency’s interpretation of the statute and its authority to collect a fee in High Impact Recreation Areas.

The Division continues to defend challenges brought against travel management plan revisions pertaining to motorized recreational use in the national forests. In one such case, *American Independence Mines & Minerals Co. v. U.S. Dep’t of Agriculture*, we successfully argued that an organization of mining companies with only economic interests at stake was not a proper plaintiff in a challenge to the management of the Payette National Forest in Idaho. In *Citizens for Balanced Use v. Heath*, ENRD successfully defended the Forest Service’s decision to restrict motorized use in a wilderness study area in the Gallatin National Forest in Montana.

Defending BLM Stewardship of Wild Horse Herds

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, but also requires BLM to remove excess horses from the range (called a “gather”) when the numbers of horses exceeds carrying capacity. The gathers of excess horses are important for maintaining the health of the range. Under this mandate, BLM recently carried out a number of gathers to remove excess horses from the wild and hold them available for adoption. These gathers are often subject to judicial challenge in the context of a complaint filed with a motion for a temporary restraining order and/or preliminary injunction. ENRD prevailed in a series of emergency and dispositive legal challenges filed last year to BLM decisions to gather wild horses from public lands. The plaintiffs in the cases alleged inadequate environmental analysis under the NEPA and violation of the Wild Free-Roaming Horses and Burros Act. ENRD successfully defended BLM’s gather decisions in Nevada and California on requests for emergency relief in *In Defense of Animals v. Salazar*; *Jubic v. United States*; *In Defense of Animals v. Dep’t of Interior*; and *Leigh v. Salazar*.



Bureau of Indian Affairs Photo

Defending FWS Implementation of the MMPA

Under the MMPA, entities are prohibited from harassing marine mammals incident to otherwise lawful activities except as permitted by regulation. In *Center for Biological Diversity v. Salazar*, the Ninth Circuit upheld a regulation promulgated by FWS under section 101(a)(5) of the MMPA that authorized for a five-year period the non-lethal incidental “take” of Polar Bears and Pacific Walrus during oil and gas activities on the North Slope of Alaska and in the



Pacific Walrus

Photo Courtesy of Joel Garlich Miller/USFWS

Beaufort Sea. The panel rejected the plaintiffs’ argument that the regulation’s authorization of incidental take from “oil and gas exploration, development, and production activities” was overly broad. It also upheld the Service’s finding that issuance of the incidental take regulation would not cause more than a negligible impact on the Polar Bears, holding that the Service could reasonably conclude that such a threat could not be “reasonably expected” to manifest itself in the context of the oil and gas activities covered by the incidental take regulation. Finally, the Court of Appeals rejected claims that the threat of significant adverse effects on Polar Bears required an Environmental Impact Statement, rather than an Environmental Assessment, under NEPA.

CRIMINALLY ENFORCING OUR NATION'S POLLUTION AND WILDLIFE LAWS

Investigating the Deepwater Horizon Oil Spill in the Gulf of Mexico

In cooperation with criminal investigators from the local U.S. Attorneys' Offices, the Department of the Interior, EPA, the FBI, and other investigatory agencies, the Division launched a

wide-ranging investigation into the explosion of the Deepwater Horizon offshore rig and the subsequent discharge of oil into the Gulf of Mexico to determine the applicability of criminal charges under the CWA as well as other traditional criminal statutes.

From fiscal year 1997 through fiscal year 2010, the Division concluded criminal cases against more than 900 individuals and 350 corporate defendants, obtaining over

500 years
of incarceration and
\$785 million
in criminal fines
and restitution.

Reducing Pollution from Ocean-Going Vessels

Under the auspices of the Vessel Pollution Initiative which began in the late 1990s, the penalties imposed in vessel pollution cases prosecuted by ENRD have totaled more than \$230 million, and responsible maritime officials have been sentenced to more than 20 years of incarceration. In fiscal year 2010, the Division's successful prosecution of deliberate violations included the representative cases below.

Fleet Management, Ltd. (Fleet), a Hong Kong ship management company, was sentenced to pay an \$8 million fine and a \$2 million community service payment to fund marine environmental projects in San Francisco Bay, after pleading guilty to CWA violations, obstruction, and making false statements in connection with the oil spill from the *M/V Cosco Busan*, which ran into the Bay Bridge in November 2007. Fleet must successfully complete a three-year term of probation and implement an enhanced compliance program.

In a separate matter, Fleet was also sentenced to pay a \$3 million fine and successfully complete a four-year term of probation upon its convictions for failing to maintain an accurate oil record book in violation of the Act to Prevent Pollution from Ships (APPS), making false statements to the U.S. Coast Guard, and obstruction of an agency proceeding. The counts arose from violations on the *M/V Lowlands Sumida*. Through the use of a false sounding tube that

showed a fuel oil tank to be empty, oily waste water could be concealed therein until it was discharged overboard. When the Coast Guard removed the false sounding tube and measured the contents of the tank, it determined the tank was almost half full with oily wastewater.

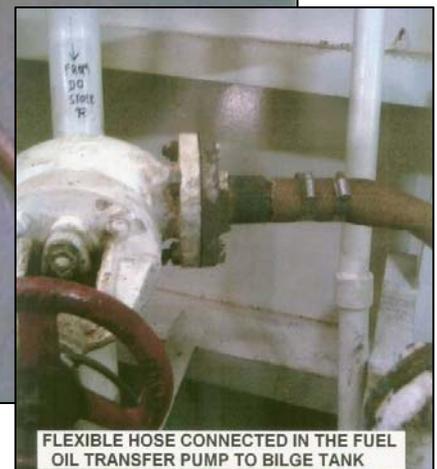


Shipping Vessel

USCG Photo

Irika Shipping, S.A., a ship management corporation registered in Panama and doing business in Greece, was sentenced to pay a \$3 million criminal fine and \$1 million in community service payments to fund various marine environmental projects, and to serve the maximum of five years' probation, subject to following a compliance program that includes audits by an independent firm and oversight by a court-appointed monitor. This sentence was pursuant to a multi-district plea

agreement arising from charges brought in the District of Maryland, Western District of Washington, and Eastern District of Louisiana, including felony violations of APPS and obstruction-of-justice charges based upon false statements to the Coast Guard, destruction of evidence, and other acts of concealment. During an inspection, the Coast Guard obtained photographs taken by a crew member showing the use of a 103-foot-long "magic hose" to bypass the ship's oily water separator. The illicit bypass system used to discharge oily waste, including sludge, was routed through the ship's boiler blow-down system where any trace of oil could be expected to be steam cleaned away. The illegal discharges were concealed in a fraudulent oil record book, a required log in which all overboard discharges are to be recorded. At the time of this offense, Irika was still on probation in Washington for a prior conviction in 2007.



Bypass Hose

Guilty pleas were entered in eight additional cases involving deliberate violations by vessel operators and crew members: *United States v. Transmar Shipping Co.*; *United States v. ChemOcean Shipping, Ltd.*; *United States v. Polembros Shipping, Ltd.*; *United States v. Stanships, Inc.*; *United States v. Offshore Vessels, L.L.C.*; *United States v. Cooperative Success Maritime, S.A.*; *United States v. Fleet Mgmt., Ltd.* (a third conviction); *United States v. Styga Compania Naviera*. These companies and individuals were sentenced to pay a total of \$4,679,500 in fines, \$600,000 in community service, \$175,000 in restitution, and over 10 months of incarceration, with each serving a term of probation for crimes including conspiracy, false statements, obstruction of justice, and oil record book violations under APPS.

Safeguarding America's Waters

Last August, DHS, Inc., doing business as Roto Rooter, its president, Donald Gregory Smith, and manager William Wilmoth, Sr., were convicted by a jury, variously, of conspiracy, knowing and negligent CWA violations, and mail fraud, for dumping thousands of gallons of waste grease and oil into the sewer system in Mobile, Alabama. After a decade during which the City of Mobile's sewage system experienced hundreds of overflows, most of which were caused by the blockage of sewer lines and treatment works with solidified grease, the Mobile Area Water and Sewer System entered into a consent decree with EPA under which it implemented a grease control program requiring restaurants and other food service establishments to install grease traps to prevent cooking oils from entering the sewer system. Roto Rooter and its employees were hired to appropriately dispose of this waste grease, but they instead discharged it into the public sewer system, causing the violations and creating the harm that their customers had paid them to prevent.

In January 2011, DHS, Inc., was sentenced to pay a \$238,000 fine plus \$5,975 in restitution, and it will complete a three-year term of probation. Donald Gregory Smith will pay a \$150,000 fine, and was held jointly and severally liable for the restitution. Smith also will complete a one-year term of probation. William Wilmoth, Sr., will serve 30 days of incarceration, followed by 60 days of home confinement. Wilmoth also will perform 200 hours of community service.

The Mobile Area Water and Sewer System provides drinking water and sanitary sewer service for more than 200,000 people in the Mobile metropolitan area. The source of drinking water is the J.B. Converse Reservoir, better known as Big Creek Lake, which is located in the western part of Mobile County. The 3,600-acre reservoir, completed in 1952, holds 17 billion gallons and is continually fed by groundwater, streams, and rainfall.

—MAWSS Website

Protecting the Environment, Public Health, and Worker Safety

Paul and Steven Mancuso were convicted by a jury of conspiracy to defraud the United States, to violate the CAA, to violate CERCLA, and to commit mail fraud, for the illegal removal of asbestos from numerous locations throughout central and upstate New York. Ronald and Lester Mancuso pleaded guilty to the charges. Paul Mancuso had twice previously been convicted of illegal asbestos removal activity and prohibited from participation in the field. Nevertheless, the Mancusos thereafter engaged in numerous illegal asbestos abatement projects that contaminated various businesses and homes. On multiple occasions, they also dumped asbestos from removal jobs on roadsides and in the woods. The Mancusos were sentenced to terms of incarceration totaling 158 months.



File of Dumped Asbestos (Foreground)



Warning Label Near Dumped Asbestos

In January 2010, 10 certified vehicle emissions testers were charged in separate indictments for CAA violations for engaging in a practice known as “clean scanning” vehicles. The scheme involves using vehicles the testers know will pass emissions tests for the actual test, but entering into the computerized system the vehicle identification number for a vehicle that will not pass. The falsifications were performed in exchange for varying amounts of money in excess of the usual emissions testing fee. Each of the individuals performed hundreds of false emissions tests. To date, seven of the defendants have entered guilty pleas.

EPA has strict rules under the CAA regarding the manner in which asbestos may be removed from buildings during demolition or remodeling projects in order to protect the health of workers. Starnes and George were sub-contractors on a project in the Virgin Islands to demolish a low-income housing project as part of a redevelopment effort. They were charged and convicted of intentionally failing to follow asbestos removal procedures and filing false reports regarding their compliance efforts. In *United States v. Starnes* and *United States v. George*, the Third Circuit upheld the defendants’ convictions and sentences (33 months of imprisonment, three years of supervised release, and a special assessment of \$1,600).

Keeping Nuclear Power Safe

The Sixth Circuit affirmed the convictions of David Geisen and Andrew Siemaszko for making false statements and material false omissions in a matter within the jurisdiction of the Nuclear Regulatory Commission (NRC). Geisen was a manager for the First Energy Nuclear Operating Company, which operates the Davis-Besse Nuclear Power Station near Toledo, Ohio. Siemaszko was the reactor coolant systems engineer. Geisen and Siemaszko prepared reports that significantly and falsely overstated the comprehensiveness and quality of past inspections, all in an effort to convince the NRC that Davis-Besse was safe to operate until a regularly scheduled shut-down of the plant would occur for a normal maintenance inspection. When that inspection finally occurred, investigators found five cracked nozzle heads and a football-sized cavity caused by boric acid erosion in the head of the reactor, conditions which would have been discovered much sooner had proper inspections been conducted.



Davis-Besse Nuclear Power Stn. NRC Photo

Prosecuting Illegal Commercial Fishing

The Environment and Natural Resources Division convicted 19 individuals and 3 corporations in a series of cases filed in Maryland, the District of Columbia, and Virginia, that resulted from a multi-year, joint federal and state investigation of trafficking rings in the Chesapeake Bay watershed that were illegally harvesting and selling millions of dollars worth of striped bass, known locally as rockfish. Striped bass are prized commercial fish recovering from stocks so



severely depleted that fewer than 20 years ago commercial harvest was banned entirely. The watershed is the major east coast breeding ground for this species. The market value of the striped bass illegally harvested in this investigation was between \$4 and \$6 million. The total poundage of illegal harvest exceeded the annual commercial catch allocated to two of the seven east coast states that allow commercial fishing. Combined, the individuals were sentenced to more than 140 months in prison, and total fines and resti-

tution exceeded \$1,360,000. The case also resulted in the State of Maryland changing its regulations to attempt to close weaknesses in the regulatory scheme exploited by the defendants and exposed by the prosecutions.

After pleading guilty to importing falsely labeled goods into the United States and selling falsely labeled fish in the United States with the intent to defraud, Thomas George was sentenced to serve 22 months of incarceration. George and a Vietnamese distribution company engaged in a scheme to falsely identify the purchase and importation of Vietnamese catfish in order to evade the applicable anti-dumping duties. George instructed the Vietnamese company

to fraudulently identify the Vietnamese catfish as "grouper" on commercial contracts, purchase orders, and other documents because grouper was not subject to any anti-dumping duties. In addition to the prison term, George must pay \$64,173,839 in restitution for the unpaid federal tariffs, plus make a \$50,000 community service payment to the National Fish and Wildlife Foundation for research into the identification of fish and other marine organisms.

Stopping Illegal Wildlife Trafficking

Taiwanese nationals Ivan and Gloria Chu were sentenced to 30 months of incarceration and 20 months of incarceration, respectively, for their involvement in illegal shipments of internationally protected black coral into the United States. Each must also pay a \$12,500 fine and is prohibited from shipping any coral or other wildlife products to the United States for a three-year period following release from prison. These sentences are the longest prison sentences to date for illegal trade in coral. Black coral is one of several types of precious corals that can be polished to a high sheen, worked into artistic sculptures, and used in inlaid jewelry. Because it is listed in Appendix II of CITES, black coral is subject to strict trade regulations. The defendants pleaded guilty to conspiracy, false statements, and violations of both the ESA and the Lacey Act for falsely labeling shipments of black coral from China to the Virgin Islands over a two-year period. The Lacey Act makes it a felony to falsely label wildlife that is intended for international commerce. The ESA is the U.S. domestic law that implements CITES.



Live Black Coral



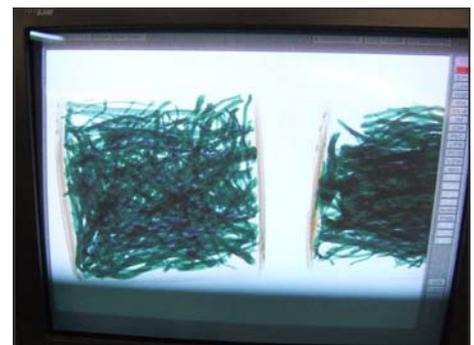
Black Coral in Box

On August 19, 2009, Peng Chia sent a shipment comprised of 10 boxes of black coral that were labeled "plastic of craft work." A U.S. Customs' Contraband Enforcement Team flagged the shipment as suspicious and contacted U.S. Fish and Wildlife (USFWS) from San Juan, Puerto Rico. As a result, USFWS, National Oceanic and Atmospheric Administration and Immigration and Customs Enforcement opened a joint investigation, "Operation Black Gold," that led to the arrest of the Chus in January 2010. Analysis by the USFWS's National Forensics Laboratory in Ashland, Oregon revealed that shipment from the Chus contained internationally-protected black coral. The Chus admitted that from 2007 to 2009, they sent more than \$194,000 worth of black coral to Company X.

— U.S. Fish and Wildlife Service Photos



Shipment of Black Coral



X-Ray of Black Coral Shipment

Wayne Breitag was convicted by a jury of smuggling a leopard hide into the United States in violation of CITES and the Lacey Act. He traveled to South Africa in August 2002 to hunt leopards while guided by a South African outfitter. After Breitag killed a leopard, the outfitter smuggled the hide from South Africa into Zimbabwe, where he purchased fraudulent CITES export permits for the hide. Breitag then submitted applications to the FWS falsely claiming that he had hunted and killed the leopard in Zimbabwe. The outfitter, who was involved in several other illegal hunts, served an 18-month prison sentence, and was deported upon his release. Breitag was sentenced to serve six months of home confinement and to pay a \$20,000 fine, and is barred from hunting during his three years of supervised release.



Defendant Holding Rifle

Prosecuting the Killing of Migratory Birds

The County of Kauai and the Kaua'i Island Utility Cooperative (KIUC) pleaded guilty to charges arising out of the killing of Newell's Shearwaters. The county manages football stadiums and other outdoor facilities that operate at night with lights. The lights attract seabirds, particularly fledgling Newell's Shearwaters that circle the lights and eventually hit something or fall to the ground in exhaustion. Newell's Shearwaters are threatened and migratory birds. Past efforts to cooperatively and voluntarily bring the county and KIUC into compliance with the ESA and the Migratory Bird Treaty Act failed. The county was sentenced to pay a \$15,000 fine and to complete a 30-month term of unsupervised probation, submitting periodic status reports



every 6 months. The cooperative was sentenced to the maximum statutory fine of \$40,000, to complete an 18-month term of probation, and to make a community service payment of \$225,000 to a federally established program geared toward the protection of seabirds on Kaua'i. Both entities also entered into comprehensive agreements to mitigate bird mortality.

Expanding Criminal Environmental Enforcement

The Division took several steps in fiscal year 2010 to ensure that U.S. Attorney districts across the nation make pollution and wildlife prosecutions part of their everyday practice. The Environmental Crimes Policy Committee, which is co-chaired by the Chief of ENRD's Environmental Crimes Section, issued "The Environmental Crimes Tool Kit," a prosecution primer which is distributed to each incoming United States Attorney, under cover of a letter from Attorney General Holder. In the letter, Mr. Holder emphasizes that environmental prosecutions are a priority for this Administration and directs each district to develop an environmental crimes program. Following release of the primer, the Division, in conjunction with the Attorney General's Advisory Committee, hosted the first-ever United States Attorneys' Environmental Crimes and Enforcement Conference in Washington, D.C. Attendees included nearly all United States Attorneys along with his or her criminal chief or environmental prosecutor. Presenters at the conference included the Attorney General, and senior Administration officials from EPA, the Department of the Interior, the White House Council on Environmental Quality, and many others.

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS



Equipment at the Deepwater Horizon Site on May 18, 2010

U.S. Coast Guard Photo

Defending Federal Agencies in Connection with the Deepwater Horizon Oil Spill

The Division is defending federal agencies and officials in numerous lawsuits filed following the April 20, 2010 explosion of the Deepwater Horizon oil rig and subsequent oil spill in the Gulf of Mexico. These cases challenge various federal regulatory requirements and approval of exploration and production plans, aspects of the federal government's response to contain the oil spill in the first months following the explosion, and the Administration's initial regulatory actions to prevent future recurrence of spills.

Examples of actions resolved in fiscal year 2010 include the following cases:

--In *Animal Welfare Inst. v. BP America Inc.*, animal protection and conservation organizations filed suit under the Outer Continental Shelf Lands Act, ESA, and CWA to prevent controlled oil burn efforts in the Gulf from harming endangered and threatened sea turtles. The case was resolved last summer on agreement of the U.S. Coast Guard to share protocols for sea turtle observation and rescue and to consider additional mitigation to avoid harming them; and then voluntarily dismissed due to the indefinite suspension of controlled burns following the success of efforts to stop the release of petroleum into the Gulf.

--In *Doyle v. BP Exploration*, citizen environmentalists in Florida filed an early action against the Secretary of the Interior for failure to enforce the CWA, Oil Pollution Act, ESA, and other laws in connection with the oil spill. Last August, following the filing of a motion to dismiss by the United States based on various deficiencies in the complaint, the plaintiffs voluntarily dismissed the case.

--In *Hornbeck Offshore Services, L.L.C. v. Salazar* and *EnSCO Offshore Co. v. Salazar*, the Division defended against petroleum company challenges in district court and the Fifth Circuit under the Administrative Procedure Act and the Outer Continental Shelf Lands Act to two suspensions of deepwater drilling on leases in the Gulf of Mexico last May and July while the Department of the Interior examined the cause of the spill and the lessees' ability to respond, and developed new safety regulations. After Interior lifted the second suspension last October, we successfully argued that challenges to the suspensions were moot. (Those actions continue based on claims that the Department of the Interior is unreasonably delaying the approval of applications for drilling in the Gulf of Mexico and for reconsideration.) A related action, *Texas v. Salazar*, was also voluntarily dismissed following the lifting of the second suspension order in October.



Louisiana and U.S. Fish and Wildlife Service staff rescue a Gulf pelican for successful rehabilitation.

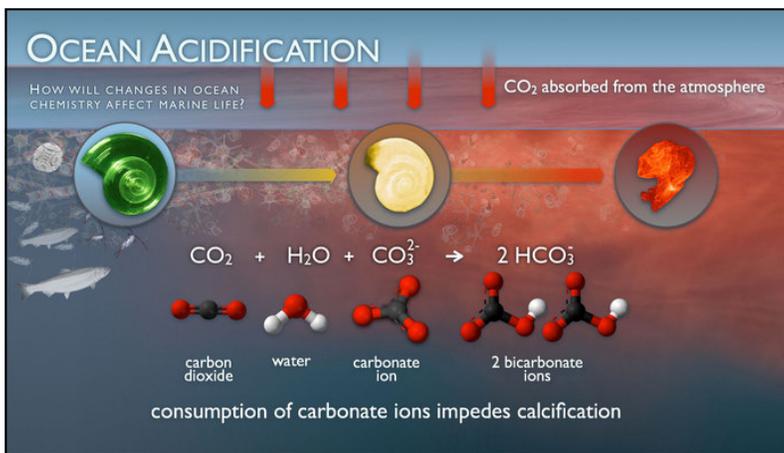
U.S. Coast Guard Photo

Upholding Administrative Actions Related to Climate Change

Over the past year, EPA has begun to develop a program under the CAA to regulate greenhouse gases that contribute to global climate change. Among other things, the Agency set limits for motor vehicle emissions of greenhouse gases and promulgated regulations specifying a phased approach for addressing greenhouse gases through stationary source permitting programs. These efforts generated a significant amount of litigation in fiscal year 2010, which ENRD will continue to vigorously defend in fiscal year 2011.

The Division also handled several cases last year challenging agency actions under the CWA for failure to account for the impacts of climate change. During the pendency of *Conservation Law Found. v. EPA*, EPA decided to reconsider its earlier decision under the CWA approving a Total Maximum Daily Load (TMDL) established by the State of Vermont for phosphorus in Lake Champlain. We successfully sought a voluntary remand of the case, over the state's objection, to allow EPA to proceed with its reconsideration. On reconsideration, as reflected in a decision issued on January 24, 2011, EPA reaffirmed that its analysis of climate change was reasonable in 2002, but disapproved the TMDL on other grounds.

Center for Biological Diversity v. EPA involved a challenge to EPA's approval of a list of impaired waters submitted by the State of Washington pursuant to the CWA. The plaintiff alleged that EPA's approval violated the act because Washington's list did not include ocean waters that the plaintiff contended are impaired due to acidification. Ocean acidification may result from global climate change, as oceans absorb more carbon dioxide from the atmosphere. The Division negotiated a settlement that provided for EPA to seek public comment on the important issue of how to address ocean acidification under the CWA's impaired waters program.



The oceans have absorbed about 50% of the carbon dioxide released from the burning of fossil fuels, resulting in chemical reactions that lower ocean pH. This has caused an increase in acidity of about 30% since the start of the industrial age through a process known as “ocean acidification.” A growing number of studies have demonstrated adverse impacts on marine organisms.

NOAA Fact Sheet

In *Natural Resources Defense Council v. U.S. Army Corps of Eng'rs*, environmental groups challenged the Corps' issuance of a CWA permit authorizing the filling of some streams and less than a quarter acre of wetlands needed to construct a \$5.5 billion coal gasification and power generation plant in Ohio. The district court issued a favorable opinion granting the Division's motion for summary judgment on behalf of the Corps, finding that the Corps did not improperly limit the scope of its review, did not improperly ignore alleged climate change impacts arising from operation of the plant, and did not skew its analysis of the project's benefits and impacts.

KEY FEDERAL FISCAL YEAR 2010 CLEAN AIR ACT CLIMATE CHANGE REGULATORY INITIATIVES

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.

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.

Tailoring Rule for Regulation of 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 limit which facilities will be required to obtain such permits. Facilities responsible for nearly 70 percent of the U.S. greenhouse gas emissions from stationary sources will be subject to permitting requirements under this rule. This includes the nation's largest greenhouse gas emitters — power plants, refineries, and cement production facilities.

Ensuring the Proper Scope of Relief on Reversal of Agency Actions

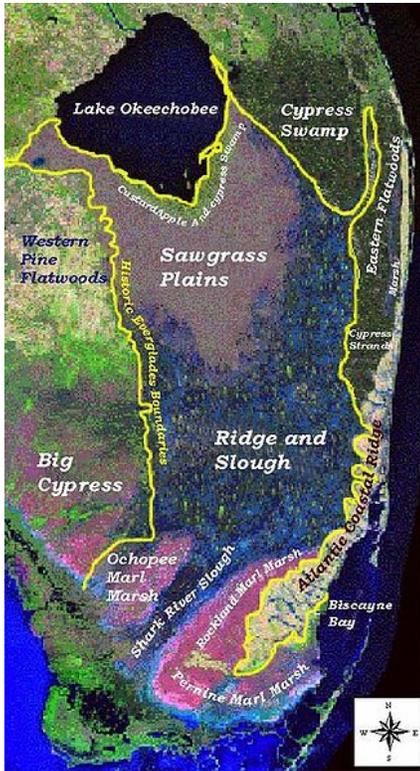
The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture supports and protects the nation's agriculture, including regulating the use and introduction of genetically engineered crops vital to the nation's food supply. Organic seed farmers sued APHIS, challenging its 2004 decision to remove Roundup-Ready Alfalfa (RRA), a crop genetically modified to tolerate the herbicide "Roundup," from regulation under the Plant Protection Act (PPA), thereby allowing commercial production of RRA. The farmers, concerned about potential cross-pollination of RRA with their organic crops, asserted that APHIS should have evaluated the impacts of deregulation through an Environmental Impact Statement (EIS). The district court agreed. It vacated APHIS's deregulation decision, ordered APHIS to prepare an EIS, and prohibited any further planting of RRA until an EIS was completed. The Court of Appeals affirmed. In *Monsanto v. Geertson*, the U.S. Supreme Court, which was asked only to address the scope of injunctive relief, reversed. The United States filed a brief on behalf of the petitioners. The Supreme Court held that Monsanto, the developer of the genetically modified product, had standing to seek review of the lower court's injunctive orders. The Court also held that the district court had erred in issuing a nationwide injunction against any planting of RRA as APHIS could take actions under the PPA short of complete deregulation, such as partial or temporary deregulation of RRA, pending its completion of an EIS.

Defending Another Challenge to APHIS's Biotechnology Program

In the past year, the Division also represented APHIS in a challenge to deregulation of sugar beets which have been genetically modified to tolerate "Roundup." Sugar beets comprise about one-half of the current refined sugar supply, and genetically modified sugar beets make up ninety-five percent of all sugar beets planted. In *Center for Food Safety v. Vilsack*, the Division successfully defended against a preliminary injunction, which allowed the harvest of root crop and seed crop in fall 2010.

Sugar beets genetically engineered to be tolerant to the Monsanto herbicide glyphosate, also known as Roundup®, are known as Roundup Ready® (RR) sugar beets. Since RR sugar beets were deregulated in 2005 and approved to be grown for food and feed, they have been widely commercialized in the United States. In the 2009/10 crop year, RR varieties accounted for about 95 percent of planted area, up from about 60 percent in 2008/09. Sugar beets are grown in 11 states in 5 regions of the United States.

APHIS Fact Sheet, June 2010



USGS Map

Litigating Water Quality in the Everglades

Miccosukee Tribe v. EPA was initially a challenge to: (1) EPA's determination that a Florida statute pertaining to pollutant discharges to the Everglades was not a change to a water quality standard and (2) EPA's approval of Florida's Phosphorous Rule. After a mixed decision on the merits in 2008, the case is back in active litigation as the plaintiffs moved for contempt and to enforce the district court's 2008 order. In response to the contempt motion, the court granted extensive relief, including requiring EPA to issue an amended determination that compelled Florida to alter its existing water quality standards and requiring EPA to withdraw Florida's authority under the CWA to issue National Pollutant Discharge Elimination System permits for discharges into the Everglades until Florida's permitting program complies with the CWA, as set forth in the court's 2008 order. The Division's substantial efforts helped EPA to issue a new determination by the court-ordered deadline last year, and we are currently defending the determination in court. EPA's issuance of the amended determination is a significant step toward improving the water quality of the Everglades.

With this action, EPA is complying with the law and acknowledging that we must do more together to restore clean water to the Everglades. The State of Florida and the South Florida Water Management District have done much good work already and we hope to build on that by meeting both the substance and the spirit of Judge Gold's decision with this plan, and to achieve clean water standards as soon as possible.

Statement of A. Stanley Meiburg, Acting Regional Administrator, EPA Region IV, on the September 3, 2010 Release of the Amended Determination for the Everglades Protection Area

Protecting Everglades Restoration Efforts from Constitutional Challenges

In *Mildenberger v. United States*, landowners along the St. Lucie River in Florida alleged a \$50 million taking of their property in violation of the Fifth Amendment resulting from the Corps' operational plan for Lake Okeechobee, pursuant to which the Corps allegedly discharges pollutants and excess fresh water into the St. Lucie River and Estuary. The plaintiffs contend that releases



Lake Okeechobee, covering 730 square miles, is the largest Florida lake and the second largest freshwater lake within U.S. borders.

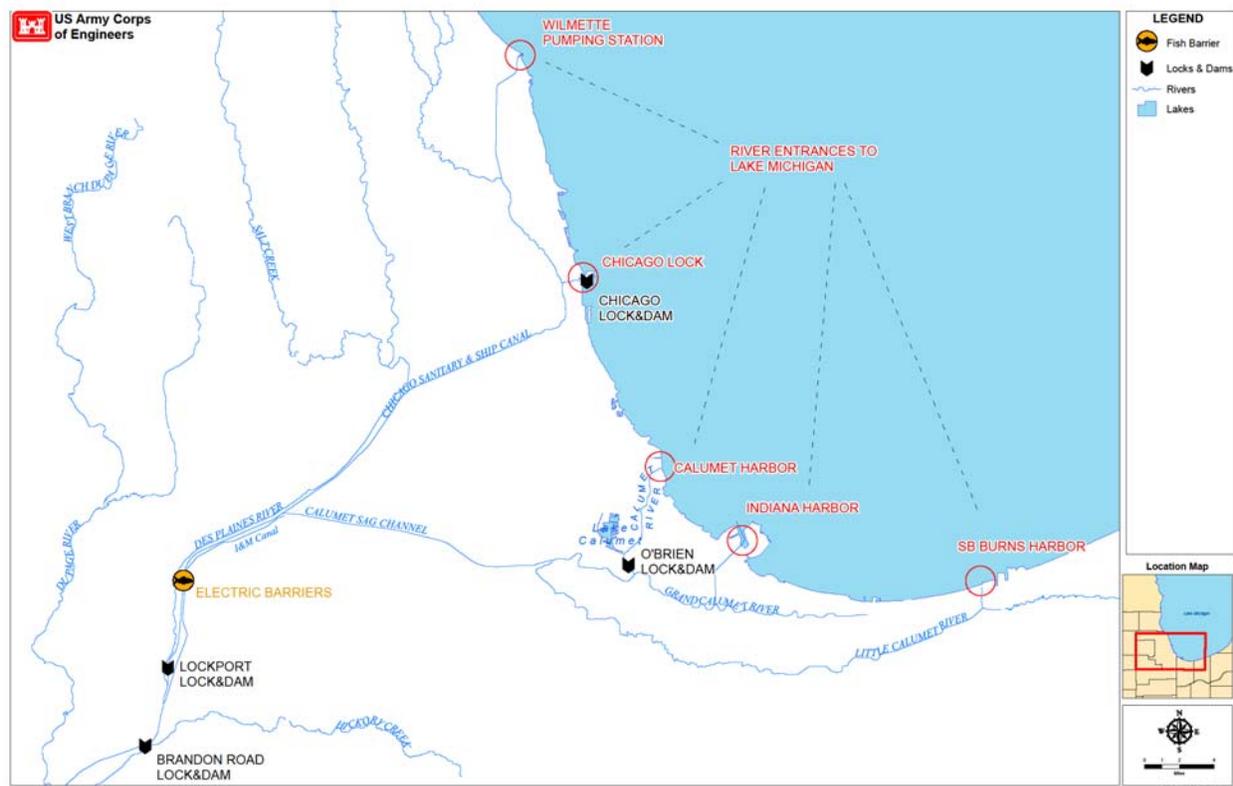
USACE Photo

of pollutants and fresh water over time have destroyed the estuarine environment and their riparian rights. The Court of Federal Claims rejected the suit, finding that the plaintiffs' claims were barred by the statute of limitations. The court also held that the various riparian rights claimed (fishing, swimming, and boating) are shared by the public at large under the state's public trust doctrine and are therefore non-compensable; and even if the plaintiffs could assert a compensable property interest under state law, the claims would be barred by the federal navigational servitude.



Representing Federal Interests in Asian Carp Litigation

Invasive species are one of the largest threats to the Great Lakes ecosystem. Last year, the Division successfully represented the interests of the United States in litigation involving the migration of Asian carp into the Great Lakes through the Chicago Area Waterway System. Asian carp, which can grow to 5 feet and weigh more than 100 pounds, have come to dominate sections of the Mississippi River and its tributaries. If the carp become established in the Great Lakes, it is feared they could create an ecological disaster by consuming the bottom of the food chain and negatively impacting the Great Lakes' \$7 billion fishery industry.



Chicago Area Waterway System

USACE

In a case filed in the U.S. Supreme Court, *Wisconsin v. Illinois*, the State of Michigan sought to force the State of Illinois, the Metropolitan Water Reclamation District of Greater Chicago, and the Corps to take additional actions to prevent the spread of invasive Asian carp into Lake Michigan. The Division successfully defended against two preliminary injunction motions and, ultimately, working with the Office of the Solicitor General, successfully argued that the Supreme Court should reject Michigan's efforts. And in *Michigan v. Army Corps of Engineers*, we prevailed against a third motion for a preliminary injunction filed in district court, following an evidentiary hearing.



U.S. Fish and Wildlife Service Team Pulling Asian Carp Below the Electric Barriers on the Canals
USFWS Owen Johnson



USACOE Map

Upholding Efforts to Deepen the Delaware River for Navigation

The long-planned deepening of the Delaware River's main channel from 40 to 45 feet is moving forward. In *Delaware Dep't of Natural Resources v. U.S. Army Corps of Eng'rs*, ENRD successfully defended the deepening of one stretch of the river against a motion for preliminary injunction from the State of Delaware, which argued that the Corps could not proceed with the project until it received certain state permits and made supplemental findings under the Coastal Zone Management Act. In November 2010, the district court granted summary judgment in favor of the Corps, allowing the full project to proceed.

Defending EPA's Standards for Regulation of Cooling Water Intake Structures

In *ConocoPhillips Co. v. EPA*, the Fifth Circuit upheld EPA's regulation governing the construction, design, capacity, and siting of cooling water intake structures to protect aquatic organisms. The court viewed the stringent standards applicable to new facilities to be reasonable, deferring to EPA's findings that compliance with the regulations was both economically achievable and necessary to protect against the risk of adverse consequences to aquatic organisms.

Protecting the Public Against Lead Hazards

In response to two recent petitions for review, the Division obtained decisions that will help protect the public from hazards posed by lead. In *Coalition of Battery Recyclers v. EPA*, the D.C. Circuit upheld, against challenge by industry, EPA's tightened primary and secondary national ambient air quality standards for air emissions of lead, thus assuring greater protection to infants and children against such exposures nationwide. In *Vidiksis v. EPA*, the Eleventh Circuit rejected a challenge to EPA's assessment of a substantial penalty against a landlord for failing to properly notify tenants of lead-based paint hazards in rental properties.

Protecting the Public Against Exposures to Harmful Pesticides

In *National Corn Growers Ass'n v. EPA*, the D.C. Circuit upheld EPA's decision to revoke domestic tolerances previously established under the Federal Food, Drug, and Cosmetic Act for the pesticide carbofuran, which EPA determined posed unacceptable risks to human health.

The Energy Policy Act of 2005 established the first renewable fuel volume mandate in the United States, requiring **7.5 billion gallons** of renewable fuel to be blended into gasoline by **2012**.

The Energy Independence and Security Act of 2007

expanded the program to:

- include diesel in addition to gasoline;
- increase the volume of renewable fuel required to be blended into transportation fuel from **9 billion gallons in 2008** to **36 billion gallons by 2022**;
- establish new categories of renewable fuel and set separate volume requirements for each one;
- require EPA to apply lifecycle greenhouse gas performance threshold standards to ensure that each category of renewable fuel emits fewer greenhouse gases than the petroleum fuel it replaces.

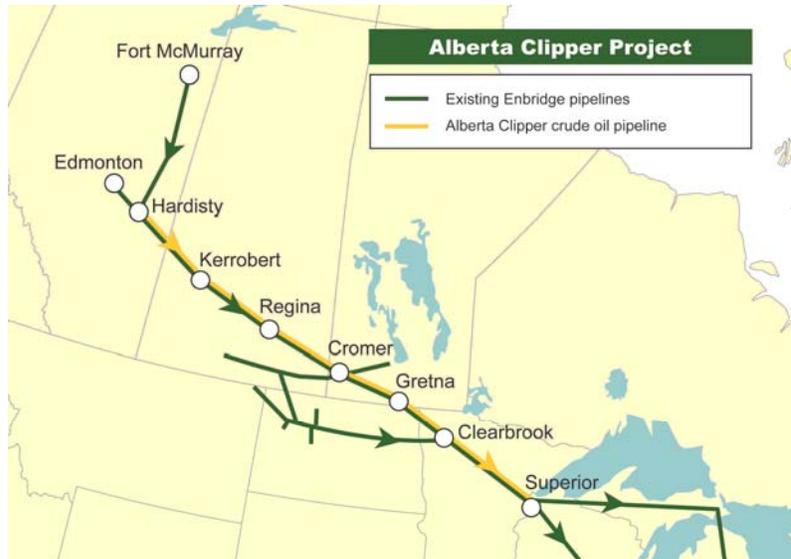
Litigating the Scope of EPA's Renewable Fuel Standards Program

The Division earned a favorable decision in *National Petrochemical & Refiners Association v. EPA*, a case seeking review of EPA's regulation governing the CAA Renewable Fuel Standards Program. The rule set requirements for minimum volumes of bio-mass diesel fuel to be produced and used in 2010, as required by the Energy Independence and Security Act. ENRD's work during FY 2010 led to a favorable decision from the D.C. Circuit, rejecting industry petitioners' challenges and holding that the rule was not impermissibly retroactive because it combined the 2009 and 2010 minimum volumes of bio-mass fuel as set out in the statute.

Defending a Presidential Permit Authorizing International Border Crossing for the Alberta Clipper Pipeline

The Division successfully handled a challenge in Minnesota to the State Department's issuance of a presidential permit for the border crossing of the Alberta Clipper Pipeline, which will transport crude oil from Canada to refineries in the United States.

In *Sierra Club v. Clinton*, the plaintiffs claimed that the Environmental Impact Statement developed under NEPA for the project failed to adequately examine impacts from operation of the pipeline. The plaintiffs also challenged permitting decisions by the Corps and Forest Service for construction of the pipeline. The district court held that the agencies had properly considered the need for additional pipeline capacity from Canada to the United States, had considered a reasonable range of alternatives, and had appropriately analyzed the potential environmental impacts of the project.



Map of Alberta Clipper Pipeline

Prepared by Enbridge Energy Company

Defending the Department of Energy's "Clean Energy" Programs

In *Appalachian Voices v. Chu*, the Division successfully defended claims against the Internal Revenue Service and Department of Energy alleging that a program allocating \$1 billion in congressionally authorized tax credits to "clean coal projects" was subject to regulation under NEPA and the ESA.

Ensuring the Continued Vitality of the Rails-to-Trails Program

The Division continues to address more than 10,000 claims brought by landowners whose property is adjacent to railroad corridors that have been converted to recreational trails pursuant to the National Trails System Act. These trails provide vital transportation benefits to communities throughout the United States, while preserving the corridors for possible railroad reactivation. Although these cases present numerous challenges, we continue to be successful in narrowing the number of claims and issues only to those that are supported by the law. Our "rails-to-trails" successes last year included *Rogers v. United States*, a case in which the Court of Federal Claims dismissed 193 properties on a trail in Florida as being outside the scope of the government action; and granted our summary judgment motion related to another 42

properties, finding that the landowners did not have a compensable property interest. In *Troha v. United States*, a class action involving a trail in Pennsylvania, the district court granted summary judgment in favor of the United States, holding that “railbanking” and interim trail use constitute “railroad purposes” under Pennsylvania law, and that such uses did not exceed the scope of the specific easements at issue in the case. And in *Bywaters v. United States*, a class action involving a trail in Texas, the district court issued a significant opinion limiting the amount of attorneys’ fees that may be obtained by class action counsel in such cases.



Great Allegheny Passage

This bridge was originally constructed in 1911 and renovated for trail use in 1999. It is part of the Great Allegheny Passage, a 135-mile trail that connects Pittsburgh, Pennsylvania and Cumberland, Maryland and is the longest trail in the east.

Photo Courtesy of the Rails-to-Trails Conservancy and Ronald Mervine

Defending Against Constitutional Challenges Relating to Post-Katrina Reconstruction

In the aftermath of Hurricane Katrina, the Corps worked closely with local government authorities in Louisiana to repair and reconstruct levees to protect the region from future hurricane damage. These efforts were accomplished through the “commandeering” by the local authorities of private properties to be used as staging grounds and borrow sites. The Corps has committed to fully compensate the landowners and has negotiated compensation for most of them; however, a small number of landowners have insisted on being compensated far in excess of the fair market value for their property. In three such suits, *Gaskell v. United States*, *Olivier Plantation, L.L.C. v. Parish of St. Bernard*, and *West Jefferson Properties, L.L.C. v. West Jefferson Levee District*, ENRD successfully gained dismissal of all such claims against the United States, resulting in a likely savings to the United States of tens of millions of dollars.

Planning for the Construction of New Hospitals in New Orleans Following Hurricane Katrina

The Department of Veterans Affairs and Federal Emergency Management Agency teamed up to consider the collective impacts of constructing two new veterans’ hospitals in New Orleans’s Mid-City neighborhood and historic district. In *National Trust for Historic Pres. v. U.S. Dep’t*

of Veterans Affairs, ENRD successfully defended the agencies' environmental review under NEPA from challenge by the National Trust for Historic Preservation, allowing final planning and construction to go forward in summer 2010.

Defending Federal Property Transfers

For more than eight years, the Division has defended the National Park Service in litigation over the display of a cross on a rock outcropping in the Mojave National Preserve in southern California. The cross was originally installed in 1934 by the Veterans of Foreign Wars as a memorial to soldiers who had died in World War I. In the case of *Salazar v. Buono*, the U.S. Supreme Court reversed a Ninth Circuit ruling upholding an injunction that had prohibited the Park Service from transferring the tract of land on which the cross is located to the local VFW Chapter in accordance with a statute enacted by Congress. The district court had prohibited the transfer as a means to enforce its earlier ruling that the display of the cross violated the Establishment Clause of the U.S. Constitution. The Supreme Court held that the district court should have examined a variety of additional factors in deciding whether to enjoin transfer of the property, including the circumstances involving Congress's passage of the land transfer statute, the historical significance the cross attained over the almost seventy years it stood, and the dilemma the original injunction presented Congress in that the cross could not be removed without conveying disrespect for those the cross was seen as honoring. The Court remanded the case to the district court for reconsideration in accordance with its opinion.



Mojave Cross

Photo Courtesy of Kathryn Kovacs

Acquiring Property for Public Purposes

The Division exercises the federal government's power of eminent domain to enable agencies to acquire land for public purposes ranging from establishing national parks to building federal courthouses to protecting the nation's borders. These actions secure the Fifth Amendment guarantee of just compensation in amounts that are fair to property owners and to taxpayers. Examples of this type of action last year include the following cases:

--In July 2010, the Division filed two condemnation actions to acquire adjacent properties on behalf of the General Services Administration for construction of an annex to an existing federal courthouse in Norfolk, Virginia. *United States v. 1.6039 Acres of Land Situate in the City of Norfolk*; *United States v. 15,478 Square Feet of Land Situate in the City of Norfolk*. Discovery is currently underway; however, title transferred to the United States upon filing of the cases. Estimated just compensation was deposited in the amount of \$6,175,000 and \$1,083,000, respectively, for the sites.

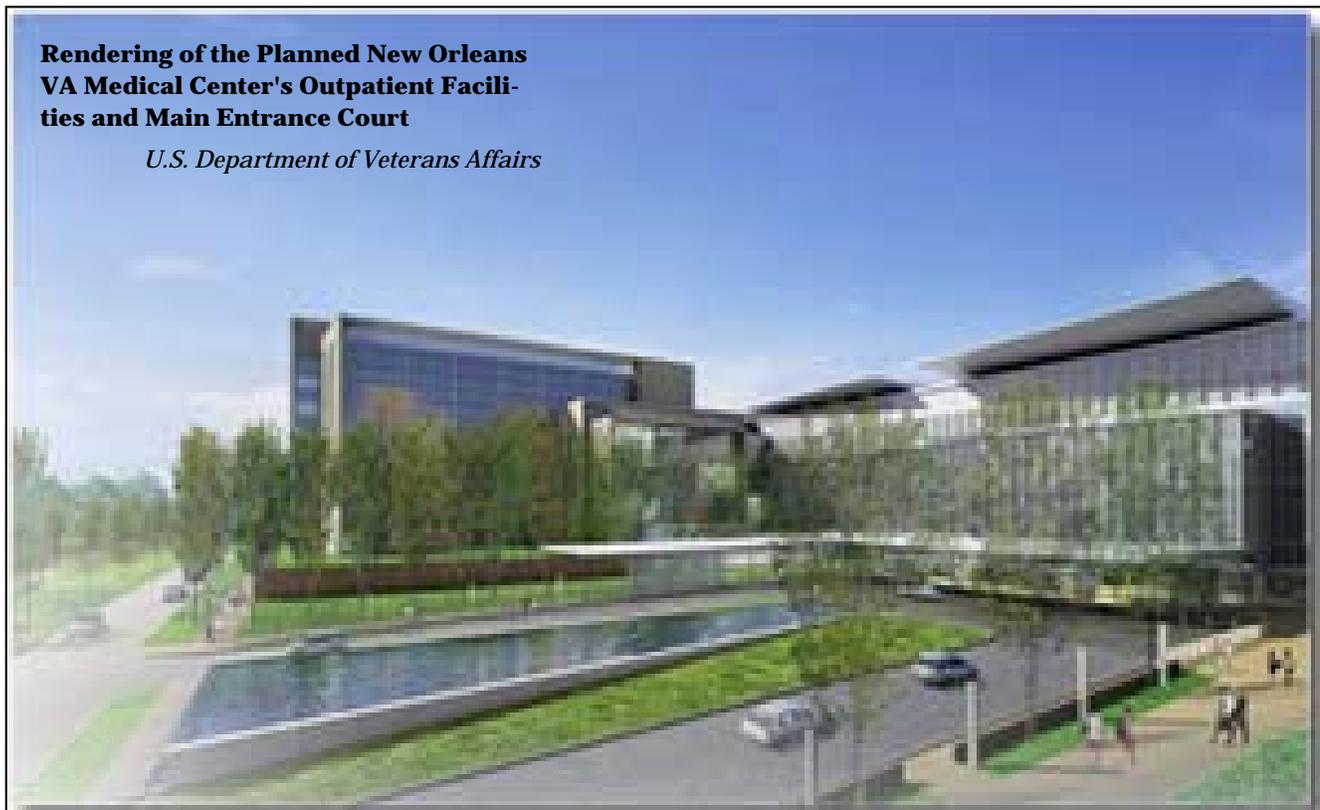
--Without filing a condemnation action, the Division reached agreement last year on behalf of the General Services Administration to acquire a 10-month leasehold in offices occupied by a component of the Internal Revenue Service in Washington, D.C. Renewal negotiations between the agency and the building owner failed because the owner refused to consider a less than three-year term. The total amount paid for the leasehold term will be \$2.8 million, an amount slightly less than the final amount offered by the General Services Administration and originally rejected by the building owner.

In fiscal year 2010, ENRD also conducted title reviews for client agencies able to negotiate property purchases without the need for the Division to file condemnation actions. One example is the review of title to 46 acres adjacent to Kansas State University in Manhattan, Kansas, to be acquired by donation as the site for a new National Bio and Agro Defense Facility. Title reviews also began in 2010 and are ongoing for the Department of Veterans Affairs (VA) replacement of the hospital in New Orleans severely damaged during Hurricane Katrina, which, as discussed previously, the Division also defended from NEPA challenge. The new VA Medical Center, which will occupy 12 city blocks, is expected to cost approximately \$1 billion to construct. It will include 200 inpatient beds and 60 nursing home care beds, as well as an outpatient center to provide primary, mental health, and specialty care, surgical capabilities, and research facilities. The VA estimates that the new center will have a significant beneficial economic impact on the city, creating 2,000 construction jobs and 2,200 permanent VA jobs with a direct and indirect economic benefit of \$8.9 billion over a 10-year period.

Working with the United States Congress on Environmental and Natural Resources Legislation and Related Matters

Through the Department's Office of Legislative Affairs, the Division responds to relevant legislative proposals and congressional requests, prepares for appearances of Division witnesses before

congressional committees, and drafts legislative proposals, including proposals implementing settlements of Division litigation. One example of this work from last year is S. 3481, Pub. L. No. 111-378, which amends the CWA to require federal agencies to pay reasonable municipal stormwater assessments. Municipal stormwater assessments seek to recover the costs that utilities incur in collecting, treating, and controlling discharges of stormwater under the CWA and its implementing regulations. Mindful of the President's directive that federal facilities should lead by example in protecting water resources through stormwater management, the Division provided technical assistance to Senator Cardin, along with EPA, to ensure that the bill accomplished its intended purpose and reflected relevant case law. Another example is the Division's ongoing support for the development of legislation to clarify the Oil Pollution Act, the Outer Continental Shelf Lands Act, and other federal statutes to prevent future oil spills from deepwater petroleum exploration and production, ensure that responsible parties are held accountable for spills, assure that adequate plans are in place to mitigate the adverse environmental impacts from such events, and improve the administration of federal mineral and energy resources.



Rendering of the Planned New Orleans VA Medical Center's Outpatient Facilities and Main Entrance Court

U.S. Department of Veterans Affairs

Enforcing Environmental Law Through International Capacity Building

The Division implements a robust and varied program of international activities to support important Administration and Department objectives. We engage in international activities in order to successfully prosecute violations of U.S. environmental and natural resource laws that

involve foreign evidence or rely on underlying foreign statutes. We build enforcement capacity in other countries in support of better enforcement in those countries and to establish relationships that enhance our ability to combat transnational environmental crimes. We also represent Division interests by ensuring that environmental enforcement and other Division priorities are considered in international treaty and trade agreement negotiations and in the development and implementation of U.S. international policies. To carry out these objectives, in FY 2010 ENRD spoke at conferences and workshops, provided training, and met with law enforcement counterparts in Brazil, Cambodia, China, Costa Rica, Germany, Indonesia, Israel, Laos, Micronesia, Peru, Russia, Thailand, and Vietnam.

The Division continued to speak at conferences and workshops internationally and domestically in order to disseminate information about the 2008 amendments to the Lacey Act, which added



Civil Enforcement Conference, Jerusalem, April 2010

enforcement tools to combat international trafficking in illegally harvested timber and wood products made from such timber. For example, ENRD spoke about the Lacey Act at workshops funded by the U.S. Agency for International Development in China, Indonesia, and Vietnam for government officials and representatives of the wood products industry. The Division engaged in a year-long effort to provide training to investigators and prosecutors in the Amazonian States of Peru on investigating and prosecuting illegal logging crimes. We were also provided funding by the State Department to implement a multi-year program in Brazil and Russia to provide training on combating illegal logging.

The Division continued to provide training, through the Association of Southeast Asian Nations Wildlife Enforcement Network, to government officials in Southeast Asia on combating wildlife trafficking. We spoke at conferences and provided training in China and Israel on implementation of effective environmental enforcement programs. And, finally, ENRD participated in the U.S. delegation to meetings of the United Nations Framework Convention on Climate Change.

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

The Division at times 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 briefs in a number of such proceedings last year. An example is *Sierra Club v. Korleski*. We filed an *amicus* brief in the Sixth Circuit on behalf of EPA, arguing that the CAA's citizen-suit provision authorized Sierra Club's action against the Ohio Environmental Protection Agency (Ohio EPA) because Ohio EPA violated a requirement of the Ohio State Implementation Plan when it issued permits to minor sources of pollution without requiring the sources to use best available technology (BAT) to reduce air pollution. The *amicus* brief further argued that the district court's injunction, which prohibits Ohio EPA from issuing permits to sources of pollution without requiring the sources to use BAT, does not violate the Tenth Amendment of the U.S. Constitution.

PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

Facilitating Military Modernization Plans

On September 21, 2010, the Department of Defense signed a record of decision concerning three projects that will affect Guam and the Commonwealth of Northern Mariana Islands: relocation of U.S. Marines Corps' troops and facilities presently stationed on Okinawa, Japan; construction of a deep-draft wharf with shoreside facilities for berthing a U.S. Navy transient nuclear-powered aircraft carrier; and establishment of a U.S. Army Air and Missile Defense Task Force. This action marked the conclusion of successful Division efforts to facilitate inter-agency discussions, under the direction of an Interagency Policy Committee chaired by the White House Council on Environmental Quality and the National Security Council, to address legal, policy, and environmental concerns associated with the projects. The decision will allow the Defense Department to move forward with the projects in a way that will promote the United States' long-term strategic interests and benefit the community at large.

Defending the Department of Energy's National Security Research Programs

In the past year, the Division successfully defended several important Department of Energy research programs. In *Tri-Valley CARES v. Department of Energy*, the agency's authorization of construction and operation of a Bio-Safety Level 3 facility at the Lawrence Livermore National Laboratory was upheld. Our victory allows the Department to continue critical research designed to enhance the nation's ability to detect and respond to terrorist attacks using biological agents. In *Natural Resources Defense Council v. Chu*, ENRD successfully defended the relocation of a Kansas City plant that manufactures non-nuclear parts used to produce nuclear weapons. The new facility has a smaller environmental footprint than the older facility, in keeping with the evolving nature of its role within the overall nuclear weapons complex.

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

In 2007, Congress mandated construction of fencing and related infrastructure at multiple points along the United States-Mexico border in order to enhance domestic security by curtailing smuggling, drug trafficking, and illegal immigration. The Division is working closely with the Department of Homeland Security and the Corps to facilitate land acquisitions necessary



U.S. Department of the Navy

Figure 1.1-1
Guam Location Map

for the construction of 225 miles of congressionally mandated fencing along the United States-Mexico border (the Strategic Border Initiative). This has required acquisition by eminent domain of over 315 land parcels in Texas, New Mexico, Arizona, and California and extensive work to obtain timely possession for construction purposes and to address widespread title and survey issues. The Division has been working with the local U.S. Attorneys' Offices to prepare for trials scheduled this year on five of the largest, most precedent-setting cases with valuation disputes totaling more than \$100 million.



View from A Border Fence Camera in the Rio Grande Valley Looking Toward Mexico

CBP Photo

The Division also obtained successful results in two cases related to securing the northern and western borders of the United States:

-- *United States v. 25,202 Acres of Land in the Town of Champlain* concerned the condemnation of property on the United States-Canada border for construction of a crossing facility on behalf of U.S. Customs and Border Protection and the General Services Administration. Trial was held the week of August 16, 2010, in Syracuse, New York. The United States presented expert valuation evidence supporting a fair market value of \$184,000. Prior to trial, defendant's expert estimated the taking at \$10.3 million. At trial, a landowner representative testified the property was worth between \$2,077,777 and \$10 million. After deliberating for barely an hour-and-a-half, the jury returned a verdict at the U.S. appraiser's exact land valuation.

-- *United States v. 10.56 Acres in Whatcom County* related to the acquisition of land on behalf of the General Services Administration and Department of Homeland Security for expansion of the Peace Arch Port of Entry in Blaine, Washington. This border crossing is located on Interstate 5 between Seattle and Vancouver; construction of the expanded facility required fee acquisitions of portions of both the southbound and northbound lanes. The district court granted a partial summary judgment in favor of the United States, reducing the State of Washington's claim to \$372,775, less than three percent of its original \$16 million demand. The state later agreed to settle this litigation for \$262,554.



The Division also conducted title reviews for client agency acquisition of seven parcels of land in Ajo, Arizona, for construction of a housing project for U.S. Customs employees who work at land ports of entry on the border with Mexico and at other inspection facilities; and two parcels of land needed as additions to the Federal Law Enforcement Training Centers in Glenn County, Georgia and in Eddy County, New Mexico.

Acquiring Additional Property to Improve Military Preparedness and National Security

The Division exercised the federal government's power of eminent domain this year to acquire land on behalf of the Department of Defense. In *United States v. 32.42 Acres in San Diego County*, ENRD filed a condemnation action on behalf of the U.S. Navy to acquire all remaining interests in filled tidelands used at the Navy's Anti-Submarine Warfare Training Center (leased by the United States until August 2049), including the public trust interest of the State of California. A jury trial in April 2010 resulted in a just compensation verdict of \$2,910,000. Two cases were also initiated in Mississippi to acquire about 150 acres for use in Navy Seal Team training. Settlement agreements were reached reflecting just compensation of \$275,037 for the smaller parcel and \$999,674 for the larger tract.

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

Supporting Tribal Recognition and Sovereignty

The Department of the Interior decides whether a group should be federally recognized as a tribe. Such a determination means the group becomes sovereign over its members and internal disputes. A federally recognized tribe receives certain federal benefits and may no longer be subject to state civil regulatory laws on its lands. Federal recognition allows a tribe to establish Indian gaming activities consistent with federal law. In fiscal year 2010, in *Parks v. Native Village of Minto*, ENRD successfully defended the federally recognized status of tribes in Alaska, as well as the authority of their courts to exercise child protection jurisdiction pursuant to the Indian Child Welfare Act. The Division also worked with the Solicitor General's Office to file a brief in the U.S. Supreme Court in *Hogan v. Kaltag Tribal Council*, supporting the inherent sovereignty of Alaska Native village tribal courts to adjudicate child custody matters and asking the Court to deny further review. The Court denied certiorari, and the favorable Ninth Circuit decision stands. The Division also filed an *amicus* brief in the Ninth Circuit in *Water Wheel Camp Recreation Area, Inc. v. Gary LaRance*, supporting tribal court jurisdiction to adjudicate a commercial law suit and eviction action brought by the tribe against non-member holdover tenants on trust land. That case is pending.

Defending Tribal and Federal Interests in Water Adjudications

The Division continued to represent the interests of the United States as trustee for Indian tribes and their members in complex water rights adjudications in nearly every western state in the United States. Increasing population pressures in the arid western United States make water rights issues particularly contentious. In the past year, ENRD contributed to five landmark Indian water rights settlements which, when fully implemented, will resolve complex and contentious Indian water rights issues in three western states. These settlements include the Taos Pueblo Indian Water Rights Settlement, the Aamodt Litigation Settlement Act, and the Navajo-San Juan River Basin Settlement in New Mexico; the Crow Tribe Water Right Settlement in Montana; and the White Mountain Apache Tribe in Arizona. Each settlement is uniquely adapted to the needs of the tribes and non-Indians involved in the particular river basins, but they all share the common features of providing welcome resolutions of complex water rights controversies that have existed for decades and ensuring that the tribes have access to water on their reservations. These settlements also provide certainty as to the nature and extent of tribal water rights, and thereby promote economic development both on-reservation and in the adja-

cent, often rural, communities. The agreements were approved by Congress, but will require additional work over the next few years to obtain final court decrees and other implementing actions.

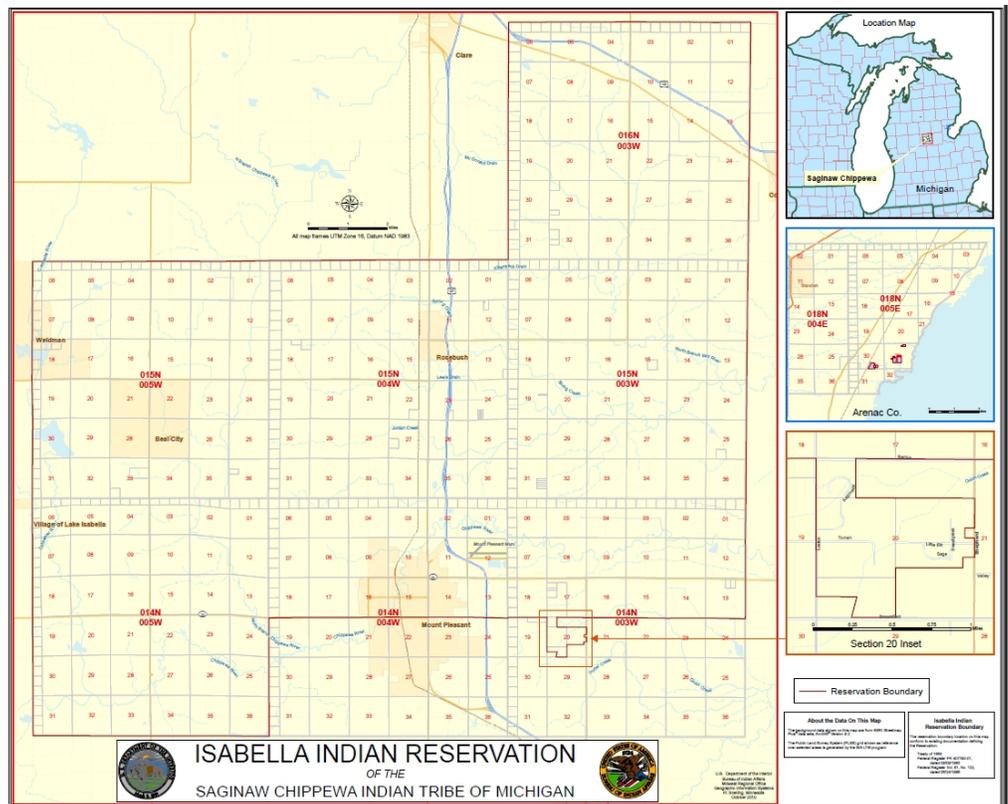
Upholding Authority to Acquire Land in Trust for Tribes

We successfully defended the Department of the Interior's authority to acquire land in trust for tribes. For example, in *Upstate Citizens for Equality v. Salazar* and *Central New York Fair Business Ass'n v. Salazar*, a district court rejected numerous constitutional and statutory challenges to a proposed trust land acquisition for the Oneida Indian Nation of New York. The court dismissed constitutional challenges to the Indian Reorganization Act, as well as to claims seeking to determine the lawfulness of gaming under the Indian Gaming Regulatory Act.

Defending Tribal Land Holdings

The Division had a very favorable outcome last year in a longstanding dispute over the boundaries and existence of a reservation. In *Saginaw Chippewa Indian Tribe v. Granholm*, the tribe, the United

States, the State of Michigan, and local governments negotiated, and the district court entered, a historic settlement recognizing that the Isabella Reservation in south central Michigan is Indian Country. The settlement also encompasses various intergovernmental memoranda of agreement regarding the Indian Child Welfare Act, taxation, regulation, land use, revenue sharing, and law enforcement jurisdiction that seek to resolve the manner in which the tribe, state, and local governments operate on a day-to-day basis. This settlement provides a model for how states, tribes, and local governments can work together to solve common problems.



U.S. Department of the Interior Map

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

The Division is defending the United States (and its two primarily affected agencies, the Departments of the Interior and Treasury) in 97 cases pending in federal district courts in Washington, D.C. and Oklahoma; the Court of Federal Claims; the Court of Appeals for the Federal Circuit; and the U.S. Supreme Court, in which 114 tribes have alleged that the federal government has breached its trust duties and responsibilities to the tribes by failing to provide the tribes with historical trust accountings and by mismanaging the tribes' trust funds and non-monetary trust assets. The tribes are seeking court orders requiring Interior and Treasury to furnish trust accountings and pay damages exceeding \$1.4 billion for the government's alleged mismanagement of tribal trust funds, lands, and other natural resources. The Division is pursuing a strategy of constructive engagement in these cases. We are litigating certain cases to final judgment, wherever necessary or appropriate, while also working cooperatively with tribes and the Interior and Treasury Departments to resolve other cases through formal alternative dispute resolution (ADR) or informal settlement processes, to the extent possible.

In *Wolfchild v. United States*, the Division secured from the Court of Appeals for the Federal Circuit a reversal of a Court of Federal Claims' holding that the Bureau of Indian Affairs had breached a trust with 20,000 alleged descendants of Indians by transferring land to three tribes in Minnesota. The claims for money damages were in the hundreds of millions of dollars, premised in part on damages from the Indian gaming revenue that the plaintiffs claim they should have received. We were also successful in *Rosales v. United States*, a suit brought in the Court of Federal Claims by individual Indians who claimed a breach of trust and a taking without compensation for allegedly favoring another tribe located in California in a land dispute. And in *Begay v. United States*, we secured dismissal in the Court of Federal Claims of an attempted class action of all Navajo allottees with pipeline right-of-ways within the Navajo Reservation. The court dismissed the action on grounds that the allottees failed to exhaust administrative remedies and were barred by the statute of limitations.

Thwarting Efforts to Disturb Geronimo's Grave

In *Geronimo v. Obama*, the Division secured dismissal of an action filed in district court by certain lineal descendants of the Apache warrior known as Geronimo. These descendants sought to repatriate Geronimo's human remains from Fort Sill, Oklahoma. The Fort Sill Apache Tribe and other lineal descendants opposed the exhumation and repatriation, believing it to be a desecration of Geronimo's grave. The court granted our motion to dismiss the complaint, holding that the plaintiffs had failed to identify any final agency action under the Administrative Procedure Act and also failed to allege an actionable claim under the Native American Graves Protection and Repatriation Act.



**#5: Beef Creek Apache Cemetery
Site of Geronimo's Grave
(National Historic Site)**

APACHE INDIAN CEMETERIES

The roll call of chiefs, warriors, army scouts and families buried here include the most famous names in Apache history: Geronimo, whose daring band performed deeds unmatched since the days of Captain Kidd; Chief Loco of the Warm Springs, who stood for peace; Chief Nana, the original desert fox; Chief Chihuahua of the Chiricahuas; and sons and grandsons of Mangus Colorados, Victorio, Cochise, Naiche and Juh and of such noted scouts as Kaahteney, Chatto, Kayitah and Martine. Here also lie 12 of the 50 Apaches who were U.S. soldiers and scouts at Fort Sill. Linked with these men in the Indian Wars was a legion of Army greats — General Cook, Miles, Howard, Crawford, Gatewood, Lawton, Grierson, and Leonard Wood.

This cemetery on Beef Creek was established in 1894 by General Scott. Related cemeteries nearby are the Chief Chihuahua plot 1/4 mile north and Walter plot just south across the road. Scouts Mangus and Demesh and, white interpreter George Whittier are buried in the Fort Cemetery.

Fort Sill, Oklahoma



**Geronimo's Grave,
Beef Creek Apache Cemetery
Fort Sill, Oklahoma**

Cemeteries of Fort Sill, Oklahoma
Map Prepared by Directorate of Public Works,
Fort Sill
U.S. Army Photos

The inscription above reads in part:

Apache Indian Cemeteries

The roll call of chiefs, warriors, army scouts and families buried here includes the most famous names in Apache history: Geronimo, whose daring band performed deeds unmatched since the days of Captain Kidd; Chief Loco of the Warm Springs, who stood for peace; Chief Nana, the original desert fox; Chief Chihuahua of the Chiricahuas; and sons and grandsons of Mangus Colorados, Victorio, Cochise, Naiche, and Juh, and of such noted scouts as Kaahteney, Chatto, Kayitah, and Martine. Here also lie 12 of the 50 Apaches who were U.S. soldiers and scouts at Fort Sill. Linked with these men in the Indian Wars was a legion of Army greats — General Cook, Miles, Howard, Crawford, Gatewood, Lawton, Grierson, and Leonard Wood.

This cemetery on Beef Creek was established in 1894 by General Scott.

SUPPORTING THE DIVISION'S LITIGATORS

Supporting the Department's Efforts to Investigate and Litigate Issues Related to the Deepwater Horizon Gulf Oil Spill



Case Strategy Meeting

from partner agencies to assist with the creation of the operations center and to provide general litigation support once it was established.

The Division has provided comprehensive facility support to the government-wide litigation efforts related to the Deepwater Horizon oil spill. In just a month, commercial office space was identified and secured in downtown New Orleans to be used by government investigators and attorneys working on cases and matters related to the oil spill. Establishing the Deepwater Horizon Operations Center involved managing construction, furnishing, and leasing all necessary equipment for the space, as well as design and installation of the information technology infrastructure. We worked with the Civil Division to share telecommunications links so as to achieve greater cost efficiencies. The ENRD Office of the Comptroller secured emergency funding from within the Department and



Launching New Public Internet Site

In fiscal year 2010, the Division's new public Internet site (www.justice.gov/enrd) was launched. In addition to a new look, which was modeled after the Department's public site, the new site includes information regarding the Division's rich history and varied ar-



ees of practice. The most popular pages on the new site continue to be our proposed consent decrees, press releases, and employment opportunities.

Providing Innovative Technology for ENRD's Workforce

The amount of Electronically Stored Information (ESI) processed in ENRD continues to grow each year. To manage the enormous volumes of data, ENRD provides innovative technology and workforce training. Over the past year, we enhanced the Division's data/document review capabilities to include new software and increased capacity, ensuring that larger cases with more ESI can be reviewed efficiently in a local or remote setting. The Division also introduced software and automated processes which enhance ability to manage litigation-hold requirements. We also built and installed new remote access infrastructure, upgrading software applications, enhancing security, and allowing additional concurrent users to connect to the Division's network in a Continuity of Operations scenario. The Division's Office of Litigation Support provided extensive training on e-discovery standard operating procedures and "tools of the trade" for handling ESI.

Conserving Financial Resources

The Division's Executive Office works diligently to achieve efficiencies of operation and carefully manage the taxpayer dollars entrusted to the Division. This year, the ENRD operating budget topped \$200 million for the first time. As part of managing these funds, the Division's Office of the Comptroller processed nearly \$40 million in expert witness contracts and secured several million dollars in supplemental funding to support, among other things, the Department's important Deepwater Horizon oil spill work. The Division achieved real cost efficiencies in several areas, including reducing paper consumption and increasing the use of videoconferencing (as an alternative to travel).

Greening the Division

In fiscal year 2010, ENRD's Greening the Government (GtG) Committee continued to work actively on environmental and sustainability issues. The Division achieved about a four-percent reduction in energy use from 2007 levels in the Patrick Henry Building (PHB), due in part to GtG Committee initiatives to remove the center bulbs from interior hallway light fixtures and to turn off soda machine lights. The committee also successfully negotiated with building management to install over 1,200 motion-activated light sensors in all offices and common areas of PHB. Installation of these sensors began in January 2011.

From March to April 2010, the GtG Committee held a Battery and Cell Phone Recycling Drive, setting up collection points in the PHB lobby and throughout the ENRD offices of Main Justice for recycling used cell phones and lithium batteries. Last May, the GtG Committee developed best practices for computer power management and publicized this information on the ENRD intranet, which also features best practices for energy use, paper use, and recycling.

The GtG Committee continues to promote "Supply Reuse Centers" to encourage employees to reuse supplies for projects. These centers have been set up in many of the common areas throughout ENRD, including copy and mailrooms. Last year, the GtG Committee spearheaded Division-wide efforts to save paper, such as switching printers to default to double-sided printing and copying, purchasing paper with high recycled fiber content, and reducing the number of books ordered. These paper reduction efforts have saved the Division over \$200,000 per year in paper costs.

