

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

**SUMMARY OF LITIGATION
ACCOMPLISHMENTS**

FISCAL YEAR 2006



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FOREWORD

It is my pleasure to present the Environment and Natural Resources Division's Accomplishments Report for Fiscal Year 2006. The Environment and Natural Resources Division brings both affirmative civil and criminal enforcement actions on behalf of our client agencies and defends federal agencies generally when their actions or decisions are challenged in court on the basis of our environmental public lands and resources laws. This year the Division achieved significant victories for the American people in each of the many areas for which it has responsibility. These responsibilities include protecting the Nation's air, water, land, wildlife and natural resources, upholding our trust responsibilities to American Indians, and furthering important federal programs, including the government's mission to ensure national security.

The Division is dedicated to the vigorous and fair enforcement of our Nation's environmental laws, in both the civil and criminal arenas. Such enforcement is a critical component of environmental protection and helps ensure that our citizens breathe clean air, drink clean water, and will be able to enjoy the country's public lands, wildlife and other natural resources for generations to come. It also helps ensure that law-abiding businesses have a level economic playing field on which to compete.

The Division's vigorous civil enforcement of our environmental laws has generated record-breaking results over the past few years, and this year was no exception. In Fiscal Year 2006 the Division secured more than \$3.7 billion in corrective measures through court orders and settlements to protect the nation's environment and safeguard the public's health and welfare. The required actions obtained by ENRD include compliance measures, land and river cleanup, state of the art pollution-abatement controls, training, and education that will significantly benefit the health and welfare of the nation. For example, the Division secured over \$227 million worth of cleanup of superfund sites, and recovered more than \$140 million in past EPA costs to be used to finance future cleanups. In addition, ENRD attorneys achieved extraordinary environmental results in five consent decrees with large petroleum refiners, resulting in over \$2 billion in new pollution controls. With these new settlements, the Division has now brought enforcement actions against more than 80 refineries comprising approximately 77% of the nation's refining capacity, thereby reducing air pollutants more than 315,000 tons per year.

Fiscal Year 2006 was one of the most successful years of the last decade for the Division's criminal enforcement of environmental laws, based on the amount of jail time and criminal penalties imposed against corporate polluters and other environmental law breakers. This year courts imposed \$70.4 million in total criminal penalties, including fines, restitution, and supplemental sentences, and 65 years of jail time, the second highest figure for jail time in the past ten years.

Although the public is generally familiar with the Division's role as enforcer of the environmental laws, much of our attorneys' time is actually spent defending a wide range of federal programs and interests. The Division has defended almost every federal agency, handling cases that challenge such diverse and critical matters as military training programs, government

cleanup actions, resource management programs, and environmental regulations. The Division's eminent domain and takings cases also facilitate important federal programs by enabling agencies to acquire needed property or other rights in a fiscally responsible manner while respecting the property interests of citizens.

The Division currently has a docket of approximately 6,800 active cases and matters. These cases involve more than 70 different environmental and natural resources statutes, including the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Water Act, the Clean Air Act, the National Forest Management Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Endangered Species Act. The Division litigates in every judicial district in the Nation.

The Division's exemplary record in protecting the environment, American Indian rights, and the Nation's natural resources, wildlife, and public lands is due to the hard work of the Division's attorneys and staff in partnership with our client agencies, the United States Attorney's Offices, and state and local officials around the country. The Division's many accomplishments this year reflect the professionalism and dedication with which all these people work together to carry out the Division's mission.

Sue Ellen Wooldridge
Assistant Attorney General
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January 2007

CRIMINAL ENFORCEMENT OF OUR NATION'S ENVIRONMENTAL AND WILDLIFE LAWS

Vessel Pollution Prosecutions. The Vessel Pollution Initiative is an ongoing, concentrated effort to prosecute those who illegally discharge pollutants from ships into the oceans, coastal waters and inland waterways. The Division continues to have great success prosecuting such activity, and these prosecutions serve as a significant deterrent to would-be polluters.

In *United States v. MSC Ship Management (Hong Kong) Limited*, the defendant, a Hong Kong-based container ship company, pleaded guilty to conspiracy, obstruction of justice, destruction of evidence, false statements and violating the Act to Prevent Pollution from Ships (APPS). MSC Ship Management paid \$10.5 million in penalties, the largest fine in which a single vessel has been charged with deliberate pollution and the largest criminal fine paid in an environmental case in Massachusetts history. MSC Ship Management admitted that crew members on the *MSC Elena* circumvented required pollution prevention equipment in order to discharge oil sludge and oil-contaminated waste directly overboard. After the discovery of the bypass pipe during a U.S. Coast Guard inspection in Boston Harbor, senior company officials in Hong Kong directed crew members to lie about it to the Coast Guard. Senior ship engineers also ordered that documents be destroyed and concealed. The Chief Engineer of the ship was sentenced to serve two months in prison and ordered to pay a \$3,000 fine.

In *United States v. Wallenius Ship Management, Pte., Ltd.*, a Singapore shipping company pleaded guilty to conspiracy to violate APPS and multiple felony counts. Under the plea agreement, the company has agreed to pay a \$5 million fine with an additional \$1.5 million payment devoted to community service. The company also will serve a three-year term of probation and implement an environmental compliance plan. Crew members on the *M/V Atlantic Breeze*, a car carrier vessel managed by Wallenius Ship Management, sent a fax to an international seafarers' union that they were being ordered to engage in deliberate acts of pollution, including the discharge of oil-contaminated bilge waste and sludge as well as garbage and plastics. In addition, a bypass system hidden in various parts of the ship had dumped oily wastes illegally for about three years.

In *United States v. Pacific-Gulf Marine, Inc.*, an American-based ship operator pleaded guilty to violating APPS, by deliberately discharging hundreds of thousands of gallons of oil-contaminated bilge waste from four of its ships through a bypass pipe. PGM admitted to circumventing the oily water separator on four of its giant "car carrier" ships. This case was also significant in the substantial credit given defendant for its extensive cooperation, facilitating Division efforts to hold other vessel pollution violators accountable.

In *United States v. Stickle*, the Eleventh Circuit upheld the conviction of a vessel owner for conspiracy to violate U.S. laws and for unlawfully operating a freight vessel as an oil transportation vessel. In 1998 the defendant's vessel had been transporting wheat from the United States to Bangladesh. En route, diesel fuel leaked from a separate storage compartment and contaminated the

wheat. When the Bangladeshi importer refused the wheat shipment, the vessel owner authorized disposal of the oil-contaminated wheat on the high seas. The court rejected the argument that because the vessel was once an oil transportation vessel, it should still be considered as such, even though it was not licensed and did not meet current standards for carrying oil.

Prosecuting Hazardous Waste Violations, Clean Water Act and Clean Air Act Crimes, and Worker

Endangerment. The Division has successfully prosecuted several companies owned by McWane, Inc., a company that the U.S. Occupational Health and Safety Administration (OSHA) has cited for violations hundreds of times since the mid-1990s. To date, McWane has paid nearly \$20 million in criminal fines, and the national prosecution effort against McWane has been a centerpiece of the Justice Department's worker endangerment activities.

In *United States v. Atlantic States Cast Iron Pipe Company*, a seven month trial resulted in guilty verdicts against Atlantic States (a division of McWane) and four of the five manager defendants on multiple felony counts. Evidence adduced at trial established a corporate philosophy and management practice that led to an extraordinary history of environmental violations, workplace injuries and fatalities, and obstruction of justice. Atlantic States and the four current and former managers were found guilty of conspiracy to violate the Clean Water Act (CWA) and Clean Air Act (CAA); to make false statements and to obstruct the Environmental Protection Agency (EPA) and OSHA; and to defeat the lawful purpose of OSHA and EPA. These five defendants also were variously

found guilty of substantive CWA, CAA, Comprehensive Environmental Reclamation, Compensation and Liability Act (CERCLA), false statement, and obstruction charges.

In *United States v. Pacific States Cast Iron Pipe Company*, a Utah division of *McWane* was convicted of making false statements, and sentenced to pay a \$3 million fine. The company's vice president and general manager was sentenced to serve 12 months and one day for violating the CAA. In *United States v. McWane, Inc.*, *McWane* was sentenced to pay a \$5 million fine and \$2.7 million in community service, for conspiring to conceal illegal wastewater discharges into Avondale Creek, from its Birmingham, Alabama facility, substantive CWA counts, making false statements and obstruction of justice.

In *United States v. Puerto Rico Aqueduct and Sewer Authority (PRASA)*, the defendant pleaded guilty to a 15-count indictment charging CWA violations based upon a 25-year history of inadequately maintaining and operating the island's wastewater and water treatment systems. PRASA is a public corporation of the Commonwealth of Puerto Rico created to provide water and sanitary sewer service, and operates the island's entire sewage collection and treatment system. PRASA admitted to nine counts of discharging in violation of its National Pollutant Discharge Elimination System (NPDES) permit at the nine largest publicly-owned treatment works on the island; five counts of illegal discharges from the five water treatment plants that supply drinking water to the largest portion of the local population; and one count of a direct discharge from the PRASA system to the Martin Pena Creek.

In *United States v. Bezhad Kahoolyadeh*, the defendant was sentenced to serve 37 months incarceration and pay \$1.29 million in restitution for cleanup costs, conspiracy, illegally transporting hazardous waste and illegally storing hazardous waste. The defendant illegally stored drums of perchloroethylene waste and then shipped them to unpermitted facilities to evade state and city inspectors.

In *United States v. Ortiz*, the defendant was convicted of negligent and knowing violations of the CWA for disposing of wastewater from the manufacture of airplane de-icing fluid into Grand Junction, Colorado's storm drain system, which flows into the Colorado River. The Tenth Circuit held that the CWA does not require proof of knowledge that a discharge will enter waters of the United States, in reversing the lower court. It also held that a sentencing enhancement should have been imposed for multiple discharges.

Protecting Homeowners and Enforcing the Clean Water Act. In *United States v. Robert Lucas*, a developer was sentenced to serve nine years in prison for violating the CWA by illegally filling in wetlands, and for conspiracy and mail fraud for selling homes to hundreds of families despite warnings from public health officials that the illegal septic systems were installed in saturated soil and were likely to fail, causing contamination of the underlying property and the drinking water aquifer. Lucas' co-defendants were each sentenced to serve 87 months in prison, and his two companies were ordered to pay a total of \$5.3 million in criminal fines.

In *United States v. Gordon Tollison*, the owner and chief executive of a corporation that owned and operated eight wastewater treatment plants servicing housing developments containing approximately 900 homes was sentenced to serve one year and a day of incarceration for four CWA violations. The defendant's plants had been in perpetual violation of their state NPDES permits, discharging untreated or under-treated sewage into state waterways for more than 25 years.

Enforcing the Laws Protecting Wildlife. In *United States v. Jonathan Corey Sawyer*, the defendant was sentenced to serve 15 months incarceration for illegally importing and exporting more than 230 reptiles worth approximately \$30,000 during an eight-month period.

In *United States v. Panhandle Trading Inc.*, two companies and their vice president entered pleas of guilty to conspiracy to violate the Lacey Act and conspiracy to commit money laundering for their role in an illegal catfish importation scheme. The defendants intentionally mislabeled frozen farm-raised catfish fillets imported into the U.S. from Vietnam to evade import duties. The scheme involved over a million pounds of catfish labeled as grouper, channa, snakehead, or bass.

In *United States v. Beau Lee Lewis*, the defendant was sentenced to serve 23 months in prison for violating the conspiracy and smuggling statutes when he imported more than 300 protected reptiles and amphibians into the United States.

United States v. Hoang Nguyen involved the smuggling of red snapper caught in violation of the Magnuson Stevens Fisheries Act. The captain of the fishing

vessel was ordered to serve 30 months in prison, while a crew member received a sentence of 21 months for his role in concealing and selling commercial quantities of red snapper that had been illegally imported into the United States.

In *United States v. Estremar S.A.*, an Argentine company was sentenced to pay a \$75,000 fine for violating the Lacey Act, as well as forfeit all assets including \$158,145.53 in proceeds from the sale of Patagonian toothfish, a.k.a. Chilean seabass. The company knowingly imported and attempted to sell over 30,000 pounds of this toothfish which had been illegally harvested and transported.

Combating Fraud in the Asbestos Abatement Training Industry. In *United States v. ACS Environmental, Inc.*, the president of one asbestos abatement company was sentenced to serve 21 months incarceration and pay a \$1.5 million fine and the president of another asbestos company was sentenced to serve five months in prison and pay a \$1 million fine for conspiring to defraud OSHA, EPA, and the Small Business Administration (SBA). The companies purchased 250 false training certificates for their employees and then directed their employees to do work involving asbestos, lead, and hazardous waste removal at schools and federal facilities under SBA contracts set aside for minority-owned businesses.

Prosecuting Illegal Sales of Ozone-depleting Chemicals. In *United States v. Dov Shellef*, two sellers of refrigeration chemicals were sentenced on 87 counts of conspiring to avoid excise taxes on ozone-depleting chemicals, money laundering,

wire fraud, and tax violations. Shellef was ordered to serve 70 months and his co-defendant 18 months incarceration. Both were held jointly and severally liable for \$1.9 million in restitution for taxes due on domestic sales of the ozone-depleting chemical referred to as CFC-113. The defendants told manufacturers that they were purchasing CFC-113 for export in order to buy the product tax-free and then sold it tax-free in the domestic market without notifying the manufacturers or paying the excise tax.

PROTECTING OUR NATION'S AIR, LAND, AND WATER

Reducing Air Pollution from Coal-Fired Power Plants. During this past year, the Division continued to successfully litigate CAA claims against operators of coal fired electric power generating plants. The violations arose from companies engaging in major life extension projects on their aging facilities without installing required state of the art pollution controls. The resulting tens of millions of tons of excess air pollution has adversely affected human health, degraded forests, damaged waterways, and contaminated reservoirs. In June 2006, the Division obtained a partial settlement in which Alabama Power Company agreed to install and operate state-of-the-art pollution controls at two units, to purchase and retire \$4.9 million in sulfur dioxide (SO₂) emission allowances allocated under the acid rain program, and to pay a \$100,000 civil penalty. And in July 2006, the court entered a consent decree with Minnkota Power Cooperative which will substantially reduce air pollution from SO₂ and nitrogen oxide (NO_x) each year from the two coal-fired units at its facility through the installation of pollution control measures estimated to cost in excess of \$100 million. Minnkota and Square Butte

will also pay a civil penalty of \$850,000 and spend at least \$5 million on environmentally beneficial wind turbine projects in North Dakota. The State of North Dakota was a co-plaintiff in this action. The Division, along with co-plaintiffs Connecticut, New Jersey, and New York, also made progress in its case against Cinergy Corp. when, in August, the Seventh Circuit upheld the District Court's ruling for the United States on the key legal test for an emissions increase under CAA regulations. This year the Supreme Court accepted *certiorari* in *Environmental Defense v. Duke Energy Corp.*, a case that addresses whether, under EPA regulations governing the Clean Air Act's Prevention of Significant Deterioration program, changes to a plant that increase total annual emissions, but do not increase hourly emissions, constitute a "modification" under the CAA. The United States filed briefs in support of the total annual emissions regulatory standard.

Settlements achieved to date with operators of coal fired power plants will ultimately remove more than a million tons of pollutants from the air a year.

Addressing Air Pollution from Oil Refineries. The Division also continued to make significant progress in its series cases aimed at CAA violations within the petroleum refining industry. During the past year, consent decrees were entered in an additional five enforcement actions against Exxon Mobil Corp., ConocoPhillips Co., Valero Energy Corp., Sunoco Refinery, Inc., and Chalmette Refining, LLC. The Exxon Mobil settlement addresses all six domestic petroleum refineries owned by Exxon Mobil and ExxonMobil Oil Corporations.

The decree requires installation of controls that will reduce air pollutant emissions by more than 51,000 tons per year, at a cost of approximately \$537 million. The company will also pay a \$7.7 million civil penalty, and another \$6.7 million for environmentally beneficial projects near the refineries. The United States was joined in this settlement by the States of Illinois, Louisiana, and Montana. The *ConocoPhillips* settlement covers nine refineries in seven states representing more than 10% of total domestic refining capacity. Under the decree, ConocoPhillips will install an estimated \$525 million in pollution control technology expected to reduce annual emissions of NO_x and SO₂ by more than 47,100 tons per year, pay a civil penalty of \$4,525,000, and perform \$10.1 million in supplemental environmental projects. The United States was joined in this settlement by co-plaintiffs Illinois, Louisiana, New Jersey, Pennsylvania, and the Northwest Clean Air Agency of Washington. In the *Valero* settlement, the settling companies will implement more than \$700 million in pollution control technologies that will result in emission reductions of over 20,400 tons per year, pay a civil penalty of \$5.5 million, and spend \$5.5 million to implement facility and community-based supplemental environmental projects. Under its settlement, Sunoco will install \$285 million in pollution control technologies at its refineries in Philadelphia (PA), Marcus Hook (PA), Toledo (OH), and Tulsa (OK), pay a \$3 million civil penalty, and perform \$3.9 million in supplemental projects. Finally, the settlement with Chalmette requires the installation of approximately \$34 million in air pollution controls at a refinery in Chalmette, Louisiana, payment of \$1 million in civil penalties, and performance of \$3 million in environmental projects. The States

of Illinois, Louisiana, and Montana joined the United States as co-plaintiffs in this action.

With these additional settlements, the Division has now addressed more than 80 refineries, comprising approximately 77% of the nation's refining capacity, and will reduce air pollutants by more than 315,000 tons per year. In related cases, the Division also completed civil enforcement actions under the CAA and CWA against Motiva Enterprises LLC, another petroleum refiner. The civil action was a companion to a criminal case and concerned a fatal 2001 explosion and fire at a Motiva oil refinery in Delaware. Under the consent decree, Motiva will pay a \$12 million penalty that will be shared with our co-plaintiff, the Delaware Natural Resource and Environment Commission, and spend at least \$3.96 million on environmental projects. The new owner of the refinery, The Premcor Refining Group Inc., now a subsidiary of Valero, also agreed to implement enhanced safety procedures estimated to cost about \$7.5 million.

Reducing Air Pollution at Other Diverse Industrial Facilities. The Division also improved the nation's air quality through enforcement actions against numerous other facilities operating in diverse industries, including methyl methacrylate and acrylic sheeting facilities (*U.S. v. Lucite International Inc.*), polystyrene foam manufacturing facilities (*U.S. v. Atlas Roofing Corp.*), rubber tractor treads manufacturing facilities (*U.S. v. Caterpillar and Camoplast Rockland, LTD*), ethanol production (*U.S. v. Cargill, Inc.*, *U.S. v. MGP Ingredients of Illinois, Inc.*), grocery store refrigeration units

(*U.S. v. Newly Wed Foods, Inc.*), polyvinyl chloride (PVC) manufacturing facilities (*U.S. v. Formosa Plastics Corp.*, *U.S. v. OxyVinyls, L.P.*), hazardous waste treatment, storage and disposal facilities (*U.S. v. Clean Harbors Environmental Services*), and pulp and paper mills (*U.S. v. Weyerhaeuser Company, Willamette Industries, Inc.*). Those efforts, addressing similarly diverse CAA violations, resulted in commitments by defendants to perform more than \$535 million in facility improvements, to undertake SEPs valued at \$6.8 million to benefit local communities, and to pay more than \$4 million in civil penalties. The States of California, Illinois, Delaware, New Jersey, and Louisiana joined the United States as co-plaintiff in one or more of the actions listed above. Just one of these settlements, which involved ethanol production (*Cargill*), will result in a reduction of an estimated 25,000 tons per year of harmful air emissions at 29 of defendant's facilities in thirteen states. The states of Alabama, Georgia, Illinois, Indiana, Iowa, Missouri, Nebraska, North Carolina, North Dakota, and Ohio, and counties in Tennessee, Ohio and Iowa, were Plaintiff-Intervenors and signatories to the consent decree.

Controlling Contaminated Storm Water Run-off. The Division also directed significant effort toward assuring that companies comply with the CWA's provisions governing the discharge of storm water, a significant source of environmental harm because of the pollutants it may contain. In January 2006, the District Court for the District of Hawaii entered a consent decree with the Hawaii Department of Transportation (HDOT) resolving CWA violations resulting from discharges along HDOT's roadways, construction projects, and at three airports. The consent decree requires HDOT to undertake comprehensive corrective

measures, at an estimated cost of \$60 million over the next five years, to achieve compliance with the CWA. HDOT will also pay a \$1 million civil penalty and perform \$1 million in environmental projects in the affected communities. In June 2006, the same district court entered a consent decree with an Hawaiian property developer in *U.S. v. James H. Pflueger*, resolving defendants' illegal discharges of storm water, sediment discharges, and placement of unpermitted fill in stream courses from construction activities on the Island of Kauai. The decree requires defendants to spend an estimated \$6 million on corrective measures, pay a \$2 million penalty, and perform a \$200,000 environmental project. The State of Hawaii joined the United States as co-plaintiff in the actions against HDOT and Pflueger.

Also in June, the District Court for the District of Idaho in *U.S. v. Idaho Department of Transportation (ITD)* entered two consent decrees resolving stormwater violations by ITD and a contractor in connection with a road building project. Under the decrees' terms, defendants will pay civil penalties totaling \$895,000 and undertake various actions to better train their employees. IDT must also improve its efforts to inspect for and comply with storm water regulations. And in August 2006, the District Court for the Northern District of Texas entered a consent decree in *U.S. v. City of Dallas*, settling allegations that the City violated the CWA by failing to adequately staff and implement its storm water management program. The decree requires the City to undertake comprehensive injunctive relief, pay a civil penalty of \$800,000 and spend

\$1.2 million on environmental projects. Texas was a co-plaintiff in this action.

Ensuring the Integrity of Municipal Wastewater Treatment Systems. The Division continued to protect the Nation's waterways by ensuring the integrity and proper operation of municipal wastewater treatment systems. In August 2006 the Division lodged a second partial consent decree with the City of San Diego requiring further injunctive measures to address unlawful discharges from the City's sewer system at a cost of an additional \$87 million. This decree follows a 2005 partial consent decree that required the City to undertake injunctive relief valued in excess of \$187 million. In December 2005 a consent decree was entered in *U.S. v. Washington Suburban Sanitary Commission (WSSC)*, resolving CWA claims against the sewage authority that serves Montgomery and Prince George's Counties in Maryland. Pursuant to the decree, WSSC will spend an estimated \$200 million on a comprehensive set of improvements to control the overflow of sanitary sewage, pay a \$1.1 million penalty, and perform \$4.4 million in environmental projects. Maryland joined the United States as co-plaintiff in this case. In August 2006, a consent decree was entered in *U.S. v. Metropolitan District Commission, Hartford (MDC)* under which MDC, the operator of the largest sewage collection system in the State of Connecticut, will upgrade the sewer collection system at a cost of more than \$100 million and pay a civil penalty of \$850,000 which will be split between the United States and the State of Connecticut. The injunctive relief is intended to eliminate sanitary sewer overflows in the collection system and improve water quality in streams in the Hartford area.

And in landmark criminal and civil enforcement actions (*U.S. v. Puerto Rico Aqueduct and Sewer Authority (PRASA)*), the Puerto Rico Aqueduct and Sewer Authority (PRASA) agreed to pay \$10 million in criminal and civil fines and to perform more than \$1.7 billion in injunctive relief to resolve repeated environmental violations at wastewater treatment plants and drinking water treatment plants throughout Puerto Rico. To comply with the settlement, PRASA will complete a total of 145 capital improvement projects, including short-term and mid-term projects over the course of two years from the entry of the settlement. The consent decree with PRASA was lodged with the Puerto Rico District Court in June 2006.

The Division also helped ensure the integrity of municipal wastewater treatment systems by concluding enforcement actions against a number of smaller municipalities: City of New Iberia (LA), City of Nashua (NH), City of Okmulgee (OK), City of Chicopee (MA), and City of Brockton (MA). In these actions, the United States secured commitments by defendants to spend an estimated \$310 million to improve their municipal wastewater systems. In all of these cases, the States joined the United States as co-plaintiff and signed onto the consent decree.

Ensuring Safe Drinking Water. The Division also achieved a significant victory under the Safe Drinking Water Act in the Ninth Circuit. The appellate court affirmed a judgment in favor of the United States in *United States v. Alisal Water Corp.*, an action involving 232 violations of the Act against five water companies

which provided water to 28,000 people in Monterey County, California. The Ninth Circuit upheld the district court's order appointing a receiver and requiring the sale of several of the defendants' systems.

Protecting the Nation's Wetlands. In *United States v. Lone Moose Meadows, LLC*, working with the U.S. Attorney's Office for the District of Montana, the Division successfully sued the developer of a ski resort in Big Sky, Montana, for the illegal filling of wetlands. The Montana District Court entered the consent decree in January 2006, and ordered Lone Moose Meadows to restore streams and wetlands, create new wetlands in mitigation, and pay a \$165,000 civil penalty. In another enforcement matter, *United States v. Don Prow d/b/a Rochester Topsoil*, the Minnesota District Court in April 2006 entered a consent decree requiring the defendant to pay a \$250,000 civil penalty and comply with onsite/offsite restoration and mitigation projects for the unauthorized discharge of fill material into approximately 73 acres of wetlands in Rochester, Minnesota.

In May 2006 the Supreme Court ruled in *S.D. Warren v. Maine Board of Environmental Protection*, consistent with the *amicus* brief filed by the Department of Justice; the Court held that dams produce "discharges" and are therefore subject to State authority under section 401 of the Clean Water Act.

ENSURING CLEANUP OF OIL AND HAZARDOUS WASTE

Continuing Progress to Cleanup Contaminated River Systems. This year the Division continued to secure significant river cleanups. In October 2005, the Division reached an agreement with the General

Electric Company (GE), requiring it to begin the dredging of sediment contaminated with polychlorinated biphenyls (PCBs) at the Hudson River PCB Superfund site in upstate New York. Under the settlement, GE will perform the first of two phases of the dredging and pay EPA up to \$78 million for the Agency's past and future costs. The first phase will remove about 10 percent of the total volume of PCB-contaminated sediment slated for dredging during the entire cleanup, at an expected cost of between \$100 million and \$150 million. The second phase of the dredging is expected to take five years. The GE cleanup project is unprecedented in size and scope and addresses the PCB discharges from two GE manufacturing plants that for years discharged hazardous PCBs directly into the upper Hudson River. The goal of the project is to restore one of the country's most important cultural and ecological resources, while using approaches to minimize impacts on local communities. In February 2006, the District Court for the District of Montana entered a consent decree in *U.S. v. Atlantic Richfield Co. (Milltown Reservoir Sediments)* resolving CERCLA claims against Atlantic Richfield and NorthWestern Corporation in connection with the Milltown Reservoir Operable Unit, one of the numerous Superfund sites within the Clark Fork River Basin in Montana. Under the consent decree, ARCO and NorthWestern will remove the Milltown Dam and millions of cubic yards of contaminated sediment accumulated behind the dam, at an estimated cost of \$106 million. In April 2006, the Division lodged a consent decree with NCR Corp. and Sunoco-U.S. Paper, which requires those parties to perform the first phase of remedial action for Operable

Unit 4 of the Lower Fox River and Green Bay site in northeastern Wisconsin. Wisconsin is participating as a co-plaintiff in the Fox River cleanup. The site is contaminated with PCBs discharged into the Fox River from several paper manufacturing and recycling facilities. The site was divided into five operable units for purposes of remediation and will cost more than \$500 million to address overall. Phase 1 is expected to cost about \$30 million and features dredging, dewatering, and landfill disposal of PCB-contaminated sediments from a hot-spot of contamination near the U.S. Paper manufacturing plant. This is the fifth partial consent decree negotiated in connection with cleanup of the site.

Conserving the Superfund through Securing Cleanup of Hazardous Waste Sites by Responsible Parties and Recovering Superfund Monies Expended for Cleanups. The Division secured the commitment of responsible parties to clean up additional hazardous waste sites, at costs estimated in excess of \$227 million, and recovered more than \$140 million for the Superfund to help finance future cleanups. Examples of some of the major Superfund cases resolved by the Division this year include: *U.S. v. Carrier Corp.* (defendants to perform the shallow zone remedy for the Puente Valley Operable Unit of the San Gabriel Valley Superfund site, valued at \$27 million, and pay \$800,000 in past response costs); *U.S. v. Allegiance Healthcare Corp.*; *v. Lockheed Martin Corp.*; *v. White & White Properties*; *v. Leach International Corp.*; *v. Azusa Land Reclamation Co., Inc.*; *v. Aerojet-General Corp.*; and *v. Phaostron Instrument and Electronic Co.* (seven consent decrees with 16 defendants required to pay \$14.3 million in response costs and 88 percent of future oversight costs at the Baldwin Park

Operable Unit of the San Gabriel Valley Superfund site); *U.S. v. Asarco, Inc.* (developer will purchase Asarco's Tacoma Smelter Superfund site and perform site remedy at an estimated cost of \$28 million and Asarco will pay \$1.5 million to Superfund from the proceeds of sale); *U.S. v. NCH Corp.* and *U.S. v. FMC Corp.* (defendants will pay over \$26 million in past and future costs and perform remedial work estimated at more than \$13 million at the Higgins Farm and Higgins Disposal Superfund sites in New Jersey); *U.S. v. Dominick Manzo* (judgment in favor of the United States for \$31 million in costs incurred cleaning up the Burnt Fly Bog Superfund site, also in New Jersey). Additionally, the Division entered into a settlement agreement with Teck Cominco America, Inc. (TCAI), and its Canadian parent, Teck Cominco Metals, Ltd. (TCM), requiring TCAI to perform a remedial investigation and feasibility study (RI/FS) at the Upper Columbia River Superfund site. The site, consisting of 150 miles of the Columbia River and adjoining lands between the Canadian border and the Grand Coulee Dam, has been contaminated by millions of tons of smelter slag and heavy metals discharged into the Columbia River from TCM's Canadian zinc and lead smelter, approximately 10 miles north of the border.

The Division also achieved notable victories on appeal in *U.S. v. W.R. Grace & Co.*, in which the Ninth Circuit Court of Appeals affirmed EPA's decision to clean up asbestos contamination in Libby, Montana that resulted from W.R. Grace's mining operations as a "removal" action under CERCLA instead of a "remedial" action, and the district court's order requiring W.R. Grace to reimburse EPA

for \$54.5 million. In *U.S. v. Vertac Chemical Corp.*, the Eighth Circuit Court of Appeals affirmed that Hercules and other companies were liable for costs associated with EPA's cleanup of hazardous waste contamination at a chemical plant site in Jacksonville, Arkansas.

Enforcing Cleanup Obligations In Bankruptcy Cases. The Division's bankruptcy practice has continued to grow. This year, the Division represented the United States in many proceedings, including the *Dana Corp.*, *Delta Air Lines*, *Asarco*, *Delphi Automotive*, *Saltire*, *Encycle*, and *Safety-Kleen* bankruptcies, where debtors had significant environmental responsibilities. The Division filed proofs of claim to require that at least part of debtors' estates be applied to the costs of environmental remediation for which the debtors are liable. In the *Eagle Picher* bankruptcy, the Division secured the agreement of the debtor to deposit \$13.6 million into a custodial trust to be used to fund environmental cleanup work at sites in several states. The Division also lodged proposed settlements in bankruptcy courts in the *Gulf States Steel*, *W.R. Grace*, *Armstrong* and *Saltire Industrial* bankruptcies. In these proceedings, the Division received distributions this year totaling more than \$6 million in reimbursement of response costs. These settlements avoided abandonment of contaminated properties by debtors and enabled companies to avoid liquidation and loss of jobs by facilitating reorganization or sales of ongoing operations.

Recovering Natural Resource Damages. The Division obtained significant results in its efforts to recover for natural resource damage claims securing settlements worth more than \$33 million. Some of the Division's recovery efforts include *U.S. v. Schlumberger*

Technology Corp, U.S. v. Elkem Metals Co., U.S. v. Sunoco, Inc., U.S. v. American Energy, Inc. and *U.S. v. BP Amoco Chemical Co.* South Carolina and Georgia joined the United States as co-plaintiffs in *Schlumberger*; Ohio and West Virginia were co-plaintiffs in *Elkem Metals*, Kentucky was a co-plaintiff in *Sunoco*, and Texas was a co-plaintiff in the case against *BP Amoco*. Restoration activities included the removal of two dams, dredging PCB contaminated sediments behind the dams, and improving the stream corridor leading to Lake Hartwell in South Carolina (*Schlumberger*); the restoration of mussels, fish, and snails damaged by releases of hazardous substances to the Ohio River (*Elkem*); the preservation of at least 100 acres of bottomland hardwood forest habitat, the re-colonization of 19 acres of former pasture with native vegetation, and the creation of six acres of riparian wetland in the vicinity of two Superfund sites in Harris County, Texas (*BP Amoco*).

PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S NATURAL RESOURCES AND WILDLIFE

Implementing the President's Healthy Forest Initiative and Defending Federal Forest Management Programs. The Division continued its string of victories defending against challenges to projects to restore public forest lands, improve wildlife habitat, and recover the value of damaged timber on federal forest lands – projects which implement President Bush's Healthy Forest Initiative. In *Defenders of Wildlife v. Kempthorne*, the Division prevailed in a challenge to the counterpart Endangered Species Act (ESA) Section 7 consultation regulations enacted as part of

the Healthy Forests Initiative. These regulations empower the Forest Service and Bureau of Land Management to render their own “not likely to adversely affect” determinations concerning threatened and endangered species for specified actions without further process, thereby expediting forest recovery under the Healthy Forests Initiative.

The Division successfully defended other forest management actions, including timber management on Forest Service land in grizzly bear habitat in *Swan View Coalition v. Barbouletos* and the issuance of oil-and-gas leases in *New Mexico v. the Bureau of Land Management*.

Tending Fire-Damaged Forests and Capturing Economic Value From Dead and Dying Timber. The Administration made increased active management of the Nation's forests a priority in 2006, including dealing with the ravages of wild fires. The Division continued its successes in defending against emergency motions for injunctive relief in lawsuits challenging Forest Service projects to salvage dead and dying trees, reduce fire risks, and secure economic value from burned-over areas in the Pacific Northwest. In *FSEEE v. United States Forest Service*, the court denied a motion for emergency relief, finding that the plaintiffs were not likely to succeed on claims challenging the Forest Service's interpretation of the applicable Eastside Forest Plan and its use of tree mortality guidelines. As a result of the favorable decision, the Easy Fire Recovery Timber Salvage Project on the Malheur National Forest was able to proceed, and the harvest was completed, allowing for restoration efforts and providing revenue to local communities. In *Lands Council v. Martin*, the district court also denied a motion

for a preliminary injunction, finding that plaintiffs were not likely to succeed on claims under the National Environmental Policy Act (NEPA) and the National Forest Management Act against the School Fire Recovery Project on the Umatilla National Forest. As a result of the Division's victory, that project has been able to proceed with similar benefits. Similarly, the Division successfully defended the Forest Service's ability to use "categorical exclusions" under the National Environmental Policy Act for timber sale projects under 250 acres in size in *Allegheny Defense Project v. Bosworth*.

Defending Multiple Federal Agencies Operating the Federal Columbia River Power System. The Federal Columbia River Power System, a system of dams and reservoirs on the Columbia and Lower Snake Rivers, provides over 50% of the power for the four states in this region. These rivers are also the habitat for 13 protected species of salmon. The Division facilitated coordination of the client agencies and fellow sovereigns to move forward in complying with the 2005 remand order in *National Wildlife Federation v. National Marine Fisheries Service* and, in *American Rivers v. National Oceanic and Atmospheric Administration Fisheries*, on May 23, 2006, obtained a critical decision rejecting plaintiffs' claims that the Upper Snake and Columbia River operations had been illegally segmented, thereby protecting the Snake River Basin Adjudication agreement from collateral attack. In related litigation, the Division obtained dismissal on jurisdictional grounds of two cases collaterally challenging the United States' compliance with and enforcement of a Canadian salmon harvest treaty in *Salmon*

Spawning and Recovery Alliance v. Department of State and Salmon Spawning and Recovery Alliance v. U.S. Customs and Border Patrol.

Restoring the San Joaquin River and Securing Bureau of Reclamation Project Water Supplies. The Bureau of Reclamation's California Central Valley Project is one of the Nation's major water conservation developments. Seventy years ago, Congress authorized construction of the Friant Division of the Project. Friant Dam diverts all but a fraction of the waters of California's second-longest river, the San Joaquin – de-watering a lengthy reach of the River for most of the year – for storage in Miller Lake and eventual distribution, primarily for agricultural use in the Central Valley. After eighteen years of contentious litigation over the Bureau's renewal of long-term water supply contracts, the Division negotiated an historic settlement in *Natural Resources Defense Council v. Rodgers*. The settlement delineates a monumental intergovernmental project by the State of California and the Bureau of Reclamation to restore flows in 153 miles of the San Joaquin River, harmonizing agricultural interests in securing irrigation water supplies with environmental interests in enhancing water quality and reviving two salmon runs that dried up when the Dam was built in the late 1940s.

Defending Fisheries Legislation. The Division successfully defended the constitutionality of a provision of the Atlantic Coastal Act. That Act creates a cooperative federalism framework under which the States have primary authority to regulate fisheries within 3 miles of shore, together with the federal government. In *Medeiros v. Vincent*, lobster fisherman challenged this legislation

under the Tenth Amendment and equal protection clause. The First Circuit rejected this challenge and the Supreme Court has now denied *certiorari*.

Protection of the Florida Everglades.

The Division continues to contribute to the restoration and protection of the Everglades ecosystem – including the 1.3 million-acre Everglades National Park, the largest, most important subtropical wilderness in North America. In *United States v. South Florida Water Management District*, the U.S. District Court entered a consent decree in 1992 requiring the State of Florida to restore water quality in the Everglades through regulation of agricultural runoff and construction of vast wetland treatment systems. After more than a year of negotiations, the Division this year negotiated an agreement with the State of Florida on additional remedial measures to complement those specified in the consent decree. The consent decree’s ambitious strategy to restore and preserve the Everglades ecosystem – and the federal-state collaboration that produced it – have heralded a new era of intergovernmental cooperation on the Everglades historic \$7.8 billion restoration effort, fulfilling a top priority of the past three federal administrations. The Division this year continued its participation in the proceedings of the South Florida Ecosystem Restoration Task Force, the intergovernmental body codified by Congress in 1996 to coordinate the restoration of the Everglades. The Division has also participated in the *Miccosukee* litigation, in which it has defended the joint federal-State approach to Everglades restoration.

The Division also contributes to protection of the endangered Everglades ecosystem by acquiring lands within Everglades National Park and Big Cypress National Preserve through exercise of the power of eminent domain, as authorized by Congress and requested by the National Park Service. Related acquisitions on behalf of the U.S. Army Corps of Engineers took place to improve water deliveries to the Everglades. The largest case to date is *United States v. 480 Acres of Land in Miami-Dade County, Florida, and Gilbert R. Fornatora, et al.* This is the lead case in a consolidated trial group of seven tracts totaling 1,000 acres in the Everglades National Park expansion project.

Defense of Offshore Oil and Gas Lease

Sale. Domestic energy production has become increasingly visible as the Nation’s energy needs grow and the role of foreign energy increases. In *Blanco v. Burton* (E.D. La.), the Governor of Louisiana sought to halt an Interior Department offshore lease sale in the western Gulf of Mexico for alleged violations of NEPA, the Outer Continental Shelf Lands Act and the Coastal Zone Management Act. The court denied the Governor’s motion for an emergency injunction to halt the lease sale because she had failed to show irreparable harm if the sale proceeded. The Interior Department and Governor ultimately settled the case favorably to federal interests. The Governor dropped all her claims against the lease sale in return for an Interior Department agreement to conduct additional environment analysis on the next lease sale and future lease activities.

PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

Defending Military Readiness Activities.

The Navy’s use of various sonar systems for

submarine detection has been the subject of several cases. This year, the Division aggressively defended a challenge to the U.S. Navy's use of mid-frequency active sonar during the multi-nation Rim of the Pacific ("RIMPAC") anti-submarine warfare exercise scheduled to take place off the coast of Hawaii in conjunction with the navies of 7 other countries. In *Natural Resources Defense Council v. Winter*, plaintiffs asserted Marine Mammal Protection Act (MMPA), NEPA, and Administrative Procedure Act (APA) challenges. During litigation of a motion for a temporary restraining order the Secretary of Defense invoked the National Defense Exemption under the MMPA, but the court still enjoined the exercise under NEPA. Despite that injunction, Division attorneys were able to negotiate terms limiting the injunction to a number of mitigation measures that the Navy was already undertaking pursuant to its standard operating procedures or its marine mammal incidental harassment authorization, and the exercise was able to proceed.

In *Ilioulaokalani Coalition v. Rumsfeld*, the Division continued to defend a challenge to a critical link in the Army's 30-year, Army-wide modernization plan to meet the national security needs of the future. The plaintiffs in this action challenged the Army's compliance with NEPA concerning its decision to transform a light infantry division into a Stryker Brigade Combat Team at an Army training facility in Hawaii. After the Ninth Circuit reversed the district court's decision granting summary judgment in favor of the Army, the Division presented argument and evidence in opposition to the plaintiffs' request to enjoin military training and

modernization in Hawaii while the Army works to complete additional environmental documentation required by the court for compliance with NEPA.

Defense of Immigration and National Security Initiatives. In *Sierra Club v. Gonzales* (S.D. Cal.), the Division secured an important victory upholding the authority of the Department of Homeland Security to undertake important initiatives at a speed appropriate to circumstances. The case was originally a challenge under NEPA to construction of a 14-mile fence on the Mexican border to deter illegal immigration. Pursuant to recently enacted authority, Secretary Chertoff waived compliance with environmental laws as they applied to construction of the fence. Plaintiffs responded with three Constitutional arguments attacking the waiver. In its favorable ruling, the court emphasized that "Congress' delegation of authority to the Executive Branch relates to matters over which the Executive branch has independent and significant constitutional authority: immigration and border control enforcement and national security." The court further found that the waiver authority as applied "in the completion of a project uniquely within the national security and immigration policy provinces of the Executive Branch" was not unconstitutional.

Property Acquisitions to Improve Military Readiness and National Security. As directed by federal agencies acting under authority of Congress, the Division exercised the federal government's power of eminent domain to initiate litigation enabling a number of land acquisitions. *United States v. 1,098.221 Acres in Duval County, Florida, and Gate Maritime Properties., et al.*, was filed to acquire a port facility on Blount

Island near Jacksonville, Florida, used by the Department of the Navy for weapons shipping around the globe. Estimated just compensation of \$101,000,000 was made immediately available to the landowner; the landowner claimed compensation of \$199,290,000 based on a highest and best use of conversion to high-end residential development, with a marina, hotel, commercial and cruise ship terminal. Following a two week jury trial conducted last November, the jury returned a verdict of \$162,000,000 resulting in a cost saving in excess of \$30,000,000.

United States v. 17.69 Acres of Land in San Diego County, California, and National Enterprises, et al., concerned land condemned by the Border Patrol, via the Army Corps of Engineers, for construction of a second fence and patrol zone along the San Diego-Tijuana border. In a three week trial, held last December, defendants argued that just compensation was \$48,000,000 to \$72,000,000 based on a highest and best use of development of a NASCAR stadium. The United States' appraiser testified that the value of the property was \$265,400 as holding for future industrial use. The verdict, after two days of jury deliberation, was that just compensation for the taking is \$1,232,280, resulting in a minimum cost saving in excess of \$46,000,000.

The Division has acquired land in a number of cases to facilitate the U.S. Army's transformation of its 2nd Brigade, 25th Infantry Division (Light) to a Stryker Brigade Combat Team. In the lead action filed last year, *United States v. 1,402 Acres of Land Honolulu, Hawaii and the Estate of James Campbell, et al.*, the parties reached a \$15,900,000 settlement, and

related NEPA claims were held not to be a defense to a taking. The Division has also acquired land on behalf of the Department of the Navy United for encroachment protection, training, and operations at Harvey Point Defense Testing.

The Division has been working closely with the U.S. Attorney (E.D. La.) and his Office, along with the Army Corps of Engineers in New Orleans, to assist and train those offices in anticipation of what is estimated will be some 400 Hurricane Katrina related condemnations for the reconstruction and enhancement of flood control systems.

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

Defending the Department of Energy's Operations at Its Hanford Nuclear Reservation. In *United States v. State of Washington*, the United States succeeded in its efforts to invalidate a Washington State voter initiative that would have significantly interfered with the activities of the Department of Energy and the Navy in Washington State and across the country. The new state law, originally known as "I-297," and now the "Cleanup Priority Act," sought to: (1) bar shipments of nuclear waste to the Department of Energy's Hanford Facility – including shipments from other sites in the Department of Energy's nationwide complex as well as nuclear components from the Navy's Pacific Fleet – pending cleanup of waste currently at Hanford; (2) change current storage, treatment and disposal practices at Hanford and its associated laboratories; and (3) expand the State's jurisdiction over radioactive materials. After obtaining a temporary injunction against implementation of the new law, the Division largely prevailed on its

interpretation of the law during a certification proceeding in the Washington State Supreme Court. The District Court for the Eastern District of Washington in June 2006 granted the government's motion for summary judgment. The court found that the law was preempted by the federal Atomic Energy Act, barred by sovereign immunity, and violated the Commerce Clause. As a result, the court held that the law was invalid on its face, and struck it down in its entirety. This case is now on appeal.

Defending EPA's Clean Water Act Standards for Coal Mining. In *Citizens Coal Council v. EPA*, petitioners under the CWA challenged effluent limitations guidelines and new source performance standards for subcategories within the coal mining category. The Division successfully sought *en banc* reversal of a prior adverse panel decision in which the court held that EPA incorrectly applied the statutory factors in setting effluent limitations. The Sixth Circuit granted *en banc* review, and in May 2006, the *en banc* court issued a favorable decision upholding the rule. The court reaffirmed the panel's decision that the Rahall Amendment – which sought to encourage re-mining of abandoned mines by providing limited exceptions from the statute's effluent limitation requirements – did not bar EPA from promulgating additional regulations to provide for broader exceptions for re-mining. The court also upheld EPA's use of best management practices (BMPs) in lieu of numerical effluent limitations, its treatment of re-mining discharges that are commingled with other waste streams, and its decision to set the effluent reduction attainable at re-mining areas at zero.

Upholding EPA Actions Implementing the Montreal Protocol. In *Natural Resources Defense Council v. EPA*, the Division successfully defended EPA's approval of the 2005 critical use exemption for the ozone-depleting substance methyl bromide. In August 2006, in a revised decision the D.C. Court of Appeals held that NRDC had demonstrated standing, but upheld the position of EPA on the merits. The court held that post-treaty decisions of parties to the Montreal Protocol on Ozone Depleting Substances were not "law" that could bind courts of the United States, as they were not signed by the President or ratified by the Senate.

Resolving Federal Liability to Ensure the Cleanup of Hazardous Waste. Through the use of alternative dispute resolution and with the assistance of a court-approved mediator, the Division was able to resolve a claim under CERCLA by Kerr-McGee Corporation (now Tronox LLC) seeking to force the United States to pay the vast majority of the cost of cleaning up groundwater contamination near its manufacturing facility in Henderson, Nevada. In January 2006, the D.C. District Court in *Kerr-McGee Chemical LLC v. United States* entered a consent decree requiring the United States to pay the agreed upon share of cleanup allocated to the United States, which was approximately one-third of the amount that Kerr-McGee originally sought. Similarly, in *Crane Co. v. United States*, a complex action under CERCLA seeking \$30 million in alleged past costs and undetermined future costs related to the cleanup of TCE and perchlorate at a former military ordnance and pyrotechnics manufacturing plant in Goodyear, Arizona, the United States was able to negotiate a favorable consent decree providing for a payment by the United States of

approximately 15% of plaintiffs' claimed past costs and 21% of future costs. The Arizona District Court entered the consent decree in August 2006, fully resolving the matter. Finally, in *Rhode Island v. United States*, the State sued under CERCLA to recover natural resource damages and response costs at the Allen Harbor Landfill and associated wetlands in North Kingstown, Rhode Island. With the assistance of court-sponsored mediation, the United States reached a \$1.2 million settlement of all claims for past response costs and damages to natural resources in connection with the Allen Harbor Landfill. The Rhode Island District Court entered the consent decree in August 2006.

Defending EPA's Cleanup Actions. In *Benzman v. Whitman*, residents of Lower Manhattan and Brooklyn filed a class-action suit alleging constitutional tort, mandamus, APA, and CERCLA claims against actions taken by EPA to clean up inside buildings following the collapse of the World Trade Center. In February 2006, the District Court for the Southern District of New York held that the Stafford Act precluded judicial review of claims that EPA failed to comply with various provisions of the National Contingency Plan because those provisions were discretionary rather than mandatory. However, the court found that the APA claim for violation of plaintiffs' substantive due process rights could proceed. The court allowed constitutional tort claims filed against former Administrator Whitman to proceed. Whitman appealed, and EPA sought and obtained certification for interlocutory appeal on the one claim against EPA that the court did not dismiss.

Defending EPA's Toxic Release Inventory and Community Right-to-Know Program. In *Ad Hoc Metals Coalition v. Whitman* and *National Federation of Independent Business v. Johnson*, the D.C. District Court in January 2006, upheld an EPA rule lowering the reporting threshold for lead under the Toxic Release Inventory program, under which industrial facilities must file reports on all releases of listed toxic chemicals. The court also held that the statute authorizes EPA not only to raise the reporting thresholds established in the Emergency Planning and Community Right to Know Act, but also to lower them, finding that such authority was not an unconstitutional delegation of legislative power. Finally, the court held that EPA reasonably applied a scientific methodology that uses persistence, bioaccumulation and toxicity to assess the hazard presented by lead.

Defending the Clean Water Act's Nationwide Permits. In *National Association of Home Builders v. U.S. Army Corps of Engineers*, the D.C. District Court in September 2006, held in the government's favor on a "a myriad of challenges" to the new Nationwide Permits issued in 2002 to replace a permit that had previously authorized filling that affected up to 10 acres of wetlands. The court determined that the Corps acted reasonably in issuing nationwide permits with more restrictive conditions than those it had issued in the past, finding that the Corps adequately explained its reasons for making each of the challenged decisions.

Defending EPA's Interpretation of the Clean Water Act. In *Dominion Energy Brayton Point, LLC v. Johnson*, the Division successfully defended the EPA's regulatory interpretation of the Clean Water Act term "opportunity for public hearing" in a

challenge by a power company. The First Circuit rejected the argument that its prior decision in *Seacoast Anti-Pollution League v. Costle*, which interpreted the disputed language, created a "non-discretionary duty" under the CWA. The First Circuit held that in light of the evolution of Supreme Court case law on statutory interpretation, deference was owed to EPA's reasonable interpretation of the ambiguous term.

Defending the Army Corps of Engineers' Emergency Authority. In *Louisiana Environmental Action Network v. U.S. Army Corps of Engineers*, the District Court for the Eastern District of Louisiana, in April 2006, refused to enjoin construction of a New Orleans landfill for the disposal of hurricane debris. The court found that plaintiffs failed to establish a likelihood of success on the merits or irreparable harm, and that the Corps' emergency authorization contained the requisite finding of an emergency necessary to by-pass notice and comment procedures and to defer NEPA analysis. The court noted: "One need only look around to know the tragic truth of these statements and findings."

Defending the U.S. Army Corps of Engineers' Clean Water Act Permits. Division attorneys defeated three challenges to the Mills Corporation's permit in connection with the proposed Xanadu shopping, entertainment, sports, lodging and office complex in the Meadowlands, in East Rutherford, New Jersey. In *Hartz Mountain Industries, Inc. v. U.S. Army Corps of Engineers*, and *Borough of Carlstadt v. U.S. Army Corps of Engineers*, the New Jersey District Court dismissed in October 2005 and

February 2006, respectively, challenges to the permit brought by a disappointed competing bidder and a neighboring municipality on grounds that the plaintiffs lacked standing to sue. Then, in *Sierra Club v. U.S. Army Corps of Engineers*, the New Jersey District Court reviewed the voluminous record compiled by the Corps, and on September 28, 2006, held that the Corps had properly and adequately analyzed the project under NEPA. The court also held that, consistent with Clean Water Act requirements, the Corps reasonably adopted a definition of the project proffered by the state development agency and gave sufficient consideration to alternative configurations that could have avoided the fill before concluding that there was no practicable alternative that would meet the project purpose.

Defending Federal Water Management Programs. The continued drought in regions of the country and the pressure on water resources generally results in constant litigation, as more fish species are listed under the Endangered Species Act due, in part, to these events. This year the Division prevailed against several challenges to federal management of water resources. In *Consejo de Desarrollo Economico de Mexicali v. United States*, a major concrete lining project for the All-American Canal, which delivers Colorado River water to the Imperial Irrigation District (IID) along the border with Mexico, and in *Alabama v. United States Army Corps of Engineers*, where the adverse impacts on protected species of the Corps' operation of dams and reservoirs in the Apalachicola- Chattahoochee-Flint Basin were worsened by drought, the Division successfully defended against emergency motions for injunctive relief. The court found that the Corps could not be held liable for

drought and allowed the Corps to continue status quo operations.

Defending Fish and Wildlife Service's Endangered Species Act listing program. Several cases resolved by the Division this year concerned interpretation of ESA provisions that allow for the listing as threatened or endangered species of "distinct population segments" of species, and provisions that require the Fish and Wildlife Service to address a species status in "a significant portion of the range." Division attorneys asserted carefully articulated legal theories explaining the agency's interpretations and achieved notable success in *Center for Biological Diversity v. Fish and Wildlife Service*, which affirmed the coastal cutthroat trout "no-list" decision, and *Center for Biological Diversity v. Norton*, which affirmed the Rio Grande cutthroat trout "no-list" decision.

Ensuring Limited Federal Jurisdiction is Enforced. The Administrative Procedure Act and other special review provisions circumscribe federal jurisdiction, and in several cases the Division prevailed on these or similar defenses. In *Environmental Protection Information Center v. Fish and Wildlife Service*, the court held that there was no judicial review of prosecutorial discretion where plaintiffs claimed the Fish and Wildlife Service failed to revoke an ESA Section 10 permit when the permittee was allegedly in violation of the permit's terms of the permit. In *American Bird Conservancy v. Federal Communications Commission* the court dismissed an ESA challenge to permits for communications towers where exclusive jurisdiction was in the court of appeals. Similarly, in *Geertson Seed*

Farms v. Johanns, the court dismissed ESA claims against EPA regarding tolerance levels of Roundup where plaintiffs failed to exhaust administrative remedies and exclusive jurisdiction rested with the court of appeals. Finally, in *Salmon Trollers Marketing Ass'n v Gutierrez*, the court denied a preliminary injunction as unavailable under the limited judicial review provisions of the Magnuson Stevens Fisheries Conservation Management Act.

Defending Federal Criminal Jurisdiction. The Division routinely assists other Department components in securing federal enclave or legislative jurisdiction. This year, the Division assisted another Department component in demonstrating the existence of federal legislative jurisdiction at a national forest site in Michigan. As a result, the Court upheld a death penalty imposed as a result of a murder committed at that site.

Defending the Establishment of a Nuclear Waste Depository. The Division advanced the important policy goal of developing a central nuclear waste repository in *Western Shoshone National Council v. United States*. The Western Shoshone Tribes brought this case pursuant to the Treaty of Ruby Valley and attempted to enjoin the federal government from taking any further steps to license or develop Yucca Mountain as a nuclear waste repository and seeking a declaratory judgment preventing any use of the land not specified in the treaty. The Court granted the government's motion to dismiss on sovereign immunity grounds.

Improved Definition of Land Use Planning Responsibilities and other Principles. In the consolidated cases *State of New Mexico v. BLM* and *New Mexico Wilderness Alliance v. Rundell* (D. N.M.), plaintiffs challenged the

Bureau of Land Management's amendment of the Resource Management Plan for Southern New Mexico to govern issuance of oil and gas leases. Plaintiffs alleged that the BLM and Fish and Wildlife Service violated several environmental statutes in adopting the Plan, which they claimed did not adequately protect the Otero Mesa grasslands. The court held in the government's favor on all major claims. Most significantly, it found that BLM complied with the Federal Land Policy and Management Act by considering a proposed alternative of New Mexico's Governor. BLM was not required to adopt or provide for public comment on the Governor's precise alternative. The court further held that BLM's "not likely to adversely affect" determination for the endangered Aplomado Falcon and the Fish and Wildlife Service's concurrence complied with the ESA.

Defense of Corps Permit Facilitating Mass Transit Construction. In many urban areas, mass transit projects and efforts to relieve the burden of auto traffic are controversial and end up in litigation. In *Advocates For Transportation Alternatives Inc. v. Army Corps of Engineers* (D. Mass.), plaintiffs claimed that the Army Corps of Engineers violated NEPA and the Clean Water Act when it issued a CWA permit to the Massachusetts Bay Transportation Authority to fill up to 7.60 acres of wetlands for construction of a 17.7-mile commuter rail line extension to serve the southeast suburbs of Boston. Plaintiffs alleged, among other things, that the Corps failed to adequately review important environmental impacts. The court found that the Corps' environmental analysis properly considered beneficial and adverse effects, mitigation measures,

public health and safety risks from train accidents and diesel emissions, and effects on recreation areas, wetlands, historic resources, and State-designated Areas of Critical Environmental Concern, and thus allowed this important project to proceed.

Protecting Taxpayers Against Unwarranted Claims. The Division has a responsibility to protect the public fisc against unwarranted claims and to provide just compensation when the government takes private property for public purposes. This year, the Division prevailed against a number of claimants bringing suits as a result of a wide variety of federal program decisions. For example, in *Cane Tennessee, Inc. v. United States* (Court of Federal Claims), the plaintiff alleged that the Secretary of the Interior's decision to designate an area encompassing his property as unsuitable for surface coal mining operations under the Surface Mining Control and Reclamation Act resulted in an unconstitutional taking. In October 2005, following trial, the court held that the plaintiff failed to establish that the government's regulatory action caused a loss sufficient to constitute a taking.

Major federal construction projects frequently result in takings claims. In *Ingram v. United States* (Court of Federal Claims), a group of property owners alleged that the construction and operation of the Red River Navigation Project in Louisiana resulted in the taking of flowage easements across their property in violation of the Fifth Amendment. In September 2006, following trial, the court ruled in favor of the United States in 15 cases, holding that the Project did not cause surface flooding on any of the plaintiffs' properties, nor did it cause groundwater levels to rise on the properties.

The Division also had an outstanding year defending important federal regulatory programs against takings claims. In *Brace v. United States* (Court of Federal Claims), the plaintiff alleged that a portion of his farm in Pennsylvania had been taken as result of a Clean Water Act enforcement action that required him to restore previously drained wetlands. In August 2006, following trial, the court dismissed all claims, finding that the government's actions did not take the farmer's property in violation of the Fifth Amendment. In *DuMarce v. Scarlett* (Court of Appeals for the Federal Circuit), the heirs of several Indian decedents, alleged a taking of property in violation of the Fifth Amendment as a result of the government's application of the Sisseton-Wahpeton Sioux Act of 1984. The Act provides that small fractional interests in land escheat to the tribe instead of passing to the heirs. In May 2006, the Federal Circuit reversed the trial court's holding and found that the government, acting as trustee, timely informed the plaintiffs of all facts pertaining to their potential causes of action and, as a result, their claims were time-barred under the statute of limitations.

General Motors v. U.S. Army Corps of Engineers involved a state law claim against the Corps for recovery of response costs in connection with the cleanup of the Middleground Landfill site on Middleground Island, in the Saginaw River. In November 2005, the District Court for the Eastern District of Michigan dismissed the complaint against the Corps with prejudice, finding that neither the Resource Conservation and Recovery Act nor CERCLA waived the federal government's sovereign immunity from

state law claims for recovery of response costs at this privately owned, third party site. Similarly, in *Rhode Island Resource Recovery Corp. v. EPA*, a suit challenging remedial action at the Central Landfill Superfund site in Johnston, Rhode Island, the court held that there is no waiver of sovereign immunity for suing EPA.

There has also been significant litigation, in multiple federal district courts and courts of appeals, relating to the interpretation and application of the Supreme Court's decision in *Cooper v. Aviall* (holding that a § 113 contribution action may be brought only if there is a pending or completed §§106 or 107 civil action or a settlement). A particular focus has been on the issue of whether a liable party who has not satisfied the requirements of section 113(f) of CERCLA for bringing a contribution action may instead bring an action under section 107 of CERCLA. The Division has taken the position that such suits are not permitted, and prevailed on this issue in the Third Circuit in *E.I. Dupont De Nemours v. United States*. The Eighth Circuit ruled adversely in *Atlantic Research Corp. v. United States*; the United States has sought *certiorari* from that decision.

Enforcing Environmental Laws Through International Capacity Building. The Division has developed considerable expertise in providing civil and criminal environmental enforcement and related training to practitioners, country officials, and judges, and it continues to get requests from both agencies and foreign countries to provide such training. Among other activities, Division attorneys assisted senior officials from ASEAN nations to create a Southeast Asia wildlife law enforcement network at a late 2005 Workshop entitled "Stopping the

Illegal Wildlife Trade in Southeast Asia” and have conducted several follow-up training workshops throughout the area in 2006. Division attorneys also lectured at the Lobster Workshop sponsored by the Gulf and Caribbean Fisheries Institute (GCFI) in Colombia in late 2005 to discuss Lacey Act prosecutions based on foreign law violations. As part of their work with the Enforcement Working Group of the Commission on Environmental Cooperation (CEC), Division attorneys developed and presented, with representatives from Canada and Mexico, a judicial training program for Mexican judges in Mexico City and an innovative enforcement techniques conference in Washington, D.C.. The Division also helped organize numerous meetings in D.C. to share information and expertise with visiting foreign enforcement and other personnel from countries such as China, Belgium, and the U.K. Finally, as a member of the U.S. Coral Reef Task Force, the Division organized and led extremely well-received interagency enforcement training workshops in three Task Force member jurisdictions. Together with a number of other federal agencies the Division is currently working with the Commonwealth of Puerto Rico on a similar workshop.

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

Defending Tribal and Federal Interests in Water Adjudications. Water adjudications are complex cases, often involving the rights of thousands of parties. During the past year, the Division settled or achieved entry of a final decree based on a settlement in four major water rights adjudications in which the United States

asserted water rights claims for the benefit of tribes. First, in *Arizona v. California*, the Supreme Court issued a consolidated final decree that ended 54 years of litigation in the oldest original action brought before the Court. The decree approved the settlements between the United States, the Quechan Indian Tribe, and the State of Arizona, and between the Quechan Tribe, the Metropolitan Water District of Southern California, and the Coachella Valley Water District. The decree also consolidated five separate decrees previously issued by the Court. Second, the United States sought the adjudication court’s final approval of the Gila River Indian Community Water Rights Settlement Agreement in *In re Gila River System and Source*. The settlement, if approved, will be the largest water rights agreement in Arizona history, and will provide the Gila River Indian Community with 653,000 acre-feet of water annually. Third, in *United States v. Washington Department of Ecology (Lummi)*, the Division worked with the Interior Department, the State of Washington, private water users, and the Lummi Indian Nation to craft a historic settlement of an important water rights lawsuit involving groundwater underlying the Lummi Reservation. Finally, the Division negotiated a consent decree resolving the United States’ claims on behalf of Duck Valley Reservation in *In re SRBA*.

Protecting Tribal Hunting, Fishing, and Gathering Rights. The Division litigates to defend treaty-protected tribal hunting, fishing, and gathering rights. In *United States v. Michigan*, the United States, several tribes, the State of Michigan, and interested Michigan hunting and conservation groups negotiated the terms of an agreement in principle that, when formalized in a consent decree, will recognize the existence and extent of the inland hunting and fishing rights

of five tribes in Michigan. In *United States v. Washington*, the Division worked with 17 tribes, the State of Washington, and commercial entities to reach a settlement of the tribes' treaty right to take shellfish.

Protecting Tribal Lands. The Division also defends and brings suits relating to over 50 million acres of land that the United States holds in trust for tribes. In *Fidelity Exploration & Production Co. v. United States*, the Division successfully defended a challenge to whether the United States had a colorable claim that a portion of the Tongue River bed lies within the Northern Cheyenne Indian Reservation.

Protecting Tribal Governmental Authority. Following a decision by the Supreme Court that Indian tribes lacked jurisdiction to bring criminal prosecutions against members of other Tribes, Congress enacted legislation reinstating that authority. The Division has successfully opposed two constitutional challenges to that legislation, and secured rulings from the Ninth Circuit that the legislation does not violate due process or equal protection. The two cases are *Means v. Navajo Nation* and *Morris v. Tanner*; *certiorari* has now been denied in both cases.

Upholding Agencies' Authority to Implement Indian Policies. In addition to actively defending the Secretary of the Interior's land trust acquisition authority against constitutional and administrative law challenges, the Division successfully resolved a challenge to the Secretary's ability to take land into trust for use by the Nottawaseppi Huron Band of Potawatomi Indians in *CETAC v. Norton*.

Defending Implementation of Indian Gaming Laws. The explosion in Indian gaming has brought an increasing number of challenges to its regulatory structure. The Division was successful in defending the constitutionality of provisions of the Indian Gaming Regulatory Act in *Santee Sioux Tribe of Nebraska v. Kempthorne*, in which the court rejected constitutional and statutory challenges to a regulation that provides procedures in lieu of a Tribal-State compact allowing gaming. The court also upheld the Interior Secretary's determination that casino games were not permitted under Nebraska law and could not be the subject of procedures in lieu of a compact. In *Wyandotte Nation v. Sebelius*, the Division preserved the exclusive jurisdiction of the United States to enforce Indian gaming laws on Indian lands in Kansas. In *Sebelius v. Norton*, the court affirmed that the Secretary acted properly in taking these same Indian lands into trust for the Wyandotte Nation as a mandatory acquisition directed by Congress and not subject to NEPA or the National Historic Preservation Act.

SUPPORTING THE DIVISION'S LITIGATORS

New ENRD Intranet. In April, the Executive Office rolled out its new and improved ENRDNET, an intranet site featuring daily announcements as well as one-stop access to more than 35 Division-wide services and programs with related guidance and online forms. The intranet upgrade has been well received by Division staff, and usage statistics (over 1 million page-views in the first 6 months) show that it is improving communication and knowledge management for the staff.

Computer System Upgrade. ENRD continued its commitment to providing top-quality technology for Division litigators with an upgrade to the JCON desktop office automation system in 2006. Over the first three months of the year, the desktop was upgraded with the latest software available in both the Microsoft and Corel office automation suites, the latest version of the Internet software, and new versions of the most-used litigation tools. This new desktop image was rolled out to all employees with minimal disruption. The Division also upgraded its video-teleconferencing hardware with portable systems that allow video-conferencing where a network system drop is available.

Automated Litigation Support. The Office of Litigation Support provided outstanding support to some of ENRD's most complex cases, making excellent use of technology, contract staff, and in-house expertise. We provided on-site trial support for major civil and criminal cases across the country, in locations as diverse as San Diego, Portland, Salt Lake City, Miami, Ohio, and Virginia. Case support ranged from assisting with document management to establishing technological infrastructure that can link the courtroom and hotel prep rooms with DOJ offices in DC or elsewhere. The litigation support team met complex demands for physical and electronic security of documents.

The Office of Litigation Support continued its exemplary "back office" support of trial teams this year with the creation of a mock electronic courtroom which trial teams can use to practice litigating in the new, entirely electronic, courtroom environment. The Division also

saw growth in the use of technology through the expanded use of its secure extranet connection over which trial teams share documents with experts, outside agency counsel and other interested parties. ENRD's document scanning lab and other innovative approaches to automated litigation support have served as models of best practices that have been emulated by other DOJ components and outside agencies.

Security and Emergency Planning. In 2006, ENRD pursued an aggressive agenda for security and emergency planning. The Division completed writing a comprehensive Continuity of Operations Plan (COOP Plan) several months ahead of the required Departmental schedule and began required employee training on the Plan (which will continue into 2007). As part of the Plan, the Division's information technology staff developed a sophisticated mirror network system that will serve as an instantly available backup, current to within 24 hours, should the primary computer network system become unavailable due to an area-wide emergency event. About two-thirds of ENRD's employees have the capability to access the Division's computer network from a remote site if the office buildings are not fit for occupancy. This network redundancy ensures a more flexible and efficient work capability for ENRD employees. The Assistant Attorney General also approved extension of a telework policy for attorneys which can be expanded, if necessary, in support of the COOP and other emergency planning initiatives.

The Division is working with building security committees and other Federal agencies to ensure that physical security in our buildings continues to improve to the highest levels needed for the health and safety

of all our employees. We have begun implementing the changes required for the issuance of government-wide identification cards mandated under Homeland Security Presidential Directive 12 (HSPD-12).

President’s Management Agenda.

ENRD has been an active participant in the DOJ initiatives to improve the management of the Federal Government under the President’s Management Agenda. The Division contributes to the Departmental rating for three initiatives: Human Capital, Budget and Performance Integration, and e-Government. We were awarded a “green” score for each quarter of 2006 in which we received a “report card” rating. Beyond the regular quarterly contributions, ENRD also has worked with the DOJ Human Resources office on the Skills Gap survey analysis, Human Capital Survey, and the updating of the Department’s Human Capital Strategic Plan.

Support Programs. ENRD’s Human Resources staff implemented an Honors Paralegal Program, as part of the Federal Career Intern Program, that will provide a strong recruiting avenue for entry-level paralegal support. Several litigating sections and individual trial teams elected to participate in a pilot program for mail scanning, which allowed them to receive all of their mail in electronic format after it had already been opened and catalogued to the proper case. This pilot program was successful and will become the basis for a fully electronic mail and file management program to be implemented in 2007.

In compliance with new requirements from the Office of Management and Budget, the Comptroller’s Office assisted the Division

with implementing stronger internal controls over our financial programs. The Office also provided updated training to all attorneys on the use and management of their purchase cards for litigation expenses.

ENRD’s Denver Field Office staff was moved into upgraded space in the Rogers Federal Building this spring. The space includes ergonomic office design, and better security for employees.

