

April 20, 2012

**ENRD**

**ACCOMPLISHMENTS REPORT**

**Fiscal Year 2011**

**UNITED STATES DEPARTMENT OF JUSTICE**

**ENVIRONMENT & NATURAL RESOURCES DIVISION**

**SUMMARY OF  
LITIGATION  
ACCOMPLISHMENTS  
  
FISCAL YEAR 2011**

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## **FOREWORD**

I am pleased to present the Fiscal Year 2011 Accomplishments Report of the Environment and Natural Resources Division. I could not be more proud of the critically important work that the Environment and Natural Resources Division (the Division or ENRD) accomplished this past year in partnership with our client federal agencies, U.S. Attorneys' Offices, and state, local and tribal governments.

### **Furthering the Division's Core Mission**

The Division is guided by its core mission, which has four key elements:

- First, strong enforcement of civil and criminal environmental laws to ensure clean air, clean water, and clean land for all Americans;
- Second, vigorous defense of environmental, wildlife and natural resources laws and agency actions;
- Third, effective representation of the United States in matters concerning the stewardship of our public lands and natural resources; and
- Fourth, vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights.

In all that we do, we are committed to fulfilling ENRD's core mission for the benefit of all Americans. All communities deserve clean air, water and land in the places where they live, work, play and learn. The Division strives to ensure that all communities are protected from environmental harms, including those low-income, minority and tribal communities that too frequently live in areas overburdened by pollution. We pursue the goals of Environmental Justice by ensuring that everyone enjoys the benefit of a fair and even-handed application of the nation's environmental laws, and affected communities have a meaningful opportunity for input in the consideration of appropriate remedies for violations of the law. This report contains a new chapter describing the Division's work in fiscal year 2011 to further Environmental Justice. As you will see, we have made significant strides toward achieving these goals, but much work remains and our efforts continue.

Individual chapters of this report describe the successful resolution of hundreds of cases in furtherance of ENRD's core mission. Our service to the American people reflected in this report is critical to the protection of public health, the environment and natural resources, and the public fisc.

The results obtained from ENRD's civil and criminal cases in fiscal year 2011 were outstanding. We secured over \$625 million in civil and stipulated penalties, cost recoveries, natural resource damages, and other civil monetary relief, including almost \$420 million recovered for the Superfund. We obtained over \$10.9 billion in corrective measures through court orders and settlements—the highest injunctive relief in any fiscal year to date—which will go a long way toward protecting our air, water and other natural resources. We concluded 52 criminal cases against 77 defendants, obtaining nearly 53 years in

confinement and over \$31.2 million in criminal fines, restitution, community service funds and special assessments. These results mean tangible health and environmental benefits for the American people through significant reductions in emissions and discharges of harmful pollutants. Obtaining these results also has other benefits: in fiscal year 2011, ENRD returned more than 85 times its budget in civil and criminal monetary relief and civil corrective measures.

It is especially important during these challenging times that violators are held accountable to the fullest extent of the law. Responsible companies play a key role in growing our economy and protecting the nation. A system that levels the playing field by penalizing those who cut corners to gain an unfair economic advantage serves everyone. The Division will continue to vigilantly enforce applicable laws and regulations to ensure that we protect the public fisc as well as human health and the environment.

### **Holding Those Accountable for the Deepwater Horizon Oil Spill**

The Division's top enforcement priority is to hold fully accountable those responsible for the tragic loss of life and disastrous oil spill in the Gulf of Mexico. The Deepwater Horizon oil spill began on April 20, 2010, when explosions and fires destroyed the Mobile Offshore Drilling Rig Deepwater Horizon approximately 50 miles from the Mississippi River delta. Eleven people aboard the rig tragically lost their lives; many other men and women were injured. Oil flowed into the Gulf of Mexico unchecked for months. Ultimately, the "Macondo Well" was finally sealed on September 19, 2010, nearly five months after the blowout began. By that time, millions of barrels of oil had been discharged into the Gulf and upon adjoining shorelines, causing immense environmental and economic harm to the entire region.

In December 2010, as part of the multi-district litigation in the Eastern District of Louisiana, the United States brought suit against BP, Anadarko, MOEX, and Transocean for civil penalties under the Clean Water Act and a declaration of liability under the Oil Pollution Act. Litigation in this unprecedented case is ongoing. On February 17, 2012, the Department announced an agreement with MOEX Offshore to settle its liability in the Deepwater Horizon oil spill. According to the terms of the settlement, MOEX will pay \$70 million in civil penalties to resolve alleged violations of the Clean Water Act—the largest to date under the Clean Water Act—and will spend \$20 million in supplemental environmental projects to facilitate land acquisition projects in several Gulf states that will preserve and protect in perpetuity habitat and resources important to water quality. Of that \$70 million in civil penalties, \$25 million will go to the States of Alabama, Florida, Louisiana, Mississippi and Texas.

Other ENRD work related to the Deepwater Horizon oil spill is equally important. During fiscal year 2011, the Department continued its criminal investigation of the spill. The investigation is being conducted by the Deepwater Horizon Task Force, which was formed in March 2011 to consolidate the efforts of the Department's Criminal Division, ENRD, and the U.S. Attorney for the Eastern District of Louisiana. Additionally, the Division supported the ongoing interagency administrative response critical to avoiding future disasters and to continuing responsible and safe drilling in the Gulf of Mexico and elsewhere. We were able to successfully resolve a number of high profile and contentious cases filed against client agencies arising from the Deepwater Horizon oil spill. Finally, I am the Department of

Justice's representative on the Gulf Coast Ecosystem Restoration Task Force, established by Executive Order and responsible in an advisory capacity for coordinating efforts to restore the Gulf Coast Region. The task force is responsible for coordinating intergovernmental responsibilities, planning and exchange of information so as to better implement Gulf Coast ecosystem restoration and to facilitate appropriate accountability and support throughout the restoration process.

### **Protecting the Public From Air Pollution**

We remain focused on civil and criminal enforcement of the nation's environmental laws in order to address air pollution from the largest and most harmful sources; improve municipal wastewater and stormwater treatment and collection to keep raw sewage, contaminated stormwater and other pollutants out of America's rivers, streams and lakes; and compel, or recover the costs of, hazardous waste cleanup. The case of *United States v. BP Products North America, Inc.*, illustrates the Division's important work to enforce the Clean Air Act (CAA). Under the consent decree entered last year, BP paid a \$15 million civil penalty to resolve claims that it violated CAA chemical accident prevention regulations at its Texas City, Texas petroleum refinery. The consent decree resolved claims stemming from two fires, one that killed 15 people and injured more than 170 others, and a leak at the refinery that occurred in 2004 and 2005. The penalty is the largest ever assessed for civil violations of the chemical accident prevention regulations and the largest civil penalty recovered for CAA violations at an individual facility.

### **Ensuring the Integrity of Municipal Wastewater Treatment Systems**

Another important example of this work is a series of cases that the Division has brought under the Clean Water Act to improve municipal wastewater and stormwater collection and treatment. From January 2009 through September 2011, courts entered 29 settlements in these cases, requiring long-term control measures and other relief estimated to cost violators more than \$13.5 billion. These cases involve one of the most pressing infrastructure issues in the nation's cities—discharges of untreated sewage from aging collection systems. Raw sewage contains pathogens that threaten public health. Discharges of raw sewage may also lead to beach closures as well as public advisories against consumption of fish.

Ten consent decrees with municipalities or regional sewer districts across the country—from Honolulu, Hawaii to northeast Ohio to Jersey City, New Jersey—were entered in fiscal year 2011. Collectively, they provide for the expenditure of more than \$7.6 billion in improvements, the payment of \$4.8 million in civil penalties, and the performance of environmental projects valued at more than \$10 million. At the same time, in settling these cases, the Division, with the Environmental Protection Agency (EPA), has sought to use the flexibility provided under the law and applicable federal policies to consider the unique circumstances of municipalities facing difficult economic times to shape protective, fair and just resolution of these cases.

### **Prosecuting Hazardous Waste Violations**

As in past years, the Division brought important cases in such priority areas of criminal enforcement as the Vessel Pollution Program and Worker Safety Initiative and under the Lacey Act to combat wildlife trafficking. One particularly notable environmental prosecution is that of Honeywell International. At a facility near Metropolis, Illinois, Honeywell International illegally stored 7,500 55-gallon drums containing radioactive and hazardous slurry from production of uranium hexafluoride (UF<sub>6</sub>), a compound used in the uranium enrichment process that produces fuel for nuclear reactors and nuclear weapons. The company pled guilty to a felony Resource Conservation and Recovery Act violation for knowingly storing hazardous waste without a permit, was sentenced to pay an \$11.8 million fine and complete a five-year term of probation, and agreed to develop, fund and implement a household hazardous waste collection program providing for the proper treatment, transportation and disposal of waste collected during at least eight collection events over a two-year period at a cost approximating \$200,000.

### **Supporting Administrative Actions Related to Climate Change**

Success in our defensive litigation preserves vital federal programs and interests. This work reflects the wide range of activities undertaken by the Division's numerous client agencies. One suite of cases known as *Coalition for Responsible Regulation v. EPA* is notable. On January 2, 2011, EPA's regulations governing motor vehicle emissions of greenhouse gases took effect, triggering not only mobile source regulation, but also regulation of the largest stationary sources in accordance with EPA's greenhouse gas tailoring rule. Parties have filed scores of lawsuits challenging these actions as well as EPA's finding that greenhouse gas emissions endanger public health and welfare and EPA's various regulations implementing the greenhouse gas regulations in the states. After extensive briefing, the D.C. and Fifth Circuits denied motions seeking to stay the effectiveness of EPA's principal greenhouse gas regulations pending judicial review. This allowed EPA's regulation of greenhouse gas emissions to begin as scheduled. Last year, we also filed substantial briefs defending the merits of those regulations in the D.C. Circuit. In February 2012, the D.C. Circuit held two back-to-back days of oral argument in these cases and its decisions are pending.

### **Achieving Landmark Settlements for the Endangered Species Act Listing Program**

The third component of the Division's core mission is litigation related to the management of public lands and associated natural and cultural resources. These cases involve federal land, resource and ecosystem management decisions challenged under a wide variety of federal statutes that affect more than a half-a-billion acres of land (totaling nearly one-quarter of the entire land mass of the United States) and hundreds of millions of acres of subsurface mineral interests. Among these cases handled by the Division in fiscal year 2011 is *In re: ESA Section 4 Deadline Litigation*. When the Fish and Wildlife Service in the Department of the Interior (FWS) was unable to make timely findings on petitions for listing species as threatened or endangered under the Endangered Species Act due to budget and

resource constraints, the agency was sued by two organizations in over 20 different lawsuits filed in seven different district courts. After nine months of mediation, the Division successfully negotiated two watershed settlement agreements under which the FWS will make overdue listing petition findings for more than 600 species by the end of fiscal year 2012 and complete proposed rule determinations for 251 others by the end of fiscal year 2016. This is likely to result in the listing of many new species for which protective action had languished due to the diversion of resources to litigation.

### **Protecting Tribal Resources**

We had notable achievements in fiscal year 2011 across the broad range of litigation involving Indian tribes. Vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights is at the heart of ENRD's core mission. The Division also is charged with representing the United States in civil litigation brought by tribes and their members against the United States, including claims that the United States has breached its trust responsibility. The United States is strongly committed to resolving the pending tribal trust accounting and trust management cases in an expedited, fair and just manner.

One case is worth a special mention. It is the settlement of the Osage Tribe's claims that the United States breached its trust duties and responsibilities to the tribe by allegedly failing to provide a trust accounting and mismanaging the tribe's trust funds and non-monetary resources (primarily oil and gas resources) from 1896 to 2000. In October 2011, the tribe and the United States agreed to a historic settlement of those claims for \$380 million. The settlement was the outcome of months of dedicated effort by both parties to resolve more than a decade of costly litigation. I believe that this agreement demonstrates the strong commitment of the United States to resolving pending tribal trust accounting and management cases in an expedited, fair and just manner; and shows how we can work together to settle conflicts that have long defied resolution. I was pleased to stand with the Osage tribal leaders and their counsel and with the Departments of the Interior and Treasury, in a spirit of partnership and mutual respect, and mark this significant milestone at the signing ceremony on October 21, 2011.

Under settlements reached this spring, the United States will pay a total of more than \$1 billion to 41 tribes in compensation of the tribes' claims regarding the government's management of trust funds and non-monetary trust resources. The settlements set forth a framework for promoting tribal sovereignty and improving or facilitating aspects of the tribes' relationship with the United States, while reducing or minimizing the possibility of future disputes and avoiding unnecessary litigation. We will continue to press forward to right historical wrongs and fulfill the promise of the government-to-government and trust relationship between the United States and the tribes.

### **Litigating Cases Before the U.S. Supreme Court**

I also would like to acknowledge the Division's appellate practice and the important role we play in supporting the Department's Office of the Solicitor General as it formulates positions on behalf of the United States in cases handled by, or of interest to, the Division. We handle the appeal of cases arising under a multitude of statutes before the federal, and occasionally state, courts of appeals across the country. In addition, the Division frequently has cases that come before the U.S. Supreme Court. In

2010 to 2011, the Supreme Court decided four cases reflecting the breadth of the Division's practice: *United States v. Tohono O'odham Nation*, concluding that the Court of Federal Claims lacked jurisdiction to adjudicate a tribal breach of trust claim where the tribe had a related suit pending in federal district court; *Montana v. Wyoming*, resolving a dispute between the States of Montana and Wyoming over claims to water in the Yellowstone River Basin; *American Electric Power Co., Inc. v. Connecticut*, finding that Congress had displaced any public nuisance cause of action that may have existed under federal common law to address greenhouse gas emissions from power plants; and *United States v. Jicarilla Apache Tribe*, recognizing the right of the United States to assert the attorney-client privilege to protect documents demanded by an Indian tribe in a breach of trust claim by the tribe against the United States.

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

It is my hope that through this accomplishments report the reader gains a renewed appreciation of the Division's great work. I must observe that none of it would happen without the tireless effort, creativity and initiative of the U.S. Attorneys' Offices across the country, our counterparts in state, tribal and local government, and, most of all, the extraordinary people we have in the Division. I am strongly committed to working closely with the U.S. Attorneys and state, tribal and local partners. Such cooperation allows us to solve difficult problems and to make the most efficient use of scarce resources, and thus is critical to protection of human health, the environment and natural resources across the country. This report is replete with examples of our continued outreach and the fruits of our joint efforts.

### **Appreciation of Division Staff**

For the third year in a row, ENRD was named the "Best Place to Work in the Federal Government" out of 240 components surveyed. This is due in no small part to the varied, challenging and important work that we do in the Division, but also to the collegiality, expertise, dedication and professionalism of the Division's employees. Our people are leaders in the government and experts in their field. They are talented and diverse in ways that reflect the best of our nation. And I am committed to doing what I can to ensure the best quality of work life for ENRD employees and to expand their opportunities for professional growth. Some of our efforts to do just that are described in the final chapter of this report.

In closing, I offer my congratulations and thanks to the terrific ENRD management team and staff. We made great strides this past year to protect human health and the environment, and will continue to do more. This is critically important work that ensures that all Americans have clean air to breathe, clean water to drink and clean land on which to live. Our work protects our wildlife and natural resources so that we can enjoy them today and in the future.

Ignacia S. Moreno

Assistant Attorney General  
Environment and Natural Resources Division  
April 20, 2012

### Box Text

We secured over \$625 million in civil and stipulated penalties, cost recoveries, natural resource damages and other civil monetary relief, including almost \$420 million recovered for the Superfund. We obtained over \$10.9 billion in corrective measures through court orders and settlements—the highest injunctive relief in any fiscal year to date—which will go a long way toward protecting our air, water and other natural resources.

We concluded 52 criminal cases against 77 defendants, obtaining nearly 53 years in confinement and over \$31.2 million in criminal fines, restitution, community service funds and special assessments.

## OVERVIEW OF THIS REPORT

In fiscal year 2011, the Division continued to achieve significant victories for the American people across its many practice areas. The chapters of this report briefly describe the organization of the Division, highlight its progress toward the goal of achieving environmental justice in protecting all communities from environmental harm, and describe the Division's key accomplishments. The chapters, which reflect the components of the Division's mission, are: protecting our nation's air, land, and water; ensuring cleanup of oil and Superfund waste; promoting responsible stewardship of America's wildlife and natural resources; enforcing the nation's pollution and wildlife criminal 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 staff. As explained in last year's report, *ENRD Accomplishments Report Fiscal Year 2010*, environmental justice is one of the priorities of the Division, and there is much progress to report. Action on other priorities--supporting the federal government's efforts to protect the environment and natural resources; Indian Country; working with U.S. Attorneys, states, tribes, and local government; national security; and addressing domestic impacts of global pollution and environmental violations--is reflected throughout this report.

## **INTRODUCING THE ENVIRONMENT AND NATURAL RESOURCES DIVISION**

The Division has a main office in Washington, D.C., and field offices in: Denver, Colorado; Sacramento, California; San Francisco, California; Seattle, Washington; Boston, Massachusetts; and Anchorage, Alaska. 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:

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

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 almost 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), and the Safe Drinking Water Act. The main federal agencies that the Division represents in these areas are the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps or USACOE). 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, national forests, and other public lands; and actions to recover royalties and revenues from development 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; the Marine Mammal Protection Act (MMPA), which protects animals such as whales, seals, and dolphins; and the Magnuson-Stevens Fishery Conservation and Management Act, which regulates increasingly depleted fishery resources. The Environmental Crimes Section also brings criminal prosecutions under these laws 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 those governing the nation's defense capabilities (including military preparedness exercises, weapons programs, and military research), renewable energy development, and food supply. These cases also involve challenges to regulations promulgated to implement the nation's anti-pollution statutes, such as the CAA and 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 handle 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. Finally, the Law and Policy Section advises and assists the Assistant Attorney General on environmental legal and policy questions, particularly those that affect multiple sections in the Division. It handles the Division's response to legislative proposals and congressional requests, ENRD's comments on federal agency rulemakings, amicus participation in cases of importance to the United States, as well as other special projects on behalf of Division leadership. Other Law and Policy Section duties include serving as the Division's ethics and professional responsibility officer and counselor, alternative dispute resolution counselor, and liaison with state and local governments. Attorneys in the Law and Policy Section also coordinate the Division's involvement in international legal matters, as well as the Division's Freedom of Information Act and Privacy Act work.

#### Box Text

#### ENRD LITIGATING SECTIONS

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

## WHAT WE DO

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

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

With offices across the United States, the Division is the nation's environmental lawyer, and has the largest environmental law practice in the country.

## ENRD CLIENT AGENCIES

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

United States Department of Agriculture [www.usda.gov](http://www.usda.gov)

United States Forest Service [www.fs.fed.us](http://www.fs.fed.us)

Animal and Plant Health Inspection Service [www.aphis.usda.gov](http://www.aphis.usda.gov)

United States Department of Commerce

National Marine Fisheries Service [www.nmfs.noaa.gov](http://www.nmfs.noaa.gov)

National Oceanic and Atmospheric Administration [www.noaa.gov](http://www.noaa.gov)

United States Department of Defense

United States Air Force [www.af.mil](http://www.af.mil)

United States Army [www.army.mil](http://www.army.mil)

United States Army Corps of Engineers [www.usace.army.mil](http://www.usace.army.mil)

United States Marine Corps [www.marines.mil](http://www.marines.mil)

United States Navy [www.navy.mil](http://www.navy.mil)

United States Department of Energy [www.energy.gov](http://www.energy.gov)

Environmental Protection Agency [www.epa.gov](http://www.epa.gov)

General Services Administration [www.gsa.gov](http://www.gsa.gov)

United States Department of Homeland Security [www.dhs.gov](http://www.dhs.gov)

United States Customs and Border Protection [www.cbp.gov](http://www.cbp.gov)

Federal Emergency Management Agency [www.fema.gov](http://www.fema.gov)

United States Coast Guard [www.uscg.mil](http://www.uscg.mil)

United States Department of the Interior [www.doi.gov](http://www.doi.gov)

Bureau of Indian Affairs [www.bia.gov](http://www.bia.gov)

Bureau of Land Management [www.blm.gov](http://www.blm.gov)

Bureau of Ocean Energy Management [www.boemre.gov](http://www.boemre.gov)

Bureau of Reclamation [www.usbr.gov](http://www.usbr.gov)

Bureau of Safety and Environmental Enforcement [www.bsee.gov](http://www.bsee.gov)

National Park Service [www.nps.gov](http://www.nps.gov)

Office of Surface Mining, Reclamation and Enforcement [www.osmre.gov](http://www.osmre.gov)

United States Fish and Wildlife Service [www.fws.gov](http://www.fws.gov)

United States Geological Survey [www.usgs.gov](http://www.usgs.gov)

United States Department of Transportation [www.dot.gov](http://www.dot.gov)

Federal Aviation Administration [www.faa.gov](http://www.faa.gov)

Federal Highway Administration [www.fhwa.dot.gov](http://www.fhwa.dot.gov)

Federal Transit Administration [www.fta.dot.gov](http://www.fta.dot.gov)

Pipeline Safety and Hazardous Materials Administration [www.phmsa.dot.gov](http://www.phmsa.dot.gov)

United States Maritime Administration [www.marad.dot.gov](http://www.marad.dot.gov)

United States Department of Veterans Affairs [www.va.gov](http://www.va.gov)

## **REPORTING OUR PROGRESS TOWARD ACHIEVING THE GOAL OF ENVIRONMENTAL JUSTICE**

Environmental justice, first identified as an important public policy goal for the federal government in the Clinton Administration, when Executive Order 12898 was issued, is a top priority for this Administration. As Attorney General Holder has stated: “[a]t every level of the Department and across all 94 United States Attorneys’ Offices [environmental justice] work is a top priority.” In fiscal year 2011, ENRD has achieved meaningful environmental justice results and has built a strong foundation to ensure achievement of greater results in the years to come.

Low-income, minority, and Native Americans are often disproportionately burdened with pollution, resulting in more significant health problems, greater obstacles to economic growth, and a lower quality of life for them. Such communities are frequently located in or near sources of pollution, and they have often expressed a concern that they do not have sufficient say in the decisions that affect their health and livelihood. Low-income, minority, and Native Americans, like all Americans, should breathe clean air, drink clean water, and be free from exposure to hazardous waste and toxic substances. Indeed, the essence of environmental justice is not special treatment, but equal treatment and full protection under the nation’s environmental, civil rights, and health laws.

This chapter is divided into two sections. First, we describe the Division’s progress in achieving environmental justice through collaboration with other federal agencies and Department of Justice components. Working primarily through the Interagency Working Group on Environmental Justice (IWG), the Division has played a leadership role in ensuring that we are working with other agencies to promote a coordinated federal response to environmental justice issues. Second, we highlight the Division’s internal actions to further environmental justice through its own work and litigation docket.

### **Collaborative Work with Other Federal Agencies and Department Components in Fiscal Year 2011**

#### *Actively Participating in the IWG*

One of the cornerstone achievements of Executive Order 12898 was the creation of the IWG. Moribund for nearly a decade, the IWG has been reinvigorated during this Administration. The IWG is chaired by EPA and is charged with providing guidance to federal agencies on environmental justice issues; coordinating the development of agency environmental justice strategies; coordinating research, data collection, and analysis; holding public meetings; and developing interagency model projects on environmental justice. The creation of the IWG underscores the importance of working collaboratively within the federal government to address environmental justice issues.

Representatives from ENRD and the Department’s Civil Rights Division regularly attend IWG senior staff level meetings and identify how the Department can support and further the IWG’s work. One example of the Division’s extensive involvement in the IWG this year was the development and execution of a foundational interagency document on environmental justice, which is discussed below.

### *Signing and Implementing an Interagency Memorandum on Environmental Justice*

In August 2011, the Department of Justice, along with 16 other federal agencies, signed the *Memorandum of Understanding on Environmental Justice and Executive Order 12898* (MOU). The MOU builds on the foundation laid by Executive Order 12898 and embodies the government's renewed commitment to environmental justice. The MOU promotes interagency collaboration and public access to information about agency work on environmental justice, and specifically requires each agency to publish an environmental justice strategy, to ensure that there exists an opportunity for public input on those strategies, and to produce annual implementation progress reports. The MOU also adopts a charter for the IWG and incorporates several new agencies into the IWG that had not previously been active participants. The Division played an important leadership role in the conception and development of the MOU, which will provide a strong and lasting foundation for continued coordinated federal efforts to address environmental justice issues.

The Department has taken steps to fulfill its own obligations under the MOU.

--In 1995, the Department produced the *Department of Justice Environmental Justice Strategy* and *Environmental Justice Guidance Concerning Environmental Justice*. These documents were initially prepared to implement the Department's commitments following the issuance of Executive Order 12898. The Department carefully re-evaluated the Strategy and Guidance in light of the MOU, and believes that both documents continue to fully reflect the goals and commitments of the Department of Justice. On September 30, 2011, we solicited comments on the Strategy and Guidance through the Department's environmental justice public website ([www.justice.gov/ej](http://www.justice.gov/ej)), as well as through EPA's IWG website and IWG conference calls with environmental justice advocates and community leaders. Public input on these documents is always welcome.

--In February 2012, the Department released the *Department of Justice 2011 Implementation Progress Report on Environmental Justice*, its first annual report on the work and achievements of the Department in this area. ENRD contributed significantly to the accomplishments reported in that document. The report is available on the Department's environmental justice website.

### *Launching the Department's Environmental Justice Public Website*

In September 2011, the Division helped develop and launch the Department's environmental justice public website, [www.justice.gov/ej](http://www.justice.gov/ej). This site provides information about Department environmental justice policies, case resolutions that incorporate environmental justice considerations, and contact information for the public. The site also provides the public access to view and comment on the Department's Strategy and Guidance.

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

The Division also has been working directly with other federal agency partners to further the dialogue on and awareness of environmental justice issues. In fiscal year 2011, ENRD, along with EPA's Office of General Counsel, organized a group of career attorneys from agencies across the federal government to discuss legal issues that arise with respect to environmental justice. The open dialogue and informal counseling fostered by this effort improves each agency's ability to understand not only how to implement environmental justice initiatives, but also how to respond to environmental justice concerns within the parameters of existing law.

Division attorneys also have assisted in training staff of other federal agencies regarding environmental justice issues. This past year, we participated in training sessions for personnel from the Department of Energy and the Department of the Interior (DOI or Interior), for example.

### *Working Within the Department to Heighten Awareness and Increase Dialogue*

The Department has renewed its efforts to consider environmental justice across its work. The Department's internal Environmental Justice Workgroup, chaired by the Associate Attorney General's Office, has been reconstituted, and the Division is an active participant in this group. This workgroup reviewed and reaffirmed the Department's Strategy and Guidance.

All affected components of the Department are working to increase awareness of environmental justice and environmental enforcement issues among their staff. For example, in December 2010, ENRD and the Civil Rights Division jointly hosted a Town Hall discussion of environmental justice. This session, which was well-attended by attorneys and staff, provided an overview of environmental justice principles and gave attorneys an opportunity to discuss how those principles apply to the varied work of the Department.

Through the work of the Environmental Issues Subcommittee (chaired by U.S. Attorney Mike Cotter) of the Attorney General's Advisory Committee, the Department also is actively working to increase awareness in U.S. Attorneys' Offices around the country regarding environmental justice issues. The Division has actively participated in this subcommittee.

### *Participating in Community and Other Outreach*

The IWG has organized numerous listening sessions in communities around the United States. These sessions provide community members; federal, state, tribal, and local governments; businesses; academics; and other interested parties the opportunity to hear about federal initiatives and speak directly to federal agency representatives about environmental issues that affect them. These meetings are often held in conjunction with other environmental and public health-related meetings to maximize the opportunities for reaching a broad spectrum of stakeholders.

The Division has been an active participant in many of these IWG sessions. Division representatives participated in sessions in New Orleans, Louisiana; Brooklyn, New York; Richmond, California; and

Washington, D.C. These sessions allow us to hear first-hand from community members about how our work is affecting them and what we might do better. We gain valuable feedback from these sessions, and look forward to continuing our participation in more of them.

In addition, the Department worked directly with federal agency partners, as well as state and local officials and community representatives, to organize direct outreach to many communities. The Division attended many such sessions. For example:

--In July 2011, Assistant Attorney General Moreno, ENRD and Civil Rights Division senior staff, U.S. Attorney Paul Fishman, EPA Assistant Administrator Cynthia Giles, and other EPA officials toured sites in Newark, New Jersey, and met with environmental and community organizations to discuss joint efforts to address environmental challenges and enforce environmental laws, and in particular, efforts to achieve environmental justice.

--Also in July 2011, Assistant Attorney General Moreno joined U.S. Attorney Joyce Vance, FBI Special Agent in Charge Patrick Maley, and EPA Regional Administrator Gwen Keyes Fleming in Birmingham, Alabama, to listen to concerns from residents and community groups about the Black Warrior River basin and environmental justice issues. The listening session was held in Ensley, a Birmingham neighborhood that borders Village Creek, a tributary of the Black Warrior River. The Black Warrior River provides drinking water for much of northern Alabama and was recently listed as one of America's Most Endangered Rivers.

--In December 2010, Assistant Attorney General Moreno and Assistant Attorney General for Civil Rights Perez, U.S. Attorney Sally Quillian Yates, and EPA officials participated in a listening session with communities in the Atlanta, Georgia, area.

--Division senior staff traveled to Alaska, Arizona, Montana, New Mexico, Oklahoma, South Dakota, and Washington State to speak directly with tribal leaders and tribal communities.

--Assistant Attorney General Moreno and other ENRD senior staff spoke about environmental justice at several major events such as the Environmental Justice in America Conference, the White House Environmental Justice Forum, the Federal Bar Association conference, and D.C. Bar events.

ENRD also conducted outreach to the corporate community regarding environmental justice. Together with Cynthia Giles, EPA's Assistant Administrator for Enforcement and Compliance Assurance, Assistant Attorney General Moreno also met with representatives from the Business Network for Environmental Justice in October 2011 to discuss opportunities for corporate engagement with communities. ENRD is currently working with EPA to plan additional meetings in order to foster a dialogue with the corporate community on these important matters.

### **Division-Specific Fiscal Year 2011 Environmental Justice Achievements**

Through its work, ENRD strives to ensure that all communities are protected from environmental harms, including the low-income, minority, and Native American communities that too frequently live in areas

with particularly acute environmental problems. The Division works closely with U.S. Attorneys' Offices and in concert with other federal agencies to ensure that affected communities have a meaningful opportunity for involvement in environmental decision making that affects them, including the consideration of appropriate remedies for violations of the law. To this end, the Division has taken significant steps to better integrate environmental justice considerations into its work and that of its client agencies.

#### *Increasing Training and Awareness Within the Division*

ENRD has worked to increase awareness and understanding of environmental justice issues among its attorneys and staff. For example:

--In 2010, ENRD formed an internal workgroup with representatives from all litigating sections to consider how to better incorporate environmental justice into the work of the Division. This group has provided training to attorneys throughout the Division, and coordinated with other Department components and federal agencies regarding environmental justice issues. The Division is in the process of implementing plans for additional training to help Division attorneys identify and address environmental justice issues that arise in their work.

--Attorneys from ENRD's Environmental Crimes Section wrote and published an article entitled "Environmental Justice in the Context of Environmental Crimes," in the July 2011 issue of the *USA Bulletin*, which is circulated throughout the Department. The July issue was devoted entirely to the subject of environmental crimes.

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

The Division has sought ways to integrate environmental justice principles across its litigation components. Through its affirmative work to enforce the nation's landmark environmental laws--the CWA, CAA, Superfund, RCRA, and the Safe Drinking Water Act, among others--the Division is vigorously enforcing the law, and strong enforcement helps all communities. Indeed, Congress enacted these laws to protect all the American people from harmful pollution in their air, water, and land.

In addition, ENRD has identified ways to address the needs of communities that have been disproportionately impacted by pollution. For example, the Division is engaging with communities directly affected by its enforcement litigation at an earlier stage. Talking to the community about a particular case allows Division attorneys to hear the community's concerns and provides an opportunity to see if those concerns can be addressed through the Division's enforcement action. This outreach can help develop facts, determine the scope and the degree of violations, identify witnesses, and pinpoint harms. This also can give Division attorneys the information needed to craft remedies that provide the most meaningful, immediate, and appropriate relief.

The Division also is seeking creative solutions that will have a positive and discernible outcome in affected communities. Information learned through the outreach process can help enable the Division

to negotiate a case resolution that better serves the needs of the community, or where, if necessary, to demand an effective and meaningful remedy from the court. For example, in reaching a settlement, community input may help the Division decide whether to look to traditional methods--like injunctive relief--or non-traditional methods--such as supplemental environmental projects (SEPs)--to achieve the desired outcome. (A SEP is an environmentally beneficial project that a defendant agrees to undertake in settlement of a civil penalty action that has a sufficient nexus to the alleged violation(s), but that the defendant is not otherwise legally required to perform.)

We are already seeing the benefits of these efforts pay off in our litigation results. Some examples of cases concluded by the Environmental Enforcement Section in fiscal year 2011 that have furthered the principles or goals of environmental justice include:

--As part of a comprehensive settlement under the CWA to address untreated sewage deposited into the Cleveland area waterways and Lake Erie, communities will benefit directly from construction projects and be able to participate publicly in infrastructure proposals. Under the settlement reached in *United States v. Northeast Ohio Regional Sewer Dist.*, a case brought with the State of Ohio, the sewer district (NEORS) will spend \$3 billion to install pollution controls, including seven tunnel systems. The district has arranged its construction schedule so that the first tunnels to be completed, the Euclid Creek and Dugway Storage Tunnels, will benefit underserved communities. The district also will spend at least \$42 million on green infrastructure projects that will help address sewage overflows, a majority of which occur in the City of Cleveland, where many minority and low-income residents live. The district will be able to propose larger uses of green infrastructure in exchange for reductions in traditional infrastructure projects. As a part of this process, NEORS will collaborate with local community groups, including those representing minority and low-income neighborhoods, in selecting the locations and types of green infrastructure projects to propose. (Examples of such projects include wetlands, troughs, cisterns, or other formations to store water, and rain gardens, urban croplands, and permeable pavement to allow for greater infiltration of water into the ground.)

--The homes of many economically disadvantaged residents of Jersey City will now be connected to the city's sewer system as a result of the consent decree in *United States v. Jersey City Municipal Utilities Authority*. The agreement requires the authority to pay a \$375,000 penalty under the CWA and invest more than \$52 million in repairs and upgrades to the combined sewer system; it also includes a SEP requiring the authority to invest \$550,000 in the replacement of illegal "common sewers" with direct sewer connections and in the process ensure better wastewater collection and disposal. Thus, the settlement will improve access to sewage removal for low-income communities and reduce the city's combined sewer overflow, which contains untreated human and industrial waste, toxic materials, and debris.

--In *United States v. Northern Indiana Public Service Co. (NIPSCO)*, NIPSCO agreed to spend approximately \$600 million to install pollution control equipment at three of its four coal-fired power plants (it will shut down the fourth plant), spend \$9.5 million on mitigation projects, and pay \$3.5 million in civil penalties under the CAA. These measures will reduce nitrogen oxide (NOx) emissions by 18,000

tons and sulfur dioxide (SO<sub>2</sub>) emissions by 46,000 tons. The decrease in harmful pollutants will benefit communities located near NIPSCO facilities, including communities disproportionately affected by environmental risks and vulnerable populations, such as children.

ENRD's Environmental Crimes Section (ECS) has prosecuted cases that benefit environmental justice communities. For example, ECS and the U.S. Attorney's Office for the District of Rhode Island prosecuted the case of *United States v. Southern Union Co.*, which involved the improper storage of mercury at a Rhode Island facility. In September 2004, vandals broke into the mercury storage building and took several containers of liquid mercury. Some of the containers shattered, causing mercury to be spilled around the facility's grounds. The mercury was discovered in a vacant building in a neighborhood frequented by vandals and homeless people and some 10 to 20 pounds were taken to the nearby Lawn Terrace Apartments in Pawtucket, Rhode Island, home to many low-income, minority, and immigrant families. Fifty-five households had to be evacuated for two months. On October 15, 2008, after a three-week jury trial, Southern Union Company was convicted of one RCRA storage violation. The company was sentenced in October 2009 to pay a \$6 million fine and \$12 million in payments to community initiatives. In a case handled by ENRD's Appellate Section, the First Circuit affirmed the conviction and sentence on December 22, 2010. (On November 28, 2011, the Supreme Court granted Southern Union's petition for a writ of certiorari on the issue of whether the sentence exceeded the district court's authority under the Supreme Court's ruling in *Apprendi v. New Jersey*.)

More than half of ENRD's work consists of defending the environmental or natural resource actions of federal agencies. The Division is working to ensure that environmental justice principles are considered in our handling of these cases as well. Two examples of this aspect of ENRD's environmental justice effort in fiscal year 2011 are described below:

--ENRD's Wildlife and Marine Resources Section (WMRS) helped defend a FWS action that protected tribal cultural interests. Fish and Wildlife Service had issued a biological opinion under the ESA governing Bureau of Reclamation (Reclamation) operation of the Glen Canyon Dam in Arizona to minimize effects on the ESA-listed humpback chub. One conservation measure in the biological opinion called for the implementation of measures to eliminate nonnative fish species that predate and compete with the chub. Subsequently, the Zuni Tribe notified Reclamation that it strongly objected to killing fish within their culturally sacred areas of the Colorado River. Once notified, WMRS attorneys worked with FWS and Reclamation to develop a defensible plan for deferring the scheduled non-native fish removal trips in response to the concerns expressed by the Zuni Tribe. When that plan was implemented, an environmental group filed a motion for an injunction seeking to compel Reclamation to undertake the non-native control measures. We successfully defended Reclamation's decision, resulting in the court's denying the motion. The court also noted that Reclamation was acting reasonably to balance the need to ameliorate the threat posed by non-native fish, while being mindful of tribal concerns.

--The Division's Natural Resources Section successfully resolved, through settlement, *Conejos County Clean Water, Inc. v. U.S. Dep't of Energy*. Here, plaintiffs challenged the Department of Energy's

(DOE) use of a truck-to-train transfer facility near Antonito, Colorado, to transfer environmental waste from flat-bed trucks to rail cars for shipment to Utah. The transfer facility is located on the edge of Antonito, a small community in Conejos County, a majority Hispanic (60%) farming and ranching community with a median household income of \$27,744--less than half the national average. The community had no notice of DOE's plan to use the transfer facility until the first truckloads of waste arrived. Under the settlement, DOE agreed not to utilize the Antonito transfer facility for the shipment of environmental waste materials unless and until it completes an environmental analysis under NEPA. In addition, DOE agreed not to rely on a categorical exclusion to satisfy NEPA and to provide public notice and opportunity to comment.

Box Text

"Our environmental laws and protections must extend to all people, regardless of race, ethnicity, or socioeconomic status, which is why the Department of Justice is committed to addressing environmental justice concerns through aggressive enforcement of federal environmental laws in every community."

--Eric Holder, Attorney General

"By enforcing the nation's environmental laws in a fair and even-handed way, we are taking steps to ensure that we achieve environmental justice. We are listening to communities and giving voice to those who have too frequently suffered an unfair burden from pollution in America."

--Ignacia S. Moreno,  
Assistant Attorney General

"To the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands."

Section 101, Executive Order 12898 of February 11, 1994, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

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

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

On April 20, 2010, explosion and fire destroyed the Deepwater Horizon offshore drilling rig in the Gulf of Mexico and triggered a massive oil spill amounting to millions of barrels of discharge that took approximately three months to contain. Immediately, ENRD and the Department's Civil Division--along with local U.S. Attorneys' Offices, the Gulf States, and client agencies--launched a civil investigation into the matter. In December 2010, as part of a multi-district litigation in the Eastern District of Louisiana, the United States brought suit against BP, Anadarko, MOEX, and Transocean for civil penalties under the CWA and a declaration of liability under the Oil Pollution Act. On February 17, 2012, the Department announced an agreement with MOEX to settle its liability in the Deepwater Horizon oil spill. According to the terms of the settlement, MOEX will pay \$70 million in civil penalties to resolve alleged violations of the CWA--the largest to date under the CWA--and will spend \$20 million to facilitate land acquisition projects in several Gulf States that will preserve and protect in perpetuity habitat and resources important to water quality. Of the \$70 million in civil penalties, \$25 million will go to the States of Louisiana, Alabama, Florida, Mississippi, and Texas.

Since filing, ENRD, in concert with the Civil Division, has taken or defended over 250 depositions, produced some 50 million pages in discovery, and continued preparation for the first of what is scheduled to be several phases of trial. The United States intends to prove that violations of federal safety and operational regulations caused or contributed to the oil spill and that the named defendants (not including 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.

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

Company-wide case settlements benefit everyone. The government benefits through expedited resolution of historic and ongoing violations on an efficient scale. Industry benefits because it gains the certainty of knowing that it is 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 2011, the Division obtained an important company-wide settlement in *United States v. Mahard Egg Farm, Inc.* There, a consent decree resolved claims that the company failed to comply with the CWA at its egg production facilities in Texas and Oklahoma. Mahard paid a \$1.9 million civil penalty, the largest ever to be paid in a federal enforcement action involving a concentrated animal feeding

operation, and will spend approximately \$3.5 million on measures to bring each of the company's seven facilities into compliance with the law and protect public health and the environment. Most egg production facilities generate various wastes, including wet or dry manure from chicken houses and compost from chicken carcasses. The allegations in the case concerned Mahard's historic practice of over-applying waste to its fields, resulting in extremely high nutrient levels in the soil, which were discharged into streams and waterways during and after rainfall.

### **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 2011, 21 of these matters settled on terms that will result in reductions of over 2 million tons of SO<sub>2</sub> and NO<sub>x</sub> each year, once the more than \$12 billion in required pollution controls are fully functioning.

Last year, the Division obtained three more settlements under this initiative in *United States v. Northern Indiana Public Service Co. (NIPSCO)*; *United States v. Hoosier Energy Rural Electric Cooperative (Hoosier)*; and *United States v. American Municipal Power, Inc. (AMP)*. Under the *NIPSCO* consent decree, the company will install approximately \$600 million worth of air pollution controls at three of its coal-fired power plants located in Chesterton, Michigan City, and Wheatfield, Indiana, and permanently retire a fourth facility in Gary, Indiana. Under the *Hoosier* consent decree, the cooperative will spend between \$250 and \$300 million upgrading and installing pollution controls at its two plants, the Meron and Ratts Stations, both located in southwest Indiana. The *AMP* consent decree requires the Ohio utility to permanently retire its Richard H. Gorsuch Station near Marietta. When fully implemented, air pollution controls and other measures will collectively reduce air pollution by more than 123,000 tons every year compared with pre-settlement emissions. *NIPSCO*, *Hoosier*, and *AMP*, respectively, also paid civil penalties under the CAA of \$3.5 million, \$950,000, and \$850,000, and will spend \$9.5 million, \$5 million, and \$15 million on projects to mitigate the adverse effects of past excess emissions.

### **Addressing Air Pollution from Oil Refineries**

The Division also made progress in its national initiative to combat CAA violations within the petroleum refining industry. Three additional settlements were obtained under this initiative during fiscal year 2011. In *United States v. Western Refining Co.*, the court entered a consent decree that requires the company to make \$60 million worth of capital improvements at its refinery in El Paso, Texas, which, when fully operational, will reduce annual air emissions of NO<sub>x</sub> and SO<sub>2</sub> by 509 tons per year and 389 tons per year, respectively. *Western* also paid a civil penalty of \$1.45 million. A consent decree entered by the court in *United States v. Murphy Oil USA, Inc.*, a case handled in close coordination with the U.S. Attorney's Office in Wisconsin, requires that refiner to spend more than \$142 million to install new and

upgraded pollution control reduction equipment at its two petroleum refineries in Superior, Wisconsin, and Meraux, Louisiana. Once the controls are installed, annual emissions of NOx and SO2 will be reduced by more than 1,400 tons per year from these facilities. Murphy also paid a civil penalty of \$1.25 million and agreed to spend \$1.5 million on SEPs, including ones to address the concerns of citizens living near the Meraux refinery, where the refiner will install and operate an ambient air monitoring station and implement noise abatement and dust control measures. The consent decree replaces a 2002 consent decree that addressed violations at the Superior refinery. In a settlement with the owner of the nation's second largest refinery, the court entered a consent decree in *United States v. HOVENSA, L.L.C.*, under which HOVENSA will spend more than \$700 million to install pollution control equipment at its refinery in St. Croix, Virgin Islands. HOVENSA also paid civil penalties of \$5.375 million, and agreed to provide an additional \$4.875 million for projects to benefit the environment of the Virgin Islands. With these settlements, the Division's petroleum refinery enforcement initiative has produced settlements or other court orders that have addressed more than 90% of the nation's refining capacity, and will reduce air pollutants by more than 360,000 tons a year.

### **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. From January 2009 through September 2011, courts entered 29 settlements in these cases, requiring long-term control measures and other relief estimated to cost violators more than \$13.5 billion.

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

Ten consent decrees with municipalities or regional sewer districts were entered in fiscal year 2011. Collectively, they provide for the expenditure of more than \$7.6 billion in improvements, the payment of \$4.8 million in civil penalties, and the performance of SEPs valued at more than \$10 million. A few examples are the following cases:

--*United States v. City and County of Honolulu* resolved claims of violations of the CWA and the State of Hawaii's water pollution law, such as the 2006 Beachwalk force main break that spilled approximately 50 million gallons of raw sewage into the Ala Wai Canal. Under the terms of the consent decree, the city agreed to make extensive improvements to its aging wastewater collection and treatment systems, at an estimated cost of \$3.7 billion over 25 years, to eliminate unauthorized overflows of untreated raw sewage. The city also paid a \$1.6 million civil penalty, split evenly between the federal government and the State of Hawaii, which worked closely with us in this case.

--In *United States v. Northeast Ohio Regional Sewer District (NEORS)*, also discussed in the Environmental Justice chapter, the district agreed to address the flow of untreated sewage into

Cleveland area waterways and Lake Erie and take measures to capture and treat more than 98% of wet weather flows entering the district's combined sewer system, which serves the City of Cleveland and 59 adjoining communities. The settlement requires the district to spend approximately \$3 billion to install pollution controls, including the construction of seven tunnel systems that will reduce the discharge of untreated raw sewage. The consent decree also significantly advances the use of large-scale green infrastructure projects by requiring NEORS to invest at least \$42 million in such projects. NEORS also paid a \$1.2 million civil penalty, split evenly between the United States and the State of Ohio.

--A district court entered a consent decree in *United States v. City of Evansville* (Indiana) under which the city agreed to develop and implement a comprehensive plan to increase the capacity of its sewer system to minimize, and in many cases eliminate, longstanding sewage overflows into the Ohio River. The city's sewer system has a history of maintenance and system capacity problems that result in it being overwhelmed by rainfall, causing it to discharge untreated sewage combined with stormwater. Costs may exceed \$500 million over approximately 25 years. The city also paid civil penalties totaling \$490,000 and agreed to implement an environmental project that will connect homes with failing septic systems to the city's sewer system at a cost of more than \$4 million.

--Consent decrees entered in *United States v. City of Lexington-Fayette Urban County Government*, *United States v. Jersey City Municipal Utilities Authority*, and *United States v. City of Revere* (Massachusetts) require those municipalities to spend \$290 million, \$52 million, and \$50 million, respectively, to make improvements to their wastewater collection systems to eliminate unauthorized discharges of sewage into local waterways.

### **Protecting the Nation's Waters and Wetlands**

Keeping contaminated stormwater out of America's waters is one of EPA's national enforcement initiatives. Construction projects have a high potential for environmental harm because they disturb large areas of land and significantly increase the potential for erosion. Last year, courts entered consent decrees with two residential homebuilders to resolve claims of CWA violations in connection with their construction projects, the fifth and sixth consent decrees with residential homebuilders under this initiative. In *United States v. Beazer Homes USA, Inc.*, the national homebuilder paid a civil penalty of \$925,000 to resolve alleged CWA violations at its construction sites in 21 states and agreed to implement a company-wide program to improve compliance with stormwater runoff requirements at current and future construction sites around the country. In *United States v. Eastwood Constr., L.L.C.*, two related homebuilders that operate in North and South Carolina, paid a \$60,000 civil penalty to resolve allegations of their noncompliance with CWA stormwater requirements at three development projects. The companies also agreed to take additional measures to facilitate their compliance with the CWA.

In *United States v. Johnson*, defendant cranberry farmers had dumped unauthorized fill material in approximately 45 acres of wetlands and streams at two locations in Carver, Massachusetts, in connection with the construction of cranberry bogs. When the Division brought an enforcement action

against them, they disputed whether the bogs were waters within federal regulatory jurisdiction. In April 2011, ENRD, in conjunction with the United States Attorney's Office in Massachusetts, tried that issue before a jury. Following the trial, the jury returned a quick verdict in favor of the United States.

The Division negotiated a highly favorable consent decree in *United States v. Century Homebuilders, L.L.C.*, an enforcement action in connection with violation of a permit governing discharges into wetlands adjacent to the Snapper Creek Extension Canal in Doral, Florida. In December 2010, the court entered a consent decree that required defendants to pay a \$400,000 civil penalty and to preserve and maintain a mitigation parcel in perpetuity.

### **Reducing Air and Water Pollution at Other Diverse Facilities**

In fiscal year 2011, the Division improved the nation's air quality by concluding a number of civil enforcement actions against industrial facilities. Under the consent decree entered in *United States v. BP Products North America, Inc.*, BP paid a \$15 million civil penalty to resolve claims that it violated the CAA's chemical accident prevention regulations, also known as the risk management program regulations, at its Texas City, Texas, petroleum refinery. The penalty is the largest ever assessed for civil violations of the chemical accident prevention regulations and the largest civil penalty recovered for CAA violations at an individual facility. The consent decree resolved claims stemming from two fires, one that killed 15 people and injured more than 170 others, and a leak at the refinery that occurred in 2004 and 2005. During the three incidents, which each resulted in the surrounding Texas City community being ordered to shelter-in-place, thousands of pounds of flammable and toxic air pollutants were released. The CAA's risk management program regulations contain a comprehensive set of requirements to prevent such accidental releases of hazardous air pollutants. Previous civil, criminal, and administrative proceedings resolved other claims in connection with the three incidents and BP's operation of the refinery.

The court entered a consent decree with three gasoline distributors in *United States v. Rocky Mountain Pipeline Systems, L.L.C.*, which resolved claims that they illegally mixed and distributed more than one million gallons of gasoline that did not meet CAA emissions and fuel quality requirements. Use of gasoline that does not meet the CAA's standards for fuel can result in increased emissions from tailpipes, affect vehicle performance, and in some cases damage engines and emissions controls. Under the consent decree, the companies paid a \$2.5 million civil penalty and agreed to conduct an environmental project designed to offset the harm that was caused by their failure to meet the federal gasoline quality requirements.

Courts entered consent decrees in three cases resolving alleged violations of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) applicable to the defendants' industries. In each case, the defendant failed to control the emission of hazardous air pollutants (HAPs) as required by the CAA and implementing regulations. HAPs, also known as air toxics, are pollutants which are known or are suspected to cause cancer or other serious health effects such as birth defects or reproductive effects in

humans. Each defendant paid a civil penalty and agreed to take measures to control the unlawful emissions.

--In *United States v. Jeld-Wen, Inc.*, a manufacturer of composite wood products paid a civil penalty of \$850,000 to resolve claims that it violated the NESHAPs applicable to the Plywood and Wood Products Industry at facilities in Washington, Iowa, North Carolina, and West Virginia.

--In *United States v. Logan Aluminum, Inc.*, a manufacturer of aluminum coils, which are used in the beverage industry, paid a civil penalty of \$285,000 to resolve claims that it violated the NESHAPs for Secondary Aluminum Production at its facility in Russellville, Kentucky.

--In *United States v. Gasco Energy Co.*, defendant oil and gas company paid a \$350,000 civil penalty to resolve claims that it violated the NESHAPs applicable to Oil and Natural Gas Production Facilities at its Riverbend compressor station located on the Uintah and Ouray Indian Reservation.

Two consent decrees furthered efforts to ensure compliance with the CAA's vehicle emissions standards, labeling, and reporting requirements. Under the consent decree entered in *United States v. Caterpillar, Inc.*, the company paid a \$2.55 million civil penalty to settle alleged CAA violations for shipping over 590,000 highway and non-road engines without the correct emissions controls and for failing to comply with emissions control reporting and engine-labeling requirements. Engines operating without proper emissions controls can emit excess NO<sub>x</sub>, particulate matter, and other pollutants that impact public health, potentially causing respiratory illnesses and aggravating asthma. The CAA requires the use of certified after-treatment devices (ATDs) that control engine exhaust emissions once the emissions have exited the engine and entered the exhaust system. Typical ATDs include catalytic converters and diesel particulate filters. Correct fuel injector and fuel map settings also are crucial for proper engine emission control. Caterpillar allegedly shipped over 590,000 engines to vehicle assemblers without the correct ATDs and with improperly configured fuel injector and map settings. In some cases, the misconfigured engines were incorporated into vehicles, which resulted in excess emissions of NO<sub>x</sub> and particulate matter into the environment.

Under the consent decree in *United States v. Powertrain, Inc.*, defendants paid a \$2 million civil penalty to resolve claims that they unlawfully imported and sold engines that were not covered by EPA certificates of conformity, lacked legally sufficient emissions-control labels, and lacked sufficient emissions-related warranties; and failed to maintain required records. Defendants also agreed to export or destroy non-compliant engines in their inventory, implement a Corporate Compliance Plan, and mitigate past excess emissions with one or more emissions offset programs.

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 noncompliance with the CWA are a coal company, a beef processor, and a mining and phosphorous processing company:

--The largest producer of coal from underground mines in the United States paid a \$5.5 million civil penalty to settle CWA claims at six of its mines in West Virginia under a consent decree entered in

*United States v. Consol Energy, Inc.* In addition to the penalty, Consol will spend an additional estimated \$200 million to implement pollution controls that will reduce discharges of harmful mining wastewater into Appalachian streams and rivers.

--In *United States v. Swift Beef Co.*, the company paid \$1.3 million to the United States and the State of Nebraska to resolve alleged violations of the CWA at its Grand Island, Nebraska, beef processing plant. Swift spent approximately \$1 million implementing measures at its plant to reduce pollutants in its wastewater and prevent future upsets at the city's publicly owned treatment works.

--Under the terms of the consent decree entered in *United States v. P4 Production, L.L.C.*, the defendant, a mining and phosphorous processing company wholly-owned by Monsanto, paid a \$1.4 million penalty to resolve claims that it violated the CWA by discharging wastewater containing high concentrations of selenium and heavy metals from a waste rock dump at its South Rasmussen Mine in southeast Idaho without a required permit.

### **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. If not properly managed, these facilities pose a high risk to human health and the environment. In fiscal year 2011, the Division concluded its second settlement under EPA's National Enforcement Priority for Mining and Mineral Processing in *United States v. Air Products, L.P.* The consent decree resolves the company's hazardous waste mismanagement violations under RCRA at its Pasadena, Texas, chemical manufacturing facility. Air Products, while not itself a mineral processor, sent large volumes of spent sulfuric acid waste for many years to Agrifos Fertilizer Co., a mineral processor that was not authorized to receive it. Some of the spent acid waste was contained in a release of 50 million gallons of acidic hazardous wastewater into the Houston Ship Channel from Agrifos' Houston phosphoric acid facility. Under the consent decree, Air Products paid a \$1.485 million civil penalty and agreed to manage the spent acid on-site so as not to generate a hazardous waste. It completed construction of a \$60 million sulfuric acid regeneration plant that will stop the acid waste stream altogether, greatly reducing risks to human health and the environment.

#### Box Text

"This agreement is the result of extensive cooperation between the States of Texas and Oklahoma and the federal government to address multiple violations of the Clean Water Act at Mahard facilities. Ensuring the lawful handling of CAFO wastes will mean cleaner streams and waterways in Texas and Oklahoma, which is important for aquatic habitats, safe drinking water, and public recreation."

--Ignacia S. Moreno  
*United States v. Mahard Egg Farm, Inc.* Press Release

Concentrated Animal Feeding Operations

--Concentrated animal feeding operations are livestock and poultry animal feeding operations that meet the regulatory thresholds of number of animals for various animal types. Animals are kept and raised in confined situations for a total of 45 days or more in any 12-month period, and feed is brought to the animals rather than the animals grazing or otherwise feeding in pastures, fields, or on rangeland.

--These operations generate significant volumes of animal waste which, if improperly managed, can result in environmental and human health risks such as water quality impairment, fish kills, algal blooms, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.

--EPA Fact Sheet

Twenty-one settlements with operators of coal-fired electric power generating plants as of September 30, 2011, will result in reductions of over 2 million tons of sulfur dioxide and nitrogen oxide, once the more than \$12 billion in required pollution controls are fully functioning.

In fiscal year 2011, the Division secured agreements with industrial defendants under the Clean Air Act to spend an estimated \$1.8 billion on corrective measures to reduce harmful air emissions, to pay \$47 million in civil penalties, and to perform \$8.6 million in mitigation projects to offset the harm caused by their unlawful emissions.

In fiscal year 2011, the Division settled cases with industrial defendants under the Clean Water Act valued at more than \$224 million in injunctive relief and \$13.6 million in civil penalties.

“This settlement demonstrates our commitment to enforcing the Clean Air Act’s requirement that engine manufacturers take steps to ensure engines are equipped with emissions controls that are essential to protecting public health from harmful air pollution.”

--Ignacia S. Moreno  
*United States v. Caterpillar, Inc.* Press Release

“This settlement eliminates the disposal of spent acid waste from the Air Products facility into the environment. By stopping this source of pollution, this settlement will reduce risks to human health and the environment.”

--Ignacia S. Moreno  
*United States v. Air Products, L.P.* Press Release

## **ENSURING CLEANUP OF OIL AND SUPERFUND WASTE**

### **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 2011, 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. Ausimont Industries, Inc.*, the settling defendants agreed to perform a \$30 million response action, to reimburse EPA \$4.5 million in oversight costs, and to pay \$1.65 million for NRD at the Sutton Brook Superfund Site in Tewksbury, Massachusetts.

--In *United States v. Manzo*, three defendants agreed to pay the United States \$4 million, based on their limited ability to pay, toward its cleanup costs at the Burnt Fly Bog Superfund Site in Marlboro County, New Jersey, and to donate a conservation easement of 41 acres of land to the New Jersey Department of Environmental Protection in order to settle New Jersey's claim for NRD. Additionally, three separate groups of insurers paid the United States a total of \$15.025 million in reimbursement of cleanup costs it incurred at the site.

--In December 2010, the court entered two consent decrees in *United States v. Union Pacific Railroad* settling the United States' cost recovery claims at the Double Eagle Refinery Superfund Site in Oklahoma City, Oklahoma. Together, the United States will recover a total of \$19,759,870 in past response costs, the State of Oklahoma will recover \$1,005,315 in past response costs, and the Joint State and Federal Trustees will recover \$774,416 in NRD.

--In August 2011, two consent decrees were entered in a different *United States v. Union Pacific Railroad* case, a CERCLA cost recovery case involving lead contamination in the residential yards of the Omaha Lead Superfund Site in Nebraska. Under the first decree, Union Pacific paid almost \$22 million in cost recovery and \$100,000 in NRD, and agreed to perform additional response work valued at \$3.15 million to settle its liability. Under the second decree, another settling party, Gould Electronics, paid \$1.15 million in response costs.

### **Protecting the Public Fisc Against Excessive or Unwarranted Claims**

The Division also defends federal agencies that are sued for their activities at contaminated sites being remediated. In *United States v. Washington State Dep't of Transp.*, the state brought contribution counterclaims against the Corps in connection with the cost of cleaning up the Thea Foss and Wheeler Osgood Waterways in the Commencement Bay-Nearshore Tidelands Superfund Site in Tacoma, Washington. Following trial, the court chose to allocate none of the response costs to the Corps,

holding that the Corps did not introduce any hazardous substances and, on balance, the Corps' dredging of hazardous substances was environmentally beneficial because it removed hazardous substances from the waterway. Accordingly, the court held that the Corps' equitable share of the \$9.3 million in response costs was zero, and dismissed the state's counterclaim.

In *AVX Corp. v. United States*, plaintiff sought to recover up to \$3 million from the United States for cleaning up trichloroethylene in the groundwater underlying undeveloped property in Myrtle Beach, South Carolina. The company alleged that a significant portion of the contamination was attributable to facilities on the now-closed Myrtle Beach Air Force Base. Following a trial in March 2011, the court entered judgment in favor of the United States. The court found that the United States was not liable under CERCLA and allocated 100% responsibility to AVX.

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 2011, these included such multimillion dollar settlements as *United States v. Newmont Mining USA, Ltd.* (regarding costs of cleanup of the Midnite Mine, an inactive, open-pit uranium mine located within the Spokane Indian Reservation in Washington State); *General Electric v. Dep't of the Interior* (response costs that plaintiffs are incurring cleaning up hazardous substances at the Northeast Church Rock Mine Superfund Site, a former uranium mine near Gallup, New Mexico); *MeadWestvaco, Inc. v. United States* (share of past response costs incurred by Mead regarding the investigation and cleanup of the Chattanooga Coke Plant site near Chattanooga, Tennessee); *Claims by LandBank, L.L.C.* (relating to costs of removal of unexploded ordnance at the former Conway Bombing and Gunnery Range near Conway, South Carolina); *United States v. Boeing Co.* (resolving claims by and against the United States for response costs incurred or to be incurred to clean up environmental contamination at the Moses Lake Wellfield Superfund Site, near the City of Moses Lake, Washington); and *Westinghouse v. United States* (response costs incurred or to be incurred by Westinghouse at a former nuclear fuel development and processing plant in Hematite, Missouri).

### **Enforcing Cleanup Obligations in Bankruptcy Cases**

The Division files claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. In fiscal year 2011, ENRD secured significant commitments of responsible parties to clean up hazardous waste sites, reimburse the Superfund, and pay damages for injuries to natural resources, in the context of several bankruptcy proceedings.

In the *In re Motors Liquidation Co.* (formerly General Motors) bankruptcy, the Division, working closely with the U.S. Attorney's Office for the Southern District of New York, obtained settlements in which (i) the debtor provided over \$639 million in funding for an environmental response trust for cleanup and administrative costs at 89 properties, (ii) the debtor provided \$25 million to resolve liabilities under cleanup orders for 6 non-owned sites, (iii) the United States received an allowed general unsecured claim and rights to certain additional funds under financial assurance provisions, in a combined total exceeding \$50 million for 34 sites, and (iv) the United States and cotrustees received general unsecured claims for NRD totaling \$11.5 million for 5 sites.

Pursuant to a settlement in the *In re Tronox, Inc.* bankruptcy, the debtor paid \$270 million cash and will cause to be paid 88% of future proceeds from a fraudulent conveyance action to environmental response trusts and federal and state agencies that will fund the cleanup of contaminated sites in 22 states. The settlement creates 5 environmental response trusts for contaminated properties in 14 states and 1,800 potentially contaminated former service station properties around the country, and provides them over \$202 million in cash funding and a share of the fraudulent conveyance action proceeds. The United States has intervened in the pending fraudulent conveyance proceeding, and trial is set for 2012.

The court in the *In re Smurfit-Stone Container Corp.* bankruptcy proceeding approved a settlement agreement under which the debtor distributed stock on account of allowed bankruptcy claims resolving federal environmental claims at six contaminated sites. Upon liquidating the stock, the United States received more than \$14.7 million in CERCLA cost recovery and more than \$3.5 million in NRD.

In the *In re Caribbean Petroleum* bankruptcy proceeding, the court approved a settlement agreement under which debtors paid more than \$8.2 million to address environmental liabilities relating to their former petroleum distribution facility in Bayamón, Puerto Rico, and more than 170 service stations they formerly owned or leased throughout Puerto Rico, and allowed general unsecured claims in excess of \$18 million for pre-bankruptcy cleanup costs and penalties. The court also entered a stipulation and order under which the debtors paid \$850,000 to address contamination at service stations they still own.

#### Box Text

In fiscal year 2011, the Division secured the commitment of responsible parties to clean up hazardous waste sites at costs estimated in excess of \$902 million; and recovered approximately \$374 million for the Superfund to finance future cleanups and more than \$52 million in Natural Resource Damages.

#### Double Eagle Superfund Site

--The Double Eagle Superfund Site extends over approximately 12 acres in Oklahoma City, Oklahoma, and is bounded to the north by the Union Pacific Railroad tracks. Although industrial areas surround the sites, the land use within a one-mile radius of both sites is mixed industrial and residential. A small neighborhood is located about one-quarter mile to the northwest. Four schools and two recreational facilities are located within a one-mile radius of the sites.

--The Double Eagle site collected, stored, and re-refined used oils and distributed the recycled product. The refinery was active as early as 1929, and Double Eagle continued to accept waste oil for storage in on-site storage tanks until 1980. The Double Eagle site recycled approximately 500,000 to 600,000 gallons of used motor oil per month into finished lubricating oil. This process generated approximately 80,000 gallons of oily sludge per month. Sludges were initially sent to an off-site disposal facility. Later, sludges were disposed of in on-site impoundments and a sludge lagoon until the late 1960s to early 1970s.

--The Double Eagle site was found to be contaminated with metals (particularly lead) and organic contaminants in the soil and ground water. It also contained acidic sludges found in on-site lagoons or pits.

--EPA Fact Sheet

From the beginning of fiscal year 2009 through the end of fiscal year 2011, ENRD has obtained agreements in 25 bankruptcy proceedings, under which debtors committed to spend an estimated \$1.46 billion to clean up hazardous waste sites, reimburse the Superfund \$663 million, and pay more than \$77 million in natural resource damages. Over that same time period, the United States also recovered an additional \$237 million for the Superfund as a result of payment of claims settled in earlier years.

“The [General Motors] agreement marks a new beginning by responsibly addressing hazardous waste contamination in impacted communities, and at the same time creates jobs to help clean up and return these sites to beneficial uses. It also shows how the federal government can work successfully in concert with states and tribes to resolve environmental legacy issues in their communities.”

--Gary G. Grindler,  
Acting Deputy Attorney General of the United States

GM Bankruptcy Proceedings

--From 1908 through 2009, General Motors Corporation was an auto manufacturer based in Detroit, Michigan.

--On June 1, 2009, General Motors Corporation and several wholly owned subsidiaries filed for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.

--On July 5, 2009, the bankruptcy court approved the sale of most of the company's assets to NGMCO, Inc., which later became known as General Motors Company ("New GM"). The original company retained certain real property from the sale. After the sale of assets to the new company, the original company was renamed Motors Liquidation Corporation, which is the holding company remaining to settle past liabilities of the original General Motors Corporation.

--In 2009 and 2010, the Department of Justice filed proofs of claim in the bankruptcy proceeding on behalf of EPA, the Department of the Interior, and the National Oceanic and Atmospheric Administration, seeking to obtain past and future response costs and Natural Resource Damages under Superfund and reimbursement for certain liabilities under the Resource Conservation and Recovery Act related to specified properties owned by the original company.

--On March 3, 2011, the bankruptcy court approved an initial October 20, 2010 settlement and environmental response trust, along with six additional settlement agreements. The parties to the settlement agreements were the United States, fourteen states (Delaware, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, Pennsylvania, Virginia, and

Wisconsin), and the St. Regis Mohawk Tribe as well as Motors Liquidation Corporation and several subsidiaries.

--The environmental response trust is the largest and most inclusive in the United States. More than half of the cleanup funds to be paid to the environmental response trust will be provided for the environmental remediation of sites in New York and Michigan.

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

### **Achieving Landmark Settlements for the Endangered Species Listing Program**

Protections for the nation's most imperiled species are triggered when a species has been listed under section 4 of the ESA. The ESA permits citizens to petition the responsible agency to list a species as endangered or threatened. For some time, however, the number of statutory obligations for addressing petitions for listing filed by citizens has far outstripped the appropriations provided by Congress to FWS's program for listing species under the ESA. The result has been roughly two decades of lawsuits and court orders directing the FWS to take actions, leaving FWS with no control over its own program. The situation reached a peak when, from 2007 to 2010, FWS was flooded with ESA listing petitions filed principally by two organizations to add hundreds of new species to the list of endangered and threatened species. When the agency was unable to make timely findings on these petitions due to budget and resource constraints, it was sued by the 2 organizations in over 20 different lawsuits filed in 7 different district courts. Subsequently, all of these suits were consolidated in the U.S. District Court for the District of Columbia as the *In re: ESA Section 4 Deadline Litigation*. After nine months of mediation, the Division successfully negotiated two watershed settlement agreements that aim to reform the FWS's litigation-plagued ESA section 4 listing program. Under the settlement agreements, the Service will make overdue listing petition findings for more than 600 species by the end of fiscal year 2012 and complete proposed rule determinations for 251 others by the end of fiscal year 2016. The agreement is likely to result in the listing of many new species for which protective action had languished due to the diversion of resources to litigation.

### **Defending the Polar Bear Listing Decision**

In May 2008, by regulation, FWS listed the polar bear as a threatened species under the ESA, based on the loss of its 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 Division successfully supported the consolidation of all of the cases in the U.S. District Court for the District of Columbia as the *In re Polar Bear Endangered Species Litigation*. The suits attacked FWS's determination that the polar bear should be listed as a threatened species, an accompanying ESA section 4(d) rule outlining conditions affecting application of the rule, and the FWS's denial of permits to import polar bear trophies. At the heart of the claims are the scientific findings of the United Nations Intergovernmental Panel on Climate Change and related work by the U.S. Geological Service, on which the listing determination is based.

In 2011, a team of Division lawyers presented multi-day oral arguments on several cross-motions for summary judgment in defense of the rules. In June 2011, the court issued a landmark 116-page ruling on the first phase of the case, upholding in its entirety the decision to list the polar bear as a threatened species.

## **Defending the Constitutionality of Congressional Action Regarding the Northern Rocky Mountain Gray Wolf**

Responding to the recovery of gray wolf populations in the Northern Rocky Mountain region, FWS issued a rule in 2009 removing the gray wolf from the list of endangered species under the ESA in Idaho and Montana, but not in Wyoming. In August 2010, a district court in Montana set aside the 2009 delisting rule. In April 2011, Congress enacted the Department of Defense and Full-Year Continuing Appropriations Act of 2011, which included a specific provision directing FWS to reinstate the 2009 rule that removed the gray wolf in Montana and Idaho from the list of endangered species. On the same day that FWS reinstated the 2009 rule, two lawsuits were filed claiming that the statutory provision violated the Separation of Powers doctrine in violation of the U.S. Constitution. The Division successfully defended FWS's action to reinstate the rule. The court granted ENRD's motions for summary judgment in their entirety and upheld the constitutionality of the statute.

## **Upholding the Constitutionality of the Endangered Species Act**

In the case of *Stewart & Jasper Orchards v. Salazar*, the Ninth Circuit in March 2011 rejected an as-applied challenge to the constitutionality of the ESA. Plaintiffs, farmers in California's Central Valley, alleged that extending the act's protections to the delta smelt, a fish of no present commercial value that was formerly harvested as bait, violated the Commerce Clause. They alleged that under a biological opinion evaluating the effects of federal and state water diversion operations on the delta smelt, they would receive less water. On the merits, the appellate court concluded that the ESA is a comprehensive regulatory scheme that bears a substantial relation to interstate commerce.

## **Managing the Variety of Resources in the Klamath River Basin**

The Klamath River Basin extends 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 Reclamation's Klamath Project. Civil unrest occurred in summer 2001 over federal ESA actions and, as a result, federal marshals were assigned to protect the project facilities for many weeks.

The Division worked closely with 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 KHSAs provide a framework for the stakeholders to collaborate on environmental and economic studies assessing the potential for removal of four PacifiCorp dams. The Division has continued to work closely with other federal agencies as those studies are conducted and as the necessary environmental review is completed. The Department of the Interior issued a draft Environmental Impact Statement under NEPA in September 2011. The KHSAs call for the United States to decide by 2012 whether to remove the dams. If removal is selected, the dams would be targeted for removal beginning in 2020. The agreements contemplate that removal would be funded by PacifiCorp ratepayers and the State of California. Legislative ratification and assurances of sufficient funding are necessary for removal to become effective. The Division has worked closely with other agencies and parties to the agreements on legislation implementing those agreements, which was introduced in the U.S. Congress in early November 2011.

### **Restoring Critical Natural Resources in the Everglades**

In July 2010, in *United States v. South Florida Water Mgmt. Dist.*, the United States filed a motion to resolve disputes with the state defendants over completion of the cleanup of phosphorus pollution from agricultural runoff in the Everglades. In January 2011, the Special Master issued a report recommending that the district court grant our motion. The Special Master agreed 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. In September 2011, the district court entered an order adopting the Special Master’s report and recommendation and ordering further proceedings to establish the limit of phosphorus pollution in discharges to the refuge. This decision will promote 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 approximately \$11 billion over 30 years.

### **Protecting National Forest Roadless Areas**

In October 2011, in *State of Wyoming v. United States Dep’t of Agriculture*, the Tenth Circuit reversed a Wyoming district court judgment that had set aside and permanently enjoined the 2001 Roadless Area Conservation Rule (Roadless Rule). For a number of years, the Division has defended the Roadless Rule, which prohibits road-building and commodity-purpose timber harvests in “inventoried roadless areas” of the National Forest System. (In 2005, the Department of Agriculture promulgated a replacement rule, but that action was invalidated and the Roadless Rule “reinstated” by virtue of litigation in the Ninth Circuit. This challenge followed.) The Tenth Circuit rejected the State of Wyoming’s claims that the Roadless Rule violated the Wilderness Act, the National Forest Management Act (NFMA), the Multiple-Use and Sustained-Yield Act, and NEPA. The court determined that the use restrictions for inventoried

roadless areas did not constitute a “de facto” designation of wilderness. The court also held that the Forest Service had authority, under its Organic Act, to promulgate nationwide rules for the management of National Forest System lands, notwithstanding NFMA’s requirement that forests be managed under forest-specific management plans. The court further held that the Roadless Rule was a reasonable exercise of the Forest Service’s authority to manage lands for wildlife, recreational, and watershed uses (in addition to commodity uses). Finally, the court rejected the state’s NEPA challenges, determining, among other things, that the Forest Service was not obligated to evaluate site-specific impacts (given the broad nature of the rule) or cumulative impacts that were not “reasonably foreseeable” because they were left to future planning decisions.

The Division also has continued to defend the Forest Service in its efforts to manage and preserve specific inventoried roadless areas within the National Forest System. Much of this land is ecologically significant. In *Jayne v. Sherman*, we successfully defended the state-specific Idaho Roadless Rule, which was collaboratively developed by the agency, the State of Idaho, and a broad coalition of environmental and industry interests. In defending the rule, we worked closely with the Idaho Attorney General’s Office, helping to promote a strong relationship with a state that contains a large share of federal lands.

### **Defending Forest Service Implementation of the 2005 Travel Management Rule**

The Division also continues to vigorously defend Forest Service decisions designating roads, trails, and areas for motor vehicle use in National Forest System lands. The 2005 Travel Management Rule requires the National Forests to specifically designate roads, trails, and areas that would be open for motor vehicle use. As individual forests have been completing their environmental analyses and designating motor vehicle use under the rule, a number of environmental and off-highway motor vehicle user groups have been bringing challenges to the designation decisions. The Division is defending over 20 cases in 9 states at various stages of litigation. Examples of cases the Division has successfully defended include *Center for Sierra Nevada Conservation v. U.S. Forest Service*, a challenge to the travel management plan for the Eldorado National Forest. The district court upheld the Forest Service’s authority to designate roads, trails, and areas under the Travel Management Rule independently of other travel planning activities under the rule. In *American Independence Mines and Minerals Co. v. U.S. Dep’t of Agriculture*, mining companies challenged the travel management plan for the Payette National Forest in Idaho, alleging that the Forest Service failed to adequately analyze impacts and failed to include a no-action alternative. The court dismissed the mining companies’ claims for lack of standing and entered judgment in favor of the United States.

### **Litigating Other Federal Land Management Policies**

In fiscal year 2011, ENRD also successfully handled litigation related to other forest management activities of the Forest Service.

--In *Western Watersheds Project v. Salazar*, ENRD prevailed in its defense of Forest Service and National Park Service management of the iconic Yellowstone bison when the herds migrate out of Yellowstone National Park (and into Gallatin National Forest) in the winter seeking forage. The federal

agencies manage the bison under a cooperative arrangement with the State of Montana that permits preservation of healthy and robust herds while also protecting the people and property in Montana from unwanted bison incursions.

--The Division negotiated a settlement in the remedies phase of *Conservation Northwest v. Sherman* that will allow the Forest Service and BLM to responsibly manage over 24 million acres of federal lands located in Washington, Oregon, and California that lie within the Northwest Forest Plan area. This settlement arose out of a lawsuit challenging the Department of Agriculture's and the Department of the Interior's 2007 Records of Decision that removed the Survey and Manage mitigation measures from the Northwest Forest Plan. The Survey and Manage mitigation measures have been the subject of litigation for many years, and this settlement enables the agencies to proceed with a timber program and gives the agencies greater flexibility in project planning.

--In *Ark Initiative v. U.S. Forest Service*, ENRD defended the Forest Service's 2003 acceptance of an amendment to a permittee's ski area master plan and the agency's approval of the Snowmass Ski Area Improvements Project in the White River National Forest, near Aspen, Colorado. The district court found that the acceptance of this conceptual master plan amendment was not a final agency action, and thus did not trigger NEPA or ESA requirements. The district court further found that the Forest Service complied with NEPA in authorizing the ski area improvements project. On appeal, plaintiffs abandoned many of their arguments and the Tenth Circuit allowed the agency's actions to stand.

--The Division successfully defended a challenge to a project on the Norbeck Wildlife Preserve in the Black Hills National Forest designed to enhance wildlife habitat and address a mountain pine beetle infestation in *Friends of the Norbeck v. U.S. Forest Service*. This is a unique area subject to the Norbeck Organic Act. This decision allows the Forest Service to continue its response to devastating mountain pine beetle infestation, furthers the agency's habitat enhancement goals, and affirms the agency's scientific methodology. The State of South Dakota intervened in the matter and we worked closely with them to defend the project.

### **Protecting National Park Lands**

In January 2011, the Fifth Circuit reversed an adverse lower court ruling and directed entry of judgment in favor of the National Park Service in *Dunn-McCampbell Royalty Interest v. National Park Service*. Plaintiffs, who hold rights to oil and gas beneath Padre Island National Seashore, challenged and obtained a district court judgment invalidating a 2001 management plan for the seashore on the ground that it unlawfully infringed upon the right of entry to their mineral estate by closing drilling and exploration on sensitive resource areas within the seashore. The Fifth Circuit concluded that a state law pursuant to which Texas had consented to the federal government's acquisition of land for inclusion in the seashore, did not protect plaintiffs' oil and gas interests from National Park Service regulation. The appellate court also rejected plaintiffs' arguments that their interests were protected from federal regulation by virtue of the Federal Enabling Act, the federal law regarding acquisition of the land.

### **Defending BLM Stewardship of National Monuments**

The Division successfully defended challenges to resource management plans for the Upper Missouri River Breaks National Monument, the Grand Canyon-Parashant National Monument, and the Vermilion Cliffs National Monument in *In re Montana Wilderness Ass'n, The Wilderness Society v. BLM*, and *Center for Biological Diversity v. BLM*. The district courts found that the management plans were consistent with Presidential intent in creating the monuments. The district courts upheld BLM's protection of monument objects, prohibition of off-road vehicle use, designation of roads, inventories of historic properties, and NEPA analyses on all three monuments.

### **Upholding 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 when the number of horses exceeds carrying capacity. To execute this mandate, BLM is required to carry out a number of gathers to remove excess horses from the wild and hold them available for adoption. These gathers are controversial and emotional for those attached to the wild horses, and often result in motions for temporary restraining order and/or preliminary injunction of BLM's actions. In several cases this year, ENRD successfully defended BLM's gather decisions in the Rocky Mountain west against such requests for emergency relief: *American Wild Horse Preservation Campaign v. Salazar* (White Mountain gather in Wyoming); *Leigh v. Salazar* (Triple B gather in Nevada); *Cloud Foundation v. Salazar* (Triple B gather in Nevada); *Leigh v. Salazar* (Silver King gather in Nevada); *Habitat for Horses v. Salazar* (North Piceance gather in Colorado). In each of these cases, the gathers proceeded as planned, thereby allowing BLM to carry out its statutory mandate.

### **Defending Management of Mineral Resources**

The Division successfully defended a challenge to BLM's management of a uranium mine within 10 miles of the north rim of the Grand Canyon that resumed mining in 2009 after a 17-year hiatus. The district court decided that BLM was not required to issue a new mining plan of operations. The district court also decided that BLM was not required to complete new or supplemental NEPA review of its approval of the existing mining plan of operations or of its decision to approve an updated reclamation bond for the mine. The Ninth Circuit affirmed the district court's denial of a motion for a preliminary injunction and also denied two requests by plaintiffs for an injunction pending appeal.

### **Defending NMFS Management of Ocean Fisheries**

The Magnuson-Stevens Fishery Conservation and Management Act and other related statutes charge NMFS with the difficult task of managing ocean commercial fishing to provide for conservation and sustainable fishing while, at the same time, optimizing fishing yield. In fiscal year 2011, the Division again successfully defended the balancing of these often-competing objectives in several challenges to NMFS regulations. Of particular note was ENRD's successful defense of two fishery management plans governing groundfish fisheries on the Atlantic and Pacific coasts known as Amendment 16 and

Amendment 20, respectively. These two plans applied for the first time a catch shares/limited access privileges management approach to these fisheries. The approach was designed to tighten restrictions on commercial groundfish fishing in an effort to end overfishing and rebuild stocks under the strict deadlines set by Congress. A variety of groups representing various interests challenged the agency's adoption of the amendments in two cases in Massachusetts and California: *City of New Bedford v. Locke* (as to Amendment 16) and *Pacific Coast Fed'n of Fishermen's Ass'ns v. Locke* (as to Amendment 20). In each case, ENRD presented oral argument and responded to several hundred pages of summary judgment briefing that levied a wide array of attacks, ranging from broad-scale constitutional allegations to detailed challenges to the scientific and mathematical methodologies employed by the agency. In the end, our efforts were successful with summary judgment granted in favor of NMFS on all issues, thereby allowing these important plans to be implemented.

We achieved similar success in the case of *Charter Operators of Alaska v. Locke*, a challenge to NMFS's final rule creating a limited access system for charter vessels in the Guided Halibut Sport Fishery in southeast Alaska and the Central Gulf of Alaska. Plaintiffs claimed that the rule violated the Northern Pacific Halibut Act of 1982 and the Magnuson-Stevens Act. As with Amendments 16 and 20, this rule was intended to reduce pressure on the Alaska halibut fishery to ensure a sustainable fishery for the future. The Division successfully opposed a motion for preliminary injunction by charter fishing operators seeking to enjoin implementation of the rule, thereby allowing the rule to take effect and provide needed protections for halibut without delay.

#### Box Text

#### Overview of Travel Management in the Eldorado National Forest

--Starting in January 2009, the Eldorado National Forest began implementing the decision to restrict all motor vehicles to designated roads and trails.

--The new designated route system includes the following features:

--Allows public motor vehicle use on 1,002 miles of native surface (dirt) roads and 210 miles of trails across the forest, including in the Crystal Basin area, Silver Fork Road, Mormon Emigrant Trail, Elkins Flat, Gold Note, Rock Creek, and many other areas. This includes cars, trucks, campers, RV's, ATV's, motorcycles, 4WD's, etc.

--Allows passenger cars on 635 miles of surfaced roads suitable for passenger cars.

--Prohibits cross-country travel by cars, trucks, ATV's, motorcycles, RV's, etc.

--Directs seasonal closure of designated system trails and dirt roads from January 1 through March 31. Seasonal closures may be longer if roads or trails are wet and susceptible to damage.

--Prohibits wheeled over-the-snow travel on certain routes and trails.

--Restricts parking outside of developed trailheads and other recreation sites to turnouts, landings, or within one vehicle length of the road or trail.

--Eldorado National Forest Website

The bison is the largest land mammal in North America. Yellowstone National Park is the only place in the lower 48 states where a population of wild bison has persisted since prehistoric times. In a typical year, more than 3,000 bison roam the park. Bison are strictly vegetarian, grazers of grasslands and sedges in the meadows, the foothills, and high-elevation forested plateaus of the park.

--National Park Service Fact Sheet

## **ENFORCING OUR NATION'S POLLUTION AND WILDLIFE CRIMINAL LAWS**

### **Prosecuting Hazardous Waste Violations**

Honeywell International owns and operates a facility near Metropolis, Illinois, where it refines raw uranium ore into uranium hexafluoride (UF<sub>6</sub>), a compound used in the uranium enrichment process that produces fuel for nuclear reactors and nuclear weapons. The air emissions from the UF<sub>6</sub> conversion process are scrubbed with potassium hydroxide (KOH) prior to discharge. This process accumulates uranium compounds that settle out of the liquid and are pumped as slurry into 55-gallon drums. In November 2002, Honeywell shut down part of its wet reclamation process used to reclaim this uranium from the potassium hydroxide and began storing the drums onsite. Honeywell was required to obtain a RCRA permit to store the drums for longer than 90 days, but failed to do so. Environmental Protection Agency special agents executed a search warrant in April 2009 and found 7,500 drums of KOH mud that was both radioactive and hazardous.

As a result, Honeywell pled guilty to a felony RCRA violation for knowingly storing hazardous waste without a permit and was sentenced to pay an \$11.8 million fine and complete a five-year term of probation. In addition, Honeywell must develop, fund, and implement a household hazardous waste collection program and arrange for the proper treatment, transportation, and disposal of waste collected during at least eight collection events over a two-year period at a cost approximating \$200,000.

### **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 from January 2009 through September 2011 have totaled more than \$42 million, and responsible maritime officials have been sentenced to more than 40 months of confinement. The program reflects the Division's ongoing, concentrated effort to detect, deter, and prosecute those who illegally discharge pollutants from ships into oceans, coastal waters, and inland waterways. Enforcement is chiefly under the International Convention for the Prevention of Pollution from Ships, known as "MARPOL," and the U.S. implementing legislation, the Act to Prevent Pollution from Ships (APPS). These laws require vessels to maintain logbooks recording all transfers and discharges of oily wastes. In addition, these cases frequently involve obstruction of U.S. Coast Guard inspections, which are charged under appropriate provisions of the federal criminal code.

In fiscal year 2011, the Division's successful prosecution of these violations included the representative cases below:

--Stanships, Inc. (Marshall Islands), Stanships, Inc. (New York), Standard Shipping, Inc. (Liberia), and Calmore Shipping (British Virgin Islands) pled guilty to obstruction of justice, failing to maintain an Oil Record Book (ORB) under APPS, and violating the Ports and Waterways Safety Act. Stanships failed to notify the Coast Guard of hazardous conditions on the *M/V Americana*, a Panamanian-registered cargo vessel. Moreover, the Coast Guard obtained photographs taken by a crew member showing the

use of a valve to bypass the ship's oily water separator. The ship's ORB was falsified to conceal the discharges and when the ship arrived in port in New Orleans, it had a variety of unreported hazardous conditions, including an inoperable and unreliable generator and a hole between a fuel tank and a ballast tank. Defendants were collectively sentenced to pay a \$1 million fine, and each will complete a five-year term of probation and were banned from doing business in the United States during the five-year probationary period. Additionally, Stanships (Marshall Islands) is a repeat offender, having pled guilty to an APPS ORB violation and CWA violation for discharging oil in the Gulf of Mexico from the *M/V Doric Glory*. As a result, the *M/V Americana* and *M/V Doric Glory* are banned from entering U.S. waters.

--Guilty pleas were entered in nine additional cases involving deliberate violations by vessel operators and crew members: *United States v. Koo's Shipping Co.*; *United States v. Atlas Ship Mgmt., Ltd.*; *United States v. Offshore Service Vessels, Inc.*; *United States v. Irika Shipping, S.A.*; *United States v. Grifakis*; *United States v. Uniteam Marine Shipping GmbH.*; *United States v. EPPS Shipping Co.*; *United States v. Fleet Mgmt., Ltd.* (third conviction); and *United States v. Nova Shipping Co.* These companies and individuals were sentenced to pay a total of \$11.4 million in fines, \$2.2 million in community service payments, and \$250,000 in restitution, and to serve a total of six months of incarceration, with each serving a term of probation for crimes including conspiracy, false statements, obstruction of justice, and ORB violations under APPS.

### **Investigating the Deepwater Horizon Oil Spill in the Gulf of Mexico**

During fiscal year 2011, the Department continued its criminal investigation of the catastrophic oil spill in the Gulf of Mexico that took place on April 20, 2010. This work is being conducted by the Deepwater Horizon Task Force, which was formed in March 2011 to consolidate the efforts of the Department's Criminal Division, ENRD, and the U.S. Attorney for the Eastern District of Louisiana. The Environment and Natural Resources Division is a member of the task force.

### **Bringing Actions to Safeguard America's Waters**

Over the course of a four-day voyage down part of the Mississippi River and then up the Ohio River, a barge of defendant Canal Barge Co. leaked benzene, a hazardous substance, from a cracked pipe. Rather than immediately reporting the leak to the Coast Guard, as required by the Ports and Waterways Safety Act, the barge crew tried to patch the crack first with bar soap and then with an inappropriate epoxy compound, neither of which worked. A jury convicted Canal Barge of failing to notify the Coast Guard of a hazardous condition on the barge. Post-trial, the district court set aside the jury's verdict, concluding that the United States should have brought the prosecution in the judicial district in which the leaking was first discovered. In January 2011, in the case of *United States v. Canal Barge Co.*, the Sixth Circuit reversed, concluding that the failure-to-report offense is a continuing offense for purposes of the criminal venue statute and, therefore, venue was proper in the charging district because the offense continued on the Ohio River within the Western District of Kentucky. This ruling (which implicates the "law of the thalweg" under which the river boundary between states moves as the

channel changes from erosion and accretion) will be important for states that share borders with other states that run through major navigable waterways.

### **Upholding the Constitutionality of the Safe Drinking Water Act**

The defendant, Cory Ledean King, a manager of a large farming and cattle operation in southern Idaho, was convicted in the district court of violating the Safe Drinking Water Act (SDWA), based upon his injection of runoff waters into underground wells without the permits required by Idaho law. In October 2011, in the case of *United States v. King*, the Ninth Circuit affirmed King's conviction, rejecting his arguments that the SDWA was unconstitutional for allegedly exceeding Congress' Commerce Clause power. The appellate court concluded that Congress had authority to regulate the activities proscribed in the SDWA because those activities had a substantial relation to interstate commerce; that is, unregulated injections of polluted substances into drinking water sources can have substantial negative effects on drinking water and the economy. The court of appeals also found that the federal government had authority to prosecute King for violating the state program, any injection without a permit violated the program, and the United States did not have to prove that the injection was contaminated or was into an underground source of drinking water.

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

The Division successfully prosecuted a number of asbestos-related cases this year. When asbestos-containing materials are damaged or disturbed by repair, remodeling, or demolition activities, microscopic fibers become airborne and can be inhaled into the lungs, where they can cause significant health problems. The Environmental Protection Agency 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 public health. The following cases are illustrative:

--A district court jury convicted Mark Desnoyers, a licensed air monitor, who was charged with conspiring to violate the CAA, the Occupational Safety and Health Act, the Mail Fraud Statute, and New York state law by conducting numerous unauthorized asbestos removal projects without taking appropriate protective measures. After the trial, the district court entered a judgment of acquittal on the conspiracy count finding that there was insufficient evidence to demonstrate that any projects except one met the relevant regulatory requirements of the CAA. In March 2011, in the case of *United States v. Desnoyers*, the Second Circuit reversed. The court reasoned that where the defendant disputed only one object of the multi-conspiracy count, but conceded that the government had proved other objects of the conspiracy, his factual insufficiency challenge to the disputed object was without merit.

--Keith Gordon-Smith and his asbestos abatement company, Gordon-Smith Contracting, Inc. (GSCI), were convicted by a jury of eight CAA violations and three false statement counts. Gordon-Smith ordered workers at GSCI to remove copper pipes, ceiling tile, and scrap metal from the six-story Genesee Hospital complex prior to its being demolished in the summer of 2009. When the unprotected workers removed this material they were exposed to asbestos, and often wore their asbestos-

contaminated clothing back to their homes and families. Gordon-Smith and GSCI made false statements to an Occupational Safety and Health Administration inspector who had received complaints from GSCI workers. Gordon-Smith and GSCI were also convicted of six counts of failing to provide the required notice to EPA prior to commencing asbestos abatement projects at six different sites in Rochester, New York, including several schools. Gordon-Smith was sentenced to six years of incarceration, followed by a three-year term of supervised release. GSCI is now defunct.

--Despite knowing of the presence of asbestos, Charles Yi and co-conspirators John Bostick and Joseph Yoon hired a company that was not licensed to conduct asbestos abatement to scrape asbestos-containing ceilings during the renovation of a 200-plus-unit apartment building. Defendants hired untrained Hispanic day laborers and failed to tell them about the asbestos or provide them with adequate protective gear. Yi was convicted by a jury of conspiracy to violate the CAA and five substantive CAA violations for his role in the illegal removal of asbestos. The co-defendants, Joseph Yoon and John Bostick, pled guilty to conspiracy. Yi was sentenced to 48 months of incarceration, followed by a 2-year term of supervised release, and ordered to pay \$5,400 in restitution. Bostick was sentenced to 6 months of home confinement and a 3-year term of probation, and ordered to complete 150 hours of community service. Yoon was sentenced to complete a two-year term of probation and held jointly and severally liable for the \$5,400 in restitution with defendants Yi and Bostick. The asbestos was cleaned up properly at a cost of \$1.2 million. The restitution was used to cover the cost of medical monitoring for the three workers involved in the illegal asbestos removal.

--Robert Joe Knapp, owner of the Equitable Building in Des Moines, Iowa, illegally removed asbestos from steam pipes and floor tile prior to converting the building into luxury condominiums. None of the workers on the project were trained to perform asbestos abatement work, and asbestos was illegally disposed of in an uncovered dumpster. Knapp pled guilty to conspiracy and failure to remove all asbestos. He was sentenced to 41 months of incarceration, and was ordered to pay a fine of \$2,500 and to perform 300 hours of community service. Co-defendant William Coco was sentenced to complete a 3-year term of probation and perform 200 hours of community service after pleading guilty to conspiracy and failure to remove all asbestos.

--Guy Gannaway and co-defendant Stephen Spencer were involved in the purchase and renovation of apartment complexes for conversion to condominiums. During the renovations, defendants disturbed large quantities of the popcorn ceiling mixture that contained significant amounts of asbestos without notifying regulators or following the work practice standards for asbestos removal. Gannaway was convicted by a jury of conspiracy, false statements, and other CAA charges related to the mishandling of asbestos. He was sentenced to 90 days of incarceration, followed by 6 months of house arrest, a 3-year term of supervised release, and 30 hours of community service. Spencer was ordered to pay a fine of \$10,000, complete a 5-year term of probation, and perform 30 hours of community service addressing contractor/architecture-related groups about the proper handling of asbestos.

--Certified Environmental Services (CES), an asbestos air monitoring company, managers Nicole Copeland and Elisa Dunn, and employee Sandy Allen were convicted by a jury of conspiracy and mail

fraud for their roles in a decade-long scheme between abatement contractors and CES in which asbestos was illegally removed from numerous homes and buildings in Syracuse, New York. CES and Dunn were also convicted of making false statements. CES provided abatement contractors with false air results to convince the building owners that the asbestos had been properly removed. An additional defendant, Frank Onoff, pled guilty to conspiracy, violations of the Toxic Substances Control Act, and mail fraud.

CES was sentenced to pay a \$20,000 fine and \$117,000 in restitution, and to complete a five-year term of probation. Nicole Copeland was sentenced to serve 12 consecutive weekends in jail, pay \$23,000 in restitution, complete a 5-year term of probation, and perform 200 hours of community service. Elisa Dunn, Sandy Allen and Frank Onoff were each sentenced to time served, a 3-year term of supervised release, \$5,000 in restitution, and 200 hours of community service. All defendants were prohibited from engaging in any asbestos-related air monitoring activities.

### **Prosecuting Crimes Against U.S. Fisheries and the Seafood Consumer**

When fisherman and fish wholesalers do not comply with the law, they imperil the entire fishery, adversely impact the livelihoods of those who abide by the law, and commit a fraud on the U.S. consumer. Illegal commercial fishing encompasses such crimes as illegal fish harvesting, purchase of illegally harvested fish, and false labeling of fish under the Lacey Act as well as related general criminal violations. The Division has made it a priority to investigate and prosecute this type of crime. Two cases from fiscal year 2011 are representative:

--Karen Blyth, David H.M. Phelps, and John Popa owned and managed Consolidated Seafood Enterprises Inc. (Consolidated) and Reel Fish and Seafood, Inc. (Reel Fish). They conspired to falsely buy and label 283,500 pounds of farm-raised Vietnamese catfish (known as sutchi), which was then falsely declared as wild-caught sole and imported without paying \$145,625 in anti-dumping duties. Blyth, Phelps and Consolidated received 81,000 pounds of sutchi, sold it to Popa and Reel Fish, and Popa and Reel Fish then changed the label to grouper and sold it to customers in Alabama, Florida, and Mississippi at a higher cost. Some of the fish seized tested positive for malachite green and Enrofloxin, both of which are prohibited from use in U.S. food. Additionally, Blyth and Phelps bought more than 25,000 pounds of Lake Victoria perch from Africa and then mislabeled and sold it as grouper to customers in Alabama and Florida at a higher cost and in greater quantities than if it had been accurately labeled. Further, defendants repackaged farm-raised foreign shrimp as U.S. wild-caught shrimp.

Defendants pled guilty to conspiracy, Lacey Act, misbranding, and smuggling violations for their roles in this mislabeling of seafood. Blyth and Phelps were sentenced to 33 and 24 months of incarceration, respectively, followed by a 3-year term of supervised release, and were ordered to pay a fine of \$5,000 and barred for 3 years from working in the seafood industry. Popa was sentenced to 13 months of incarceration followed by a 3-year term of supervised release.

--Stephen Delaney, Jr., was convicted by a jury of violating the Lacey Act and the Federal Food, Drug and Cosmetic Act. The violations involved the false labeling of \$8,000 worth of frozen fillets of pollock from China as cod loins from Canada and the misbranding of \$203,000 worth of frozen fish fillets

that were falsely labeled as products of Holland, Namibia, and the United States, when they were actually products of Canada. The price of cod was \$1 per pound higher than that for Alaskan pollock. Delaney was sentenced to three months of home detention, as part of a one-year term of probation, and was ordered to pay a fine of \$5,000 into the Magnuson-Stevens Fund.

### **Stopping Illegal Wildlife Trafficking**

Federal criminal enforcement of wildlife statutes plays a key deterrent role and augments state, tribal, and foreign wildlife management efforts. A wildlife case can include prosecution of both individual and organizational perpetrators; disgorgement of proceeds from illegal conduct such as smuggling; punishment that includes community service to help mitigate harm caused by the offense; and forfeiture of wildlife and instrumentalities used to commit the offense. One key statute for prosecution of wildlife crimes is the Lacey Act. The Division resolved a number of these cases in fiscal year 2011:

--James Bobby Butler, Jr., was involved in the illegal hunting and killing of white-tailed and mule deer. Butler and his brother, Marlin Jackson Butler, operated a guiding service hunting camp to out-of-state hunters, who killed deer in excess of annual bag limits, hunted deer without permits, and killed deer using illegal equipment and hunting methods such as spotlighting. The enterprise brought in \$77,500 in guiding fees, which included arranging for the transport of the antlers and capes to Kansas, Texas, and Louisiana. James Bobby Butler pled guilty to conspiracy to violate the Lacey Act, a Lacey Act trafficking charge, and obstruction of justice. He was sentenced to 41 months of incarceration, followed by a 3-year term of supervised release, a fine of \$25,000 to the Lacey Act Reward Fund, and an additional \$25,000 in restitution to the Kansas Department of Wildlife and Parks, and was banned from all hunting and guiding activities for 3 years. Marlin Jackson Butler pled guilty to conspiracy and Lacey Act violations, and was sentenced to 27 months of incarceration, followed by a 3-year term of supervised release, a \$10,000 fine, and an additional \$10,000 in restitution.

--David Place illegally bought and imported sperm whale teeth and narwhal tusks into the United States. From 2001 to 2006, Place and two Ukrainian co-defendants, Andrei Mikhalyov and Charles Manghis, conspired to import the whale teeth for resale in the United States through the Manor House Antiques Cooperative in Nantucket, Massachusetts, that Place owned. The market value of the teeth and tusks illegally imported by Place was determined to be between \$200,000 and \$400,000. Place was convicted by a jury of 7 felony counts including conspiracy, Lacey Act, and smuggling violations, and was sentenced to 33 months of incarceration followed by a 3-year term of supervised release. Mikhalyov pled guilty to conspiracy, and was sentenced to nine months of incarceration and deported to the Ukraine. Manghis was sentenced to 30 days of intermittent incarceration as part of a 2-year term of probation, and was ordered to pay a \$50,000 fine and forfeit a number of ivory carvings.

--Jeffrey M. Bodnar and his wife Veronica Anderson-Bodnar engaged in the illegal trapping and interstate sale of bobcats. They sold the bobcat pelts to fur buyers in Montana and Kansas. Additionally, the two conspired to submit false records to the Colorado Division of Wildlife in order to obtain tags for the pelts. Jeffrey Bodnar pled guilty to conspiracy to violate the Lacey Act and possession

of a firearm by a felon, and was sentenced to serve 27 months of incarceration, followed by a 3-year term of supervised release during which he is prohibited from hunting, trapping, or fishing. Veronica Anderson-Bodnar was sentenced to a five-year term of probation, during which time she will not be allowed to possess firearms and also will be prohibited from hunting, trapping, or fishing.

--Between 2003 and 2007, Jeffrey Foiles and his hunting club, Fallin' Skies Strait Meat Duck Club, sold and guided waterfowl hunts for the purpose of illegally hunting ducks and geese in excess of hunters' individual bag limits. Foiles pled guilty to violating the Lacey Act and the Migratory Bird Treaty Act. He was sentenced to 13 months of incarceration and a 1-year term of supervised release, and was ordered to pay a fine of \$100,000. Additionally, he will be prohibited from hunting or being a guide for two years. Fallin' Skies Strait Meat Duck Club was sentenced to complete a two-year term of probation and will serve as guarantor of the \$100,000 fine assessed to Foiles.

### **Working Together on Criminal Environmental Enforcement**

In fiscal year 2011, the Division continued its vigorous efforts to ensure that U.S. Attorneys across the nation make pollution and wildlife prosecutions part of their everyday practice. In addition to hosting, along with the Attorney General's Advisory Committee, the first-ever United States Attorneys' Environmental Crimes and Enforcement Conference for all United States Attorneys on November 18 and 19, 2011, the Division developed and participated in major training events and task forces with various United States Attorneys' Offices:

--Three major training events centered around growing concerns with new techniques in energy extraction. The first of these was the Marcellus Shale Law Enforcement Conference in State College, Pennsylvania, in May 2011. Approximately 250 people attended this conference, which was sponsored by ENRD, each of the 3 U.S. Attorneys' Offices in Pennsylvania, EPA's Criminal Investigations Division, FWS, the FBI, the Internal Revenue Service, and the Pennsylvania Office of the Attorney General, among others. The purpose of the conference was to strengthen coordination and communication among federal, state, and local law enforcement in this area. Other energy extraction conferences included the Environmental Enforcement Training Conference in Bismarck, North Dakota, in September 2011; and the Environmental Law Conference in Great Falls, Montana, in October 2011.

--United States Attorneys' Offices in Alabama, Colorado, Louisiana, Missouri, and Ohio joined in the Division's Worker Endangerment Initiative, conducting joint training and docket reviews with the Occupational Safety and Health Administration and Department of Labor.

--The Division provided pollution and wildlife crimes training at events held by the United States Attorneys' Offices in the District of Montana in February 2011, the District of Idaho in April 2011, and the Eastern District of Pennsylvania in June 2011.

--Division attorneys worked closely with United States Attorneys' personnel on environmental task forces in the Southern District of Alabama, District of Idaho, Southern District of Ohio, District of

Maryland, Western District of New York, Eastern District of North Carolina, Western District of Pennsylvania, and District of South Carolina.

--In January 2011, representatives of the U.S. Attorney's Office for the Eastern District of Virginia, the ENRD Environmental Crimes Section, the Coast Guard, and EPA met in Norfolk, Virginia, to discuss environmental crimes in the Tidewater area. The topics of the meeting included Coast Guard investigative authorities, substantive environmental laws, title 18 crimes, and investigative strategies. The Coast Guard thereafter conducted numerous facility and vessel visits, and generated a number of leads for further investigation.

--And, as it does each year, the Division co-hosted the biannual meetings of the Environmental Crimes Policy Committee, comprised of Division prosecutors and Assistant United States Attorneys; and provided basic and advanced environmental crimes training to dozens of Assistant United States Attorneys and agency counsel in the week-long Environmental Crimes Seminar.

#### Box Text

From January 2009 through September 2011, the Division concluded criminal cases against 186 individuals and 59 corporate defendants, obtaining over 113 years of confinement and over \$214 million in criminal fines, restitution, and other monetary relief.

"Together with our partners at the Coast Guard, Environmental Protection Agency, and United States Attorney's Office, we are sending the message that we will vigorously prosecute deliberate violations of environmental and safety laws. As a consequence of their violations of the law, Stanships' vessels and related corporations will pay a substantial fine and be barred from doing business in the United States for the next five years."

--Ignacia S. Moreno  
*United States v. Stanships Plea Agreement* Press Release

#### Facts about Asbestos

--Because of its fiber strength and heat resistant properties, asbestos has been used for a wide range of manufactured goods, mostly in building materials, friction products, heat-resistant fabrics, packaging, gaskets, and coatings.

--When asbestos-containing materials are damaged or disturbed by repair, remodeling, or demolition activities, microscopic fibers become airborne and can be inhaled into the lungs, where they can cause significant health problems.

--EPA regulates asbestos primarily under the authority of:

--The Clean Air Act (Asbestos National Emission Standards for Hazardous Air Pollutants regulations).

--The Toxic Substances Control Act (Asbestos Ban and Phaseout regulations).

--The Comprehensive Environmental Response, Compensation, and Liability Act.

--EPA Fact Sheet

“Knapp's illegal conduct put at risk the health of workers who lacked basic training and protective equipment. The Clean Air Act work practice standards are designed to protect people's health from real dangers, and we will hold violators fully responsible for their actions.”

--Ignacia S. Moreno

*United States v. Knapp* Sentencing Press Release

“These defendants have admitted to flouting federal laws in a misguided scheme to defraud the American consumer. . . . This type of scam floods the market with falsely labeled fish, thereby misleading consumers, artificially deflating the cost of wild-caught fish, and depriving law-abiding fishermen of the full measure of their labor.”

--Ignacia S. Moreno

Blyth and Phelps Plea Agreements Press Release

## DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

### Defending the U.S. Response to the Deepwater Horizon Oil Spill and Management of Oil and Gas Resources

In fiscal year 2011, the Division continued to defend a number of cases arising from the Deepwater Horizon oil spill. These cases challenge aspects of the federal government's response to contain the oil spill following the explosion, regulatory actions to prevent future recurrence of oil spills, and approval of exploration and production plans and lease sales in the Gulf of Mexico and Alaskan waters. Examples of cases resolved in fiscal year 2011 include the following cases:

--In *Hornbeck Offshore Services, L.L.C. v. Salazar* and *EnSCO Offshore Services v. Salazar*, the Division successfully defeated claims alleging that Interior lacks authority to impose planning and permitting requirements on oil and gas development activities on the Outer Continental Shelf. We also obtained dismissal of district court challenges to the Secretary's suspension in 2010 of certain deepwater drilling activities, and successfully negotiated a resolution to claims alleging unreasonable delay in the review of applications for permits to drill.

--In *Center for Biological Diversity v. Salazar*, the U.S. District Court for the District of Columbia dismissed nearly all of plaintiff's claims in response to the United States' motion to dismiss. Plaintiff had challenged DOI's policy of using categorical exclusion reviews under NEPA when approving exploration plans, development and production plans, and drilling permits, but the court agreed that the statute of limitations on any such challenge had run because the categorical exclusion policy was first adopted in 1986. The court also dismissed claims related to several planned lease sales as constitutionally and prudentially unripe for decision. The court also ruled that the plaintiff had failed to provide the notice required before bringing challenges to certain permits under the ESA. In fiscal year 2012, the parties continued to litigate plaintiff's remaining challenges to Lease Sale 213.

--In *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation & Enforcement*, plaintiff also challenged oil and gas lease sales for deepwater wells in the Gulf of Mexico, alleging violations of NEPA, ESA, and the Administrative Procedure Act (APA) arising from DOI's alleged failure to modify offshore oil and gas leasing operations, policies, and practices following the Deepwater Horizon oil rig explosion and oil spill. The U.S. district court in Alabama also granted the United States' motion to dismiss all claims other than those relating to Lease Sale 213.

--In *Alaska v. Salazar*, the State of Alaska primarily sought to compel Interior to vacate a purported moratorium on Outer Continental Shelf exploration and development in the Alaska region and to provide plaintiff with notice and an opportunity to participate before imposing any future moratorium. The district court in Alaska granted the United States' motion for summary judgment in the case, agreeing that no moratorium on permitting of oil and gas exploration and development in the Alaska region existed.

--We filed responsive briefs in the Fifth Circuit in *Center for Biological Diversity v. Salazar* in November 2010 and in *Gulf Restoration Network, Inc. v. Salazar* in December 2010. Both of these cases consist of consolidated petitions for review of DOI's approval, shortly after the Deepwater Horizon oil rig explosion and resulting oil spill, of exploration plans that provide for the drilling of exploratory wells in the Gulf of Mexico. Petitioners primarily challenge Interior's reliance on categorical exclusions from NEPA review requirements when approving the plans. Petitioners also argue that Interior violated the APA and other federal statutes by allegedly failing to consider the implications of the Deepwater Horizon oil spill. In April 2011, the Fifth Circuit heard argument in both cases.

### **Upholding Administrative Actions Related to Climate Change**

EPA's efforts to regulate greenhouse gases that contribute to global climate change reached a critical point in fiscal year 2011. Specifically, on January 2, 2011, EPA's regulations governing motor vehicle emissions of greenhouse gases took effect, triggering not only mobile source regulation, but also regulation of the largest stationary sources in accordance with EPA's greenhouse gas tailoring rule. Scores of lawsuits have been filed challenging these actions as well as EPA's finding that greenhouse gas emissions endanger public health and welfare and EPA's various regulations implementing the greenhouse gas regulations in the states.

--In a suite of cases known generally as *Coalition for Responsible Regulation v. EPA*, four motions were filed in the D.C. Circuit by opponents of EPA's principal greenhouse gas regulations seeking to stay their effectiveness pending judicial review, and additional motions were filed in the Fifth and D.C. Circuits seeking to stay EPA's implementation rules in the states. After extensive briefing, both courts entered orders denying the motions for stay in December 2010 and January 2011, thus ensuring that EPA's efforts to regulate greenhouse gas emissions began as scheduled.

--In March 2011, the D.C. Circuit issued briefing orders in the suite of cases challenging EPA's principal greenhouse gas regulations, largely adopting our briefing format proposal and establishing a briefing schedule extending through December 2011. From August to September 2011, the United States filed substantial briefs on the merits defending EPA's principal greenhouse gas regulations. In February 2012, the court heard two back-to-back days of oral argument.

In a related matter, *Chamber of Commerce of the United States v. EPA*, the D.C. Circuit dismissed challenges to EPA's 2009 decision to grant California a waiver of preemption under the CAA so that the state could implement its own motor vehicle greenhouse gas emission regulations. The court found that petitioners lacked standing to challenge EPA's action.

Additionally, in *Amigos Bravos v. U.S. Bureau of Land Mgmt.* and *WildEarth Guardians v. Bureau of Land Mgmt.*, the Division successfully defended three BLM quarterly oil and gas lease sales in New Mexico as well as a Forest Service decision to open an area of the Carson National Forest in New Mexico to oil and gas leasing. Plaintiffs alleged that the decisions, involving dozens of lease tracts around the state, violate the Federal Land Policy and Management Act, the Mineral Leasing Act, NEPA, and NFMA. In *Amigos Bravos*, the court dismissed plaintiffs' claims for lack of standing, finding that plaintiffs' could not

satisfy Article III injury requirements by alleging harm stemming from impacts caused by global climate change. In *WildEarth*, the court found in favor of BLM and the Forest Service on the merits on all claims. These cases are significant because of the court's holdings on air quality impacts and standing in the climate change context.

### **Defending Against a Public Nuisance Tort Lawsuit Related to Climate Change**

The Division also assisted the Solicitor General's Office in handling a case before the Supreme Court on behalf of the Tennessee Valley Authority on the issue of climate change. Eight states, a city, and several private land trusts sued five major electric power companies, including the Tennessee Valley Authority, in an attempt to address climate change issues. They alleged that power plant emissions violated common law nuisance principles and sought an injunction to limit those emissions. The district court dismissed the lawsuit, but the Second Circuit reinstated it. In June 2011, in *American Electric Power v. Connecticut*, the Supreme Court issued a favorable decision reversing the Second Circuit. An equally divided Court of eight Justices held that plaintiffs had standing to bring their complaint (the four dissenting justices would have held that plaintiffs lacked constitutional standing). On the merits, however, the Court found that the CAA and actions taken by EPA under the act displaced any federal common law right that plaintiffs may once have had. In reaching this conclusion, the Court noted EPA's authority to regulate existing stationary sources under the act, and the multiple avenues for enforcement provided by the act, including the ability of parties to petition for rules. The Court further explained that Congress' decision to entrust EPA with regulation of greenhouse gases made sense based upon the agency's scientific, economic, and technological resources.

### **Upholding the Administration's Decisions Regarding Handling of Nuclear Waste**

In July 2011, the D.C. Circuit issued a favorable decision in *In re Aiken*. The court dismissed for lack of jurisdiction four consolidated petitions for review that sought to challenge the Department of Energy's (DOE's) decisions to file a motion to withdraw its license application for a permanent geologic repository for high-level nuclear waste at Yucca Mountain and to terminate the Yucca Mountain program. The court agreed that petitioners' claim challenging DOE's attempt to withdraw the license application was not ripe because the Nuclear Regulatory Commission's Licensing Board had denied DOE's motion to withdraw and the Nuclear Regulatory Commission itself had not yet decided whether it would review the Board's denial. The court explained that if the Commission declined to review the Board's decision or upheld it, DOE will have failed in its attempt to withdraw the license application and petitioners' claim will be moot. The appellate court also held that petitioners' claim challenging a determination allegedly made in January 2010 by the President and DOE Secretary to unilaterally and irrevocably terminate the Yucca Mountain repository process is not justiciable because petitioners failed to identify any reviewable final agency action.

### **Supporting Investment in Transportation Infrastructure**

In fiscal year 2011, the Division continued its effort to support the Department of Transportation's investment in state and city efforts to improve transportation options in urban areas. In *St. Paul Branch*

of the *NAACP v. Federal Transit Admin.*, we worked with the United States Attorney's Office in Minnesota to defend the Federal Transit Administration's environmental impact disclosures for the Central Corridor Light Rail Transit Project connecting downtown St. Paul with downtown Minneapolis. The court ruled in favor of the agency on all claims but one, and declined to halt the project while the agency remedied its environmental disclosures. The court agreed with our argument that the public interest in the transit project, including the construction jobs it is bringing to the Twin Cities, outweighed the potential harm to plaintiffs. In *Friends of Congaree Swamp v. Federal Highway Admin.*, ENRD also succeeded in defending a \$37 million project to rebuild a series of four structurally deficient bridges and expand connecting causeways along U.S. Highway 601 within the Congaree National Park in South Carolina. Plaintiffs were successful in a prior challenge, and brought new claims challenging the revised environmental analysis. The South Carolina Department of Transportation also was a defendant in this suit and the Division worked very closely with it. As a result of the favorable decision, this important public safety work continues. Construction is expected to be completed in June 2013.

### **Defending the Operation of Floodways During Mississippi River Flooding**

The State of Missouri sought emergency relief in *Missouri v. U.S. Army Corps of Eng'rs* to enjoin the Corps from operating the Birds Point-New Madrid Floodway in response to record high flooding. Operation of the floodway was necessary to protect thousands of people and millions of dollars' worth of property from the potential of a catastrophic flooding event that could result from the failure of a levee near Cairo, Illinois. Missouri alleged that the Corps' plans to operate the floodway violated the Missouri CWA and the APA. In less than a week, the Division successfully opposed a request in the district court for a temporary restraining order, and motions for emergency stay in the Eighth Circuit and the Supreme Court. The Corps detonated the levee several days later. Missouri then voluntarily dismissed its suit. This victory required close cooperation among the local U.S. Attorney's Office, three sections of the Division, and the Solicitor General's Office.

### **Upholding Efforts to Deepen the Delaware River for Navigation**

We successfully opposed multiple challenges to the long-planned deepening of the Delaware River's 102-mile main channel from 40 to 45 feet. 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 in Delaware granted summary judgment in favor of the Corps, allowing the full project to proceed. In January 2011, the district court in New Jersey similarly granted summary judgment in favor of the Corps in *New Jersey v. U.S. Army Corps of Eng'rs* on claims brought by the State of New Jersey and several environmental groups under the CWA, CAA, and NEPA.

## **Defending Permitting of Dredge-or-Fill Activities**

The Division successfully defended multiple decisions by the Corps to issue CWA permits authorizing the discharge of dredged or fill materials into various waters of the United States, including in: *Jordan River Restoration Network v. Army Corps of Eng'rs* (April 2011 order denying preliminary injunction against a permit authorizing the discharge of dredged or fill materials into wetlands adjacent to the Jordan River in Salt Lake County, Utah, in connection with the construction of the Salt Lake Regional Athletic Sports Complex); *ARC Ridge, L.L.C. v. Army Corps of Eng'rs* (February 2011 judgment dismissing challenge to the Corps' decision to allow the construction of an electric transmission line in Texas to proceed pursuant to a nationwide permit); *Hillsdale Environmental Loss Prevention, Inc. v. Army Corps of Eng'rs* (orders denying a preliminary injunction and subsequently affirming the decision of the Corps in issuing a permit allowing BNSF Railway Co. to fill wetlands in conjunction with development of an intermodal transportation facility near Gardner and Edgerton, Kansas).

## **Litigating Water Quality in the Everglades**

Plaintiffs in *Miccosukee Tribe v. EPA* originally challenged a determination by EPA that certain statutory and regulatory actions by the State of Florida concerning discharges into the Everglades did not amount to changes to the state's water quality standards. After a largely unfavorable ruling in 2008, the district court issued a harshly worded order in April 2010, in response to contempt motions filed by plaintiffs. That order directed EPA to issue an amended determination in the matter by September 3, 2010, and to take other specific actions related to its implementation of the CWA. While EPA issued a comprehensive amended determination that complied with nearly all of the court's injunctive instructions, the Division filed a motion for reconsideration of aspects of the April 2010 order. The Division also successfully petitioned for a writ of mandamus from the Eleventh Circuit setting aside the district court's order requiring EPA Administrator Lisa Jackson to personally appear and be subject to examination by the court. In December 2010, following months of briefing, the court held a hearing on, among other things, EPA's compliance with the April 2010 order and the pending reconsideration motion. In April 2011, the court granted EPA's reconsideration motion in full and resoundingly endorsed EPA's views as to the appropriate administrative approach to protecting the Everglades under the CWA.

Last year, the Division also successfully litigated petitions for review in the Eleventh Circuit challenging EPA's September 2010 amended determination. In July 2011, in *South Florida Water Mgmt. Dist. v. EPA*, the court of appeals granted ENRD's motion to dismiss because the amended determination was neither final for purposes of review nor the type of EPA action reviewable under the provisions of the CWA.

## **Protecting Everglades Restoration Efforts from Constitutional Challenges**

In *Mildenberger v. United States*, landowners along the St. Lucie River in Florida alleged a taking of their property in violation of the Fifth Amendment resulting from the U.S. Army Corps of Engineers' operational plan for Lake Okeechobee. Plaintiffs alleged that releases of pollutants and fresh water into the St. Lucie River and Estuary over time have destroyed the estuarine environment and riparian rights of plaintiffs. In 2010, the court rejected plaintiffs' claims that their riparian rights had been taken,

holding that the claims were time-barred; 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 plaintiff could assert a compensable property interest under state law, the claims would be barred by the federal navigational servitude. In subsequent proceedings, the court dismissed all remaining claims, including those relating to alleged noxious odors, mangrove tree mortality, flooding, and pollution of an irrigation well. In September 2011, the Federal Circuit affirmed the Court of Federal Claims' dismissal of all claims.

### **Representing Federal Interests in Asian Carp Litigation**

Invasive species are one of the largest threats to the Great Lakes ecosystem. 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 were to become established in the Great Lakes, it is feared the species could create an ecological disaster by consuming the bottom of the food chain and negatively impacting the Great Lakes' \$7 billion fishery industry.

In fiscal year 2011, the Division continued to successfully represent the interests of the United States in litigation involving the migration of Asian carp into the Great Lakes through the Chicago Area Waterway System. In *State of Michigan v. U.S. Army Corps of Eng'rs*, the States of Michigan, Wisconsin, Illinois, Pennsylvania, and Ohio filed suit against the Corps, alleging that the Corps had created a public nuisance by operating structures around Chicago in such a way as to allow Asian carp to enter Lake Michigan. They moved for a preliminary injunction, which the district court in Illinois denied. In August 2011, in the case of *Michigan v. Corps of Eng'rs*, the Seventh Circuit affirmed the denial of a preliminary injunction. The appellate court held that the injunctive relief sought would only marginally decrease the likelihood of harm during the pendency of the litigation while imposing great costs on the government and the public. It concluded that any effort by the courts to intervene in the ongoing extensive interagency effort to stop the invasion of carp was unnecessary and might do more harm than good given the relative competency of the branches.

### **Protecting U.S. Waters Against Invasive Species Carried in Vessels' Ballast Water**

Marine vessels traveling in commerce in the United States can pose a threat to the waters in which they travel when they discharge ballast water laden with foreign organisms. EPA has promulgated a general permit under the CWA specifying procedures designed to reduce the threats posed by such ballast water discharges. In July 2011, in the case of *Lake Carriers Ass'n v. EPA*, the D.C. Circuit upheld EPA's regulations against challenges brought by representatives of the shipping industry who contended that the permit was too burdensome because it required compliance with all states' water quality certification conditions. The court rejected these arguments, holding that petitioners had failed to establish that EPA may alter or reject state certification conditions.

### **Defending EPA's Regulation of Hazardous Air Pollutants Emitted by Medical Waste Incinerators**

In *Medical Waste Inst. v. EPA*, a trade group representing the hospital waste industry challenged EPA's CAA standards governing the emissions of hazardous pollutants that result from the incineration of hospital, medical, and infectious wastes. In June 2011, the D.C. Circuit upheld EPA's determination to consider up-to-date data in revising these standards following a prior remand and rejected as untimely petitioners' challenges to EPA's approach of setting hazardous air pollutant standards on a pollutant-by-pollutant basis.

### **Ensuring Timely Implementation of Air Quality Standards for Sulfur Dioxide**

In *National Environmental Dev. Council's Clean Air Project v. EPA*, petitioners sought to stay implementation of EPA's more stringent air quality standards for SO<sub>2</sub> pending judicial review. We opposed, and in April 2011 the D.C. Circuit entered an order denying the stay motion, thus ensuring that the protections afforded by the new standards would be implemented as scheduled.

### **Defending the Animal and Plant Health Inspection Service's Biotechnology Program**

The Animal and Plant Health Inspection Service (APHIS) of the Department of Agriculture regulates the nation's use and introduction of genetically engineered crops. In fiscal year 2011, the Division continued its defense of APHIS's biotechnology regulatory program with respect to several genetically engineered crops.

Sugar beets comprise about one-half of the current domestic refined sugar supply, and genetically modified sugar beets make up 95% of all sugar beets planted. Several of ENRD's cases involved "Roundup Ready" sugar beets (RRSB):

--In February 2011, in the case of *Center for Food Safety v. Vilsack*, the Ninth Circuit reversed a district court's preliminary injunction entered against APHIS. In 2005, APHIS deregulated genetically engineered RRSB under the Plant Protection Act. Its decision was accompanied by an Environmental Assessment (EA). After plaintiffs filed suit challenging the EA, the district court vacated the deregulation decision and remanded for preparation of an Environmental Impact Statement (EIS). Pending its issuance of the EIS, APHIS issued four permits allowing seed companies to grow RRSB "stecklings" (seedlings), which could be used to grow the seed crop if APHIS granted additional regulatory approvals that were the subject of the EIS review. Plaintiffs, a public interest group and organic farmers, sued to enjoin the interim authorizations. The district court granted a preliminary injunction requiring destruction of the stecklings. In reversing, the Ninth Circuit held that growth of the stecklings posed a negligible risk of genetic contamination, as the juvenile plants are biologically incapable of flowering or cross-pollinating before the permits expired. The court found the district court improperly relied on alleged past incidents of contamination by genetically engineered plants to find present harm. The court noted that APHIS's permits "follow the . . . blueprint" the Supreme Court set forth in *Monsanto v. Geertson Seed Farms* for a limited authorization of a genetically engineered crop pending completion of an EIS. Once the permits expired, ENRD subsequently obtained a dismissal on mootness grounds from

the district court. The favorable outcome allowed the planting of up to 526 acres of RRSB seed crop in the fall of 2011.

--In *Grant v. Vilsack* and *Center for Food Safety v. Vilsack*, ENRD defended APHIS from litigation brought by industry groups and environmental groups against its interim decision to partially deregulate RRSB root crop production and to permit planting of RRSB seed crop subject to mandatory conditions while it prepares the EIS regarding full deregulation of RRSB. A decision from the court is expected in the second or third quarter of fiscal year 2012.

Additionally, in *Center for Biological Diversity v. Animal and Plant Health Inspection Service*, the Division successfully managed a challenge to APHIS's approval of permits that authorize the planting and flowering of a genetically modified hybrid of eucalyptus tree in seven states in the southeastern United States. The permits authorized field trials of a variety of eucalyptus that is designed to reduce fertility, enhance the ability to occasionally withstand cold temperatures, and increase efficiency for producing pulp and paper. Plaintiffs brought claims under NEPA, ESA, and the Food, Conservation, and Energy Act of 2008. The Division obtained a dismissal of certain claims on jurisdictional grounds and succeeded on the merits of the remaining NEPA claims.

### **Clarifying the Jurisdiction of the Court of Federal Claims**

In *United States v. Tohono O'odham Nation*, the Supreme Court held that long-established statutory law precludes the Court of Federal Claims from hearing "any claim for or in respect to which the plaintiff . . . has pending in any other court." Following the issuance of that decision, we concluded that the Court of Federal Claims lacks jurisdiction to hear claims in several pending Fifth Amendment takings cases. As a result of motions filed by ENRD, the United States was able to gain dismissals of takings claims in three significant cases: *Central Pines Land Co. v. United States*, seeking more than \$150 million for the alleged taking of oil and gas rights on federal lands in Louisiana; *Brandt v. United States*, involving the alleged taking of an interest in an abandoned railroad right-of-way in Wyoming; and *Stockton East Water Dist. v. United States*, seeking \$500 million for an alleged taking based on the alleged failure by Reclamation to deliver water to several California water districts. Motions to dismiss several other significant cases remain pending.

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

The Division continues to defend thousands of Fifth Amendment takings claims brought by landowners who allege that the National Trails System Act deprives them of reversionary rights in abandoned railroad rights-of-way. While the defense of these cases presents numerous legal challenges and requires significant resources, we have been able to narrow the claims in many of the cases, resulting in a savings of millions of dollars to the public fisc. These cases include: *Thompson v. United States* (granting partial summary judgment to the United States for Michigan properties); *Gregory v. United States* (granting partial summary judgment to the United States for Mississippi properties); *Farmers Co-op Co. v. United States* (limiting temporal scope of federal liability for Kansas properties); *Whispell Foreign Cars, Inc. v. United States* (granting partial summary judgment to the United States for Florida

properties); *Macy Elevator, Inc. v. United States* (granting partial summary judgment to the United States for Indiana properties); and *Rasmuson v. United States* (denying plaintiffs' motion to certify a class of Iowa property owners).

### **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 in fiscal year 2011 include the following cases:

--Last year saw a successful conclusion to the protracted eminent domain action, *United States v. 753.95 Acres in Washoe County, Nevada, and Incline Lake Corp.* This action was filed at the request of the Forest Service under authority of the Southern Nevada Public Land Management Act, which makes funds generated by disposal of public lands in the Las Vegas Valley available for purchase of environmentally sensitive land. In May 2008, the Forest Service and landowner Incline Lake Corporation (ILC) agreed to federal acquisition of these 753.95 acres, with the purchase price to be set by a federal court. Estimated just compensation of \$46,000,000 was deposited in the district court in Nevada by the United States at the outset of litigation. ILC sought a valuation of at least \$74,450,000. After lengthy discovery and pre-trial motions, the parties arrived at a settlement amount of \$43,500,000. The settlement resulted in repayment by ILC to the United States of the \$2,500,000 difference between the initial deposit and the settlement amount.

--In the case of *United States v. 1.604 Acres of Land Situate in the City of Norfolk, Commonwealth of Virginia, and 515 Granby, L.L.C.*, the Division sought to acquire land on behalf of the General Services Administration for construction of an annex to the Walter E. Hoffman U.S. Courthouse in Norfolk, Virginia. The site had been slated to house a \$180,000,000 condominium project; however, construction halted in 2007 as a result of financial difficulties. The landowner was seeking more than \$36,000,000 in just compensation for the property but, following a series of successful pre-trial motions and an effective trial presentation, the jury ultimately awarded just compensation in the amount of \$13,401,741. *United States v. 15,478 Square Feet of Land Situate in the City of Norfolk, Commonwealth of Virginia, and Balaji Sai, L.L.C.*, is a companion case for the same project. The parties engaged in court-ordered mediation in June 2011, and reached a favorable \$1,667,000 settlement.

--*United States v. 275.81 Acres of Land in Stonycreek Township, Somerset County, Pennsylvania and Svonavec, Inc.*, is a condemnation action on behalf of the National Park Service for construction of the Flight 93 National Memorial. The memorial site includes approximately 275 acres containing a museum, observation area, and memorial. The United States' designated trial appraiser values the property at \$600,000. Defendant's appraiser originally estimated just compensation at \$30,895,000 (\$23,300,000 for land value and \$7,595,000 for oil and gas rights), but in the course of discovery

defendant agreed to stipulate to a reduced oil and gas value of \$105,000. This matter will likely be scheduled for trial in 2012.

--The condemnation action *United States of America v. 7.85 Acres of Land, More or Less, Located in Prince William County, Commonwealth of Virginia*, was filed on behalf of the National Park Service in January 2011. We sought to acquire one of the last remaining private landholdings within the boundaries of Prince William Forest Park on behalf of the National Park Service. The Service had attempted to negotiate acquisition of this property for nearly a decade, but was unsuccessful because ownership was divided among dozens of descendants and heirs of the last record owner, who died nearly 50 years ago. Taking this action allowed the transfer of title from and payment of just compensation to the many landowners. Prince William Forest Park, established in the 1940s, protects the largest piedmont forest in the national park system and the largest green space in the Washington, D.C., metropolitan region. The district court in Virginia awarded just compensation of \$190,000, the amount for which the Division presented evidentiary support at trial.

In fiscal year 2011, ENRD also conducted title reviews for client agencies able to negotiate property purchases without the need for the Division to file condemnation actions. Examples include the acquisition by the General Services Administration of a warehouse in Sterling, Virginia, for use by the Department of State for a consideration of \$9,700,000; by the Indian Health Service of 18.77 acres of land located in Sage, Riverside County, California, for construction of a residential rehabilitation treatment center serving 96 American Indian/Alaska Native youth annually for a consideration of \$850,000; and by the U.S. Department of Veterans Affairs of 12 city blocks in New Orleans, Louisiana, as the site of the new \$1 billion VA Medical Center to replace the facility damaged by Hurricane Katrina.

### **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 the Division's continuing 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 and resources are in place to mitigate the adverse environmental impacts from such events, and improve the administration of federal mineral and energy resources.

### **Enforcing Environmental Law Through International Capacity Building**

The Division implements an active and varied program of international activities, often in collaboration with partners from other federal agencies, to support important Administration and Department objectives.

--We successfully prosecute transnational environmental and natural resource crimes that involve foreign evidence or foreign assistance, or that rely on the violation of underlying foreign statutes.

--We provide critical training for law enforcement partners in other countries to ensure that they may work effectively with us in investigating and prosecuting transnational environmental crimes.

--We participate in the development and implementation of trade and investment agreements, treaties, international environmental agreements, and domestic implementing legislation in order to ensure that they protect and promote effective environmental enforcement.

--We also help to develop and facilitate international partnerships and networks that promote effective prosecution of transnational environmental crimes.

To carry out these objectives, in fiscal year 2011 ENRD spoke at conferences and workshops, provided training, and met with law enforcement counterparts in Brazil, Chile, China, Mexico, New Zealand, Peru, and Russia, as well as in the United States.

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 enforcement tools to combat international trafficking in illegally harvested timber and wood products made from such timber. For example, ENRD worked with the Department's Overseas Prosecutorial Development, Assistance, and Training Program to organize a workshop on the Lacey Act and prosecution of illegal logging crimes at the Russian Ministry of Justice Legal Academy in Khabarovsk, Russia. The workshop was attended by representatives of the Russian Ministry of Justice, regional and local prosecutors, regional police, and the Russian Federal Forestry Agency. The Division also spoke about the Lacey Act at four workshops in China funded by the U.S. Agency for International Development for government officials and representatives of the wood products industry. We also have been provided funding by the State Department and U.S. Agency for International Development to implement multi-year programs in Brazil, Russia, Peru, and Honduras to provide training on the Lacey Act and combating illegal logging.

We participated in negotiations led by the Office of the U.S. Trade Representative of the environment chapter of the Trans-Pacific Partnership Trade Agreement with eight Asian and South American countries. The Division attended and supported the U.S. delegation at meetings of the United Nations Framework Convention on Climate Change. And ENRD, with colleagues from EPA, began a program to provide training to judges in Chile on adjudicating environmental enforcement cases.

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

At times, ENRD 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 in fiscal year 2011. An example is the case of *Morrison Enterprises, L.L.C. v. Dravo Corp.* In that case, the Eighth Circuit issued a decision interpreting a key provision of CERCLA as

advocated by the United States. In *United States v. Atlantic Research*, the Supreme Court held that a potentially liable private party who has voluntarily cleaned up hazardous substances at a site can seek to recover the costs of response from other potentially liable parties through an action under section 107 of CERCLA. The Supreme Court decision did not address whether a potentially liable party that was compelled to clean up a site under an administrative settlement or consent decree, and thus may seek contribution under the plain language of CERCLA section 113, also may seek to recover costs under section 107.

Following the Supreme Court's decision, the Division filed numerous amicus briefs on behalf of EPA in district courts and courts of appeals arguing that such parties cannot seek to recover costs under section 107. The underlying concern is avoiding an interpretation of CERCLA that would undermine the contribution protection that CERCLA provides to parties that reach settlements with the federal government to resolve their liability for cleaning up hazardous waste sites. In *Morrison*, the Eighth Circuit held, consistent with its prior decision in *Atlantic Research* (before the case reached the Supreme Court) and arguments made by ENRD in its amicus brief, that CERCLA section 113 provides the exclusive remedy for a party who incurs response costs under an administrative settlement or consent decree. The Second and Third Circuits, and many district courts, have now interpreted this CERCLA provision as the United States construes it.

Other important cases in which the Division filed amicus briefs include *PPL Montana, L.L.C. v. State of Montana* (a U.S. Supreme Court case addressing the question of whether the Montana Supreme Court erred in concluding that riverbeds occupied by hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a state) and *Northwest Environmental Defense Center v. Brown* (a Ninth Circuit case involving EPA regulations addressing what silvicultural activities are subject to CWA National Pollutant Discharge Elimination System permitting requirements).

The Division also conducts the Department's review of citizen-suit complaints and consent judgments under the CAA and CWA. Those statutes contain provisions allowing citizens to file suit for violations of those statutes, and require that citizen-suit complaints and consent judgments be served on the Department and EPA. When served with complaints, we offer our assistance to counsel for the parties, and we review all consent judgments to ensure that they comply with the requirements of the relevant statute and are consistent with the statute's purposes. The case of *State of New York v. ExxonMobil* is illustrative. In concert with the U.S. Attorney's Office for the Eastern District of New York, we reviewed and negotiated amendments to a proposed consent decree in a suit filed by the State of New York under state and federal law (including the citizen-suit provisions of RCRA and the CWA) for civil penalties and natural resource damages arising out of an oil spill at Exxon's oil refining and storage facilities in Greenpoint, Brooklyn. Under the terms of the consent decree, Exxon agreed to pay over \$6 million to the State of New York for damages and penalties, as well as \$19.5 million to fund environmental benefit projects. After identifying several aspects of the proposed consent decree that were cause for concern for EPA and the federal natural resource trustees, we worked with the parties to develop amendments

that would address those areas of concern. Plaintiffs ultimately lodged a revised proposed consent decree, and after the United States filed its comments, the court entered the decree in March 2011.

### Box Text

There are three species of Asian carp that are considered invasive and a threat to the Great Lakes, the bighead, silver and black carp. Silver and bighead carp are filter-feeding fish and consume plant and animal plankton at an alarming rate. Bighead carp can grow over 5 feet in length and can weigh 100 pounds or more. Black carp differ in that they consume primarily mollusks, and threaten native mussel and sturgeon populations. They can grow to 7 feet in length and 150 pounds.

--Asian Carp Regional Coordinating Committee

### Genetically Engineered Eucalyptus

--Eucalyptus species are among the fastest growing woody plants in the world and represent about 8% of all planted forests. While there are over 700 eucalyptus species identified, only a limited number are grown commercially.

--Eucalyptus is a preferred fiber source for the global pulp and paper industry.

--It is hoped that genetically engineered (GE) cold tolerant eucalyptus will allow production of this hardwood species for pulping and for biofuel applications in managed plantation forests in the southeastern United States.

--APHIS Fact Sheet

### Lacey Act Plant Protection Provisions Added by the Food, Conservation, and Energy Act of 2008

--The Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken in violation of the laws of a U.S. state, or any foreign law that protects plants.

--The Lacey Act also makes it unlawful to make or submit any false record, account or label for, or any false identification of, any plant.

--The definition of the term "plant" includes "any wild member of the plant kingdom, including roots, seeds, parts, and products thereof, and including trees from either natural or planted forest stands." The definition contains certain exceptions, including for common cultivars and common food crops.

--The Lacey Act also requires an import declaration for plants and plant products, except for plant-based packaging materials used exclusively to import other products. Importers must file a declaration upon importation that contains the scientific name of the plant, the value of the importation, the quantity of the plant, and the name of the country from which the plant was taken. Enforcement of the declaration requirement is currently being phased in.

-- Anyone who imports into the United States, or exports out of the United States, illegally harvested plants or products made from illegally harvested plants, including timber, as well as anyone who exports, transports, sells, receives, acquires or purchases such products in the United States, may be prosecuted.

--USDA Fact Sheet

## **PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS**

The Environment and Natural Resources Division makes 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, including actions to expand the domestic energy portfolio to a broad range of energy sources and reduce the nation's dependence on fossil fuel.

### **Facilitating Military Modernization Plans**

Two years ago, the Division facilitated interagency 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 three critical military redevelopment projects that will affect Guam and the Commonwealth of the Northern Mariana Islands. Covered actions include the 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. In September 2010, the Department of Defense signed a Record of Decision concerning the three projects, thus marking the successful conclusion of the federal interagency problem-solving process. As part of the decision-making process, EPA ultimately concluded that the final Environmental Impact Statement prepared by the Defense Department, with our assistance, contains an adequate discussion of the environmental impacts of the projects and proposes a mitigation plan that, if successfully implemented, will avoid unsatisfactory public health and environmental impacts. This 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.

Subsequently, in fiscal year 2011, the Division successfully defended a lawsuit, *Guam Preservation Trust v. Gregory*, brought by a coalition of historic preservation groups and local community organizations asserting claims against the Navy under the National Historic Preservation Act, the Coastal Zone Management Act, and NEPA. Plaintiffs challenged the Navy's selection of the Pagat Point area, which has cultural significance to the indigenous Chamorro people, for Marine Corps training and firing ranges as part of the Department of Defense's relocation of troops to Guam from Okinawa. The district court agreed with the Navy's argument that the litigation should be dismissed as moot based on the Navy's decision to prepare additional NEPA documentation before making a site-specific selection for the training ranges.

### **Defending the Department of Energy's Programs, Research, and Prerogatives**

*Los Alamos Study Group v. U.S. Dep't of Energy* was a case brought by an anti-nuclear advocacy group that alleged the Department of Energy and the National Nuclear Security Administration (NNSA) violated NEPA by failing to prepare a "new" Environmental Impact Statement (EIS) for changes in design for construction of the multi-billion dollar Chemistry and Metallurgy Research Replacement Nuclear Facility

(CMRR-NF) at the Los Alamos National Laboratory in New Mexico. The CMRR-NF is a key component of the nation's security infrastructure and efforts to ensure a safe, secure, and effective nuclear arsenal in the 21st century. As we had argued, the district court dismissed the case under the doctrine of prudential mootness due to NNSA's initiation of a supplemental EIS process. In the alternative, the court found that ripeness was an equally valid ground for dismissal because the NEPA process is not yet complete.

### **Furthering the Administration's Renewable Energy Agenda**

One component of the Administration's efforts to reduce the country's dependence on foreign oil is expansion of cleaner domestic sources of energy in the form of wind and solar power and renewable fuels. The Division is actively defending challenges to permits and rights of way issued by BLM to promote the development of renewable energy projects on western public lands. We successfully defeated motions for temporary restraining orders and/or preliminary injunctions for the Ivanpah Solar Project, Blythe Solar Project, and Sunrise Powerlink transmission project in California. The Division also successfully opposed efforts in *Western Watersheds Project v. BLM* to preliminarily enjoin the Spring Valley Wind Project located in Nevada. This represented the first decision on a wind energy project sited on federal land. The court concluded that the public has a strong interest in this project because "Congress and the President have clearly articulated that clean energy is a necessary part of America's future and it is important to Nevada's economic and clean energy goals." Finally, we are working closely with BLM to defend the permit issued for the Cape Wind Project, America's first offshore wind project.

In *National Petrochemical & Refiners Ass'n v. EPA*, industry petitioners challenged EPA's efforts to ensure that the full volume of renewable fuels specified by Congress in the Energy Independence and Security Act for use in 2009 and 2010 were produced and used, notwithstanding the fact that EPA had been unable to promulgate regulations in time for calendar year 2009. In December 2010, the D.C. Circuit found not only that EPA acted reasonably in combining the 2009 and 2010 quantities in the 2010 regulation, but also that the regulation was not impermissibly retroactive. In November 2011, the Supreme Court declined to grant a petition for writ of certiorari in the case.

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

In *Phippsburg Shellfish Conservation Comm'n v. Army Corps of Eng'rs*, the Division successfully defended against a challenge to a U.S. Army Corps of Engineers dredging project that was critical to the delivery of the U.S.S. *Spruance*, a billion-dollar guided missile destroyer, from the Bath Iron Works in Kennebec, Maine, to the possession of the United States Navy. Delay in the delivery of the destroyer would have had a ripple effect on training and assignments for multiple ships implicating military training readiness. In July 2011, the district court issued an order denying plaintiffs' motion for a preliminary injunction. In ruling in favor of the Corps, the court gave particular attention to balancing the potential for environmental harm with the public's strong interest in national defense and in the continued economic vitality of the Bath Iron Works. Plaintiffs subsequently dismissed their case voluntarily after the dredging occurred.

## **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 local U.S. Attorneys' Offices, the Department of Homeland Security, and the Corps to facilitate land acquisitions necessary for the construction of 225 miles of fencing (the Strategic Border Initiative). This has required acquisition by eminent domain of nearly 400 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 helped resolve 160 cases (most from fiscal year 2009 forward), and has trials scheduled next year on four of the most precedent-setting cases with valuation disputes of more than \$100 million. In fiscal year 2011, for example, we brought to a successful conclusion *United States v. 6.09 Acres of Land Situated in Cameron County, Texas, and Rollins M. Koppel, Trustee*, a condemnation action filed in Texas on behalf of the Department of Homeland Security. The landowner's appraisers opined a value of over \$13,500,000; the parties reached an agreed settlement of \$4,995,000.

The Division also filed over a dozen cases, on behalf of the Department of Homeland Security and the General Services Administration, on an expedited basis, for the modernization and expansion of various land ports of entry in Maine, New York, Texas, and Washington. Virtually all of these cases have been resolved, and on terms favorable to the United States.

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

We also acquire lands or review title to lands needed to fulfill other critical military and homeland security functions. The following cases illustrate this work in fiscal year 2011:

--In *United States v. 2,560 Acres of Land in Imperial County, California, and Donald Crawford*, the Division filed a condemnation on behalf of the U.S. Navy to acquire privately owned land located within El Centro Naval Air Facility. The Navy had previously leased this property, which contains portions of a strafing range and the main target for air-to-ground bombing practice at the facility. The United States condemned fee title in September 2011, depositing estimated just compensation of \$1,280,000. Trial is expected in late 2012 or early 2013.

--In February 2011, the United States deposited estimated just compensation of \$4,363,000 in the case of *United States v. 1,136.526 Acres of Land, in Goliad County, Texas*. This is a condemnation action on behalf of the Department of Defense for acquisition of an airstrip to be used in Navy training.

--The Division issued a preliminary title opinion for the Department of Homeland Security acquisition by donation from the State of Kansas of 45.84 acres and 6 appurtenant easements located in Manhattan, Kansas. This will be the site of a new \$450,000,000 National Bio and Agro-Defense Facility.

--We also issued a preliminary opinion of title for a joint U.S. Air Force/Trust for Public Land acquisition of a conservation easement adjacent to Beale Air Force base in Yuba County, California, for

consideration of \$1,593,681. The acquisition is occurring under a federal program that protects military operations from encroaching development.

--Finally, ENRD issued another preliminary title opinion for 16.840 acres located in Glynn County, Georgia. This land is to be acquired for development of an addition to the Department of Homeland Security's Federal Law Enforcement Training Center.

#### Box Text

"New facilities, such as the Chemistry and Metallurgy Research Replacement building . . ., along with materials consolidation, means that the nation's special nuclear materials inventory can be protected to meet the security challenges of the 21st century."

--Los Alamos National Laboratory

"Reducing our dependence on oil is going to strengthen our national security. It will make our environment cleaner for our kids. It will make energy cheaper for our businesses and for our families. And doubling down on a clean energy industry will create lots of jobs in the process."

--President Barack Obama, February 2012

"By helping stand up responsible large-scale renewable energy projects on America's public lands and oceans, the Department of the Interior is playing a leading role in fulfilling President Obama's vision for a new energy future. As America's principal public lands management agency with stewardship responsibility over 20 percent of the nation's land mass and 1.75 billion acres of the Outer Continental Shelf, Interior manages areas with extensive renewable energy potential."

--Interior Secretary Ken Salazar, January 2011

Camp Beale opened in October 1942, as a training site for the 13th Armored and the 81st and 96th Infantry Divisions. The base has been under several commands, including Air Training Command, Continental Air Command, Aviation Engineer Force, the Strategic Air Command, and since June 1, 1992, Air Combat Command. In 2001, the 12th Reconnaissance Squadron activated at Beale as the parent organization for the GLOBAL HAWK, the Air Force's newest high-altitude reconnaissance platform. Today, Beale AFB is the home for the U-2 reconnaissance aircraft, the T-38 jet trainer, and the KC-135 tanker.

--U.S. Air Force Fact Sheet

## PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

This Administration has made clear its commitment to Indian Country. In connection with the third Tribal Nations Conference sponsored by the White House in 2011, President Obama stated: “I believe we are seeing a turning point in the relationship between our nations, and I promise to do everything I can to fight for a brighter future for First Americans and all Americans.” Attorney General Holder has reaffirmed the Department of Justice’s commitment to “building and sustaining healthy and safe native communities; renewing our nation’s enduring promise to American Indians and Alaska Natives; and respecting the sovereignty and self-determination of tribal governments.” Vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights is at the heart of ENRD’s core mission and is a top priority for us.

ENRD’s work related to Indian tribes and their members is multi-faceted:

--Today, the United States holds almost 60 million acres of land in trust for federally recognized tribes and individual tribal members. The Department of the Interior and ENRD, working with federally recognized tribes, seek to protect these lands and associated resources from trespass, impairment, and encumbrance.

--The Division brings suits on behalf of the United States to protect tribal rights and resources. The rights and resources at issue in our cases are tribal water rights, the ability to acquire reservation land, and treaty-protected hunting and fishing rights, among others.

--The Division also defends against challenges to statutes and federal agency actions designed to protect tribal interests.

--We bring cases to address environmental contamination affecting Indian tribes. Many tribal communities may be disproportionately affected by pollution of the air, water, and land, including the effects of climate change. This also raises environmental justice issues.

--In addition, the Department of Justice defends claims asserted by Indian tribes against the United States on grounds that the United States has not properly managed the tribes’ monetary and natural resources held in trust by the United States. Indian tribes also may be parties to cases challenging the actions of federal resource management agencies.

In fiscal year 2011, we continued our efforts to ensure that this work is conducted in the most effective manner, and with careful consideration of the government-to-government relationship between the United States and federally recognized tribes. We have achieved significant successes. In particular:

--ENRD has increased outreach to tribal leaders and communities to better understand their concerns, and we are working more closely with them in carrying out our important tribal responsibilities.

--The Division is actively engaged with the Department of the Interior and tribes in identifying, developing, and prosecuting affirmative cases (including through amicus participation) in multiple areas, including tribal water rights, reservation boundaries, and tribal jurisdiction and sovereignty. We also are taking steps to address uncertainty regarding Interior's trust acquisition authority created by recent Supreme Court case law.

--With other responsible federal agencies, ENRD is exploring ways to improve environmental compliance in and around Indian Country.

--With the Departments of the Interior and the Treasury, we are exploring opportunities for resolution of tribal trust cases in an expedited, fair, and just manner, and have successfully resolved cases. The Division has developed and is implementing expedited settlement processes in tribal trust litigation.

The remainder of this chapter describes specific ENRD activities in each of these areas.

### **Working Closely with Tribal Leaders and Communities**

In the past year, ENRD senior management traveled around the country--from Arizona to Alaska, and from Montana to South Dakota--to meet with tribal leaders, visit tribal lands, and hear about and see first-hand their unique environmental and natural resources challenges, including the effects of climate change on tribal lands and fishing grounds, and increased pressures for development on sacred sites. For example:

--In September 2011, Assistant Attorney General Moreno and U.S. Attorney Michael Cotter attended the North Dakota United States Attorney's Office's Environmental Enforcement Training Conference in Bismarck, North Dakota. At this conference, Assistant Attorney General Moreno and U.S. Attorney Timothy Purdon, along with representatives from EPA, provided training on environmental enforcement actions to federal, state, local and tribal law enforcement officers, and environmental investigators.

--In July 2011, the Department held the Joint Native American Issues Subcommittee and Attorney General's Advisory Committee meeting in South Dakota, and tribes from that state discussed their public safety, environmental, and other concerns with the Department's senior leadership.

--In April 2011, Assistant Attorney General Moreno, ENRD senior staff, and U.S. Attorney Dennis Burke met with Navajo Nation officials to discuss environmental and natural resource issues of concern to that tribe.

--In February 2011, Assistant Attorney General Moreno and ENRD staff joined U.S. Attorney Michael Cotter and Montana Attorney General Steve Bullock in Helena, Montana, to attend the Joint Environmental Enforcement Training. Representatives from EPA, the Montana Department of Environmental Quality, ENRD's Environmental Crimes Section, and the Montana U.S. Attorney's Office

provided training on environmental enforcement actions to state, local, and tribal law enforcement officers, and environmental inspectors and regulators.

--In December 2011, Assistant Attorney General Moreno and senior ENRD staff participated in the third White House Tribal Nations Conference. Representatives from every federally recognized tribe were invited to attend the meeting. Assistant Attorney General Moreno was part of a panel that discussed tribal land, cultural resources and awareness, natural resources, and numerous other issues.

### **Supporting Tribal Recognition and Sovereignty**

The Division has continued its longstanding efforts to support tribal jurisdiction and sovereignty. For example, in *Water Wheel Camp Recreation Area, Inc. v. LaRance*, ENRD filed an amicus brief in the Ninth Circuit supporting tribal court jurisdiction. The underlying dispute arose over a lease secured by Water Wheel Camp Recreation Area, Inc., for the development of tribal land on a reservation of the Colorado River Indian Tribes (CRIT). After CRIT obtained an eviction order and monetary judgment in tribal court against the company and its principal owner, both filed an action in federal district court arguing that the tribal court lacked jurisdiction. While the district court found that the tribal court had jurisdiction to adjudicate the tribe's claims only as to the company, the Ninth Circuit held that the tribal court had jurisdiction as to the claims against both the company and its owner. Consistent with the argument made by the Division, the Ninth Circuit concluded that the tribe's authority to regulate non-member use of tribal land is an inherent part of its power to exclude and that the tribe's adjudicatory authority was coextensive with its regulatory authority over the land.

### **Preserving the Culture and Religion of Federally Recognized Indian Tribes**

While bald and golden eagles are protected under federal law, such birds also are important to the religious and cultural life of many Indian tribes. The United States has a strong interest both in protecting eagles and in ensuring that members of federally recognized tribes can practice their religion to the greatest extent possible. The Division works closely with FWS to balance these competing interests by defending the rights of federally recognized tribes and their members to have exclusive access to feathers for religious purposes and by prosecuting anyone (Indians and non-Indians alike) who illegally kills or trades in eagles or eagle parts.

An important example of this defensive work is *United States v. Wilgus*, a case in which ENRD secured a favorable outcome after over ten years of litigation in trial and appellate courts. The United States charged Wilgus, a practitioner of the Native American religion who is not a member of a federally recognized tribe, with unlawful possession of 141 eagle feathers in violation of the Bald and Golden Eagle Protection Act (the Eagle Act). The district court dismissed the charges, holding that the Eagle Act's prohibition against possessing eagle feathers violates the Religious Freedom Restoration Act (RFRA). The RFRA prohibits the federal government from substantially burdening the religious freedom of individuals unless it does so to support a compelling government interest through the least restrictive means. In March 2011, the Tenth Circuit reversed, joining the Ninth and Eleventh Circuits in upholding against RFRA claims the Eagle Act and its implementing regulations, which permit only members of

federally recognized tribes to possess and use eagle feathers for religious purposes. The Tenth Circuit's decision clarified the contours of the government's compelling interest in preserving Native American culture and religion, holding that such interest relates specifically to federally recognized Indian tribes. The court held that the current regulatory scheme both furthers the government's compelling interest in protecting eagles and furthers its compelling interest in preserving tribal religion, by "do[ing] its best to guarantee that those tribes, which share a unique and constitutionally-protected relationship with the federal government, will receive as much of a very scarce resource (eagle feathers and parts) as possible." The Tenth Circuit found the current regulatory scheme to be the least restrictive means by which the government could promote these compelling but somewhat competing interests.

### **Defending Tribal and Federal Interests in Water Adjudications**

The Division continues to assert water rights claims for the benefit of federally recognized Indian tribes and their members in 29 complex water rights adjudications in nearly every western state in the United States. Increasing population pressures in the arid West make water rights issues particularly contentious. Settlements are often preferred as the best way to resolve these complex matters, and over the past several years, the Division has worked diligently both to settle these difficult cases and to implement settlement agreements that have been approved by Congress but still need court approval. For example, Division attorneys are actively involved in implementing five landmark Indian water rights settlements approved by Congress in 2009 and 2010 that, 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 Rights Settlement in Montana; and the White Mountain Apache Tribal Settlement 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 of 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 adjacent, often rural, communities.

Settlements are not possible in every case due to the exigencies of particular cases. In those situations, resolution of these complex water issues falls to the adjudicating court or agency. The Division continues to have considerable success in achieving a just resolution of tribal water rights claims through adjudication. In the *Klamath Basin Adjudication* in Oregon, for example, the Division prevailed before a state administrative law judge on its claims for the benefit of the Klamath Tribes. After eight years of litigation, including extensive discovery and lengthy evidentiary proceedings, the judge ruled in favor of the United States on all issues in six water rights cases, affirming sufficient water rights to support productive habitat for fish, wildlife, and edible plants on the Klamath Reservation in southern Oregon.

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

The Division continued to have considerable success in defending the Department of the Interior's authority to take land into trust for tribes. The following cases are examples of this important work:

--The Division obtained dismissals, in whole or in part, of three suits challenging the acquisition in trust of land for the Sisseton and Yankton Sioux Tribes, including claims that the Bureau of Indian Affairs has a structural bias and challenges to the constitutional authority of the Secretary of the Interior to take land into trust.

--In a case involving the Karuk Indian Tribe, the court dismissed an action challenging DOI's decision to accept land into trust for the benefit of the tribe. The district court in California granted the Division's motion for summary judgment, interpreting an important aspect of the agency's trust land acquisition policy deferentially.

--The Division also successfully defended the timing and substance of a decision to take land into trust in Glendale, Arizona, for the Tohono O'odham Nation in four lawsuits filed in the District of Columbia and Arizona.

## **Addressing the Supreme Court's *Carcieri* Decision**

In 2009, in *Carcieri v. Salazar*, the Supreme Court limited Interior's trust land acquisition authority to those tribes that were "under federal jurisdiction" when the Indian Reorganization Act was enacted in 1934. The decision created uncertainty regarding Interior's trust acquisition authority, resulting in a backlog of trust applications. The Division has worked closely with Interior to develop a new framework for decision in trust land acquisition cases. The agency is now actively addressing its backlog.

## **Litigating the Status of Tribal Land Holdings**

In fiscal year 2011, we continued to defend reservation boundaries and the status of tribal land holdings in various cases. For example:

--The Yankton Sioux Tribe filed an action seeking a declaration that its reservation had not been diminished beyond the extent delineated in a 1998 Supreme Court case. The Eighth Circuit held that the reservation had not been disestablished in its entirety, but that it was diminished to the extent that fee or trust lands passed out of Indian ownership. The State of South Dakota and various other parties filed petitions asking the Supreme Court to review the disestablishment ruling, and the Yankton Sioux Tribe filed a conditional cross-petition seeking review of the partial diminishment ruling. In May 2011, the United States filed a brief opposing a petition for a writ of certiorari. Critically, the Supreme Court's denial of certiorari preserves the existence of a reservation for the tribe.

--In a case of first impression, the Division secured dismissal of a case that raised the issue of the applicability of local stormwater management fees to Indian trust lands. The Wisconsin Oneida Tribe sued the Village of Hobart, Wisconsin, in district court seeking to prevent the village from assessing a

stormwater fee on tribal trust land. The village filed a third-party complaint against the United States, alleging that the United States is liable for the fee. The court granted ENRD's motion to dismiss, finding that the village had failed to state a claim under the APA because it had not specifically sought payment from the United States. The lawsuit resumed once the Department of the Interior took final agency action in October 2011 by declining a request for payment.

### **Addressing Environmental Issues Affecting Tribes**

The Division is working with EPA, DOI, the Department of Agriculture, and the Indian Health Service to develop a coordinated approach to environmental issues affecting tribes. The Division also has brought these important issues to the attention of a newly developed interagency working group on Indian law, and anticipates continuing to work with this group to address tribal environmental problems that require interagency coordination.

In addition, through the Department of Justice's National Indian Country Training Initiative, ENRD is developing a training program for tribal and federal law enforcement officials and prosecutors on enforcing environmental and wildlife laws that affect tribal lands. The goals of the training are to develop tribal capacity to protect its own lands and resources, strengthen tribal self-government and autonomy, and promote federal-tribal communication and partnership in pollution and wildlife enforcement. We are working closely with other federal agencies and with tribal partners to develop practical training that will help tribal officials work with their federal counterparts to protect tribal lands from the effects of pollution on or off those lands. One of the themes will be the need to strike a careful balance between strong enforcement and the preservation of Native American cultural and religious practices.

In fiscal year 2011, we continued to bring and resolve environmental enforcement actions on and adjacent to Indian reservations. The following case resolutions are illustrative:

--The health of tribal residents of the Spokane Indian Reservation will be protected by the settlement reached in *United States v. Newmont USA, Ltd.* The mining companies in this case agreed to the cleanup of the Midnite Mine Superfund Site, located on the Spokane Indian Reservation in northeastern Washington. This cleanup will help control radioactive mine waste and protect nearby waters from acid mine drainage. Although the tribe is not a party to the settlement, it will support EPA in overseeing the work.

--In September 2011, the court entered a consent decree in *United States v. Hecla, Ltd.*, under which Hecla paid more than \$260 million for CERCLA cost recovery and natural resources damages to the United States, the Coeur d'Alene Tribe, and the State of Idaho to resolve its liability in connection with the immense Coeur d'Alene Basin Superfund Site (also known as the Bunker Hill Mining and Metallurgical Complex Superfund Site) in Idaho. The Coeur d'Alene Tribe and the State of Idaho were co-plaintiffs. Sixty-million dollars of the relief goes toward natural resource damages for joint federal, state, and tribal resources; \$4 million goes toward the tribe's past costs; and \$2 million goes toward a

state and tribal management plan for Lake Coeur d'Alene. The consent decree concludes litigation that was filed more than 15 years ago.

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

The Division also is charged with representing the United States in civil litigation brought by tribes and their members against the United States, including claims that the United States has breached its trust responsibility. We strive to defend the United States in ways that are fair to all parties and respectful of tribal sovereignty and government-to-government relations.

The Division is defending the United States and its two primarily affected agencies, the Departments of the Interior and Treasury, in 72 cases pending in federal district courts in the District of Columbia and Oklahoma and in the U.S. Court of Federal Claims (CFC) as of the end of fiscal year 2011. In these cases, 110 tribes allege that the federal government has breached its trust duties and responsibilities to them by failing to provide the tribes with historical trust accountings and by mismanaging the tribes' trust funds and non-monetary trust assets. The tribes seek 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 the tribal trust cases. It is litigating certain cases to final judgment, wherever necessary or appropriate, while also working cooperatively with tribes and Interior and Treasury to resolve other cases through formal alternative dispute resolution or informal settlement processes, to the extent possible. Working with DOI, ENRD has taken the lead in developing expedited settlement methodologies in support of a large-scale effort to settle tribal trust cases with over 90 tribes.

In 2011, the Division negotiated or helped negotiate settlements in cases brought by the Osage Nation, the Ponca Tribe of Oklahoma, and the Sokaogon Chippewa Indian Community. The settlement with the Osage Nation included a payment of \$380 million to compensate the tribe for its claims of historical losses to its trust funds and interest income, as well as agreement to implement measures that will lead to strengthened management of the tribe's trust assets and improved communications between Interior and the tribe.

Lawyers for most of the tribes that had brought trust accounting and trust mismanagement cases against the United States wrote letters to the President in September 2009, after the public announcement of the settlement of the *Cobell v. Salazar* litigation, seeking to engage the United States in expedited settlement discussions regarding the tribes' trust claims. Since September 2009, several of the tribes have dropped out of the informal coalition, while the remaining tribes--called the "SPOA group" ("Settlement Proposal to Obama Administration")--have proceeded with numerous informal settlement discussions with the United States (which, among other things, have included limited and focused data productions). Those informal settlement discussions continue in fiscal year 2012.

In *Wolfchild v. United States*, the Division secured a denial of a petition for a writ of certiorari to the Supreme Court. The U.S. Court of Appeals for the Federal Circuit had reversed a U.S. 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 claimed they should have received. On remand, we secured a partially favorable decision further limiting the possible liability exposure.

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

Many Indian tribes have sued the United States for mismanagement of tribal trust property and funds by filing claims in both federal district court and the U.S. Court of Federal Claims. A statute enacted by Congress in the 1860s, now codified at 28 U.S.C. § 1500, was designed to prohibit multiple lawsuits against the federal government by providing that the Court of Federal Claims lacked jurisdiction to adjudicate a lawsuit in that court if another lawsuit was pending in federal district court based on the same operative facts. The Federal Circuit Court of Appeals, which oversees the Court of Federal Claims, had given a narrow construction to section 1500, holding that the Tohono O'odham Nation could maintain suits in both courts simultaneously where different relief was sought in each court. In a 7-1 decision issued in June 2011, *United States v. Tohono O'odham Nation*, the Supreme Court reversed. The Court held that section 1500 precludes Court of Federal Claims' jurisdiction if the Court of Federal Claims suit and the suit in the other court "are based on substantially the same operative facts, regardless of the relief sought in each suit." Following the Supreme Court's decision, the Division filed motions to dismiss in 25 Court of Federal Claims' cases for lack of subject-matter jurisdiction under section 1500, and it prevailed in 14 cases. Ten cases are still awaiting rulings.

### **Defining the U.S. Role as Trustee for Indian Tribes in the Context of Tribal Trust Litigation**

In another lawsuit for alleged mismanagement of tribal trust resources and funds, the Jicarilla Apache Nation sought discovery of documents that the United States said were protected from disclosure based upon the attorney client privilege because the documents provided advice from Interior or Justice Department attorneys regarding the management of tribal assets. The U.S. Court of Federal Claims held that the United States' assertion of privilege was subject to an exception, known as the fiduciary exception, because the United States was acting in a fiduciary capacity on behalf of the Indian tribes in the management of tribal resources. The Federal Circuit agreed with the lower court, holding that the fiduciary exception was applicable. In another 7-1 decision issued in June 2011, *United States v. Jicarilla Apache Nation*, the Supreme Court reversed. The Court assumed that a fiduciary exception to the attorney client privilege exists at common law, but held that it did not apply to the United States as trustee for Indian tribes. The Court reasoned that the United States is not akin to a private trustee in its dealings with Indian tribes. Rather, the nature of the relationship between the United States and tribes is defined by statute and regulation. The Court concluded that the tribe was not the "real client" of the United States as the United States had its own independent interests in executing federal law. It also concluded that the United States does not have the same disclosure obligations as a private trustee.

## **Defending Against Miscellaneous Other Tribal Claims**

The Division also prevailed against tribal claims in several cases that set important precedents for determining when it is appropriate to hold the United States liable. Several cases involved multi-million dollar claims against the public fisc. In *Samish v. United States*, the tribe secured federal recognition as an Indian tribe in 1996, but contended it should have been recognized since 1969. Plaintiffs brought claims for federal program monies the tribe did not receive when it was not recognized. We prevailed both at the Court of Federal Claims and at the Federal Circuit, with the courts holding that that statutory language authorizing the money was not mandating. We secured dismissal in *San Carlos Apache Tribe v. United States*, a case seeking a \$10 million claim for inadequate representation by the Bureau of Indian Affairs and the Department of Justice of the tribe's water rights claim. We prevailed on a defense based on the statute of limitations, creating strong precedent on "first accrual" not being delayed pending final resolution of a state water rights adjudication. We also secured a very favorable opinion in *Klamath Claims Committee v. United States*, concerning a taking and damages claim for the destruction of the Chiloquin Dam and treaty fishing rights.

## **Litigating the Question of Where Tribal-Court Judgments May Be Enforced**

In June 2011, the Supreme Court also denied a petition for a writ of certiorari in *Miccosukee Tribe of Indians v. Kraus-Anderson Constr. Co.* While state courts are often called upon to recognize and enforce tribal-court judgments, this case involved a scenario in which the Miccosukee Tribe asked a federal district court to enforce a favorable tribal-court judgment entered against a non-Indian opponent. The district court held that it had subject matter jurisdiction over the Miccosukee Tribe's action to enforce a tribal-court judgment entered in its favor against Kraus-Anderson. It declined, however, to recognize the judgment because it concluded that Kraus-Anderson had been denied due process when the Tribal Business Committee had disallowed a discretionary appeal to the Tribal Court of Appeals. On appeal, the Eleventh Circuit concluded that subject matter jurisdiction was lacking. In its petition, the Miccosukee Tribe argued that there was federal question jurisdiction over the action, a position that Kraus-Anderson also took in its brief in support of this petition. Our amicus brief, which was filed in May 2011 at the invitation of the Supreme Court, argued that the Eleventh Circuit's holding was correct as in most instances, including here, the action to enforce the tribal-court judgment does not raise a federal question.

## **Defending Bureau of Indian Affairs Program Decisions and Congressional Direction as to the Distribution of Tribal Judgment Funds**

The Division successfully defended actions taken by the Bureau of Indian Affairs regarding two large tribal judgment funds held in the U.S. Treasury. In *Different Horse v. Salazar*, individual Indians sought disgorgement of the Black Hills Judgment Fund and other Sioux Nation Judgment Funds totaling over \$1 billion being held in trust for the various Sioux tribes. The tribes have been opposed to using or distributing the funds. The district court granted our motion to dismiss the case because the tribes were indispensable parties and the individuals lacked standing. At issue in *Timbisha Shoshone Tribe v. Salazar*

was the proper distribution of a fund set aside for the benefit of the nations and tribes constituting the Western Shoshone Identifiable Group, of which the Timbisha Shoshone Tribe is a member. In August 1977, the Indian Claims Commission determined that the United States should pay the Western Shoshone Identifiable Group approximately \$26 million in compensation for the taking of a large area of the Western Shoshone aboriginal homeland in Nevada and California. The money remained in the custody of the Treasury Department and grew to a size of \$185 million. Individual Indians and some of the tribes that comprise the Identifiable Group sought distribution of the fund, while other tribes and many of their members, including the Timbisha, opposed any distribution. Congress, with the support of the Bureau of Indian Affairs, directed in the Western Shoshone Claims Distribution Act that all of the funds be distributed per capita to all individual Indians who are members of Western Shoshone tribes, with none of the proceeds going directly to the tribes. We secured dismissal of the constitutional challenge to the act. The district court rejected claims brought by the Timbisha Shoshone Tribe that this distribution violated the Fifth Amendment and Equal Protection Clause, concluding that Congress had a rational basis for this distribution scheme.

#### Box Text

#### Colorado River Indian Tribes

--The Colorado River Indian Tribes (CRIT) include four tribes: the Mohave, Chemehuevi, Hopi, and Navajo.

--The CRIT Reservation was created in 1865 by the federal government for "Indians of the Colorado River and its tributaries," originally for the Mohave and Chemehuevi, who had inhabited the area for centuries. People of the Hopi and Navajo Tribes were relocated to the reservation in later years.

--The reservation stretches along the Colorado River on both the Arizona and California sides. It includes almost 300,000 acres of land.

#### --CRIT Fact Sheet

"This Administration's support for four water rights settlements in a single Congress is unprecedented. The agreements reflect the commitment of a wide range of stakeholders, including states, tribes and local communities, to work together constructively with the Administration rather than stay locked in an endless cycle of litigation. Step by step we are making steady progress in empowering Indian Country."

--Department of the Interior Assistant Secretary of Indian Affairs Larry Echo Hawk on the Passage of the Taos Pueblo, Aamodt, Crow, and White Mountain Apache Water Rights Agreements

#### Five Landmark Indian Water Rights Settlements Approved by Congress in 2009-2010

--Taos Pueblo Indian Water Rights Settlement (New Mexico)

- Aamodt Litigation Settlement Act (New Mexico)
- Navajo-San Juan River Basin Settlement (New Mexico)
- Crow Tribe Water Rights Settlement (Montana)
- White Mountain Apache Tribal Settlement (Arizona)

“Under today’s agreement, the mining companies will perform the cleanup of the Midnite Mine. The cleanup will bring important environmental protections to residents of the Spokane Indian Reservation, including the control of radioactive mine waste and the protection of nearby waters from acid mine drainage. This settlement . . . gives the Spokane Tribe a role in working with EPA to ensure that the cleanup protects human health and the environment on the Reservation.”

--Ignacia S. Moreno  
*United States v. Newmont USA, Inc.* Press Release

#### Coeur d’Alene Basin

The Coeur d’Alene Basin is one of the largest areas of historic mining in the world. Since the late 1880s, mining activities in the Upper Coeur d’Alene Basin contributed an estimated 100 million tons of mine waste to the river system. Many of the Basin communities were built on mine wastes. Until as late as 1968, tailings were deposited directly into the river. Over time, these wastes have been distributed throughout more than 160 miles of the Coeur d’Alene and Spokane Rivers, lakes, and floodplains.

--EPA Fact Sheet

## SUPPORTING THE DIVISION'S STAFF

### Promoting Staff Quality of Life and Career Growth

For the third year in a row, ENRD was named the "Best Place to Work in the Federal Government" out of 240 agency subcomponents surveyed. The rankings are calculated by the Partnership for Public Service and are based on data from the Office of Personnel Management's annual Federal Employee Viewpoint Survey. Division management is committed to ensuring the continued best quality of work life for its staff and to expanding employee opportunities for professional growth. During fiscal year 2011, the Division took various steps to advance these goals:

--The number of approved telework agreements within the Division nearly septupled. Telework is an alternative work arrangement for employees that allows the conduct of some of their work at an alternative worksite away from the Division's typically used office. (The federal government is a leader in the use of innovative workplace flexibilities, including telework. Congress passed the Telework Enhancement Act of 2010 to encourage its use.)

--On July 15, 2011, ENRD issued the *Environment and Natural Resources Division Diversity Management Plan*. On April 30, 2010, the Attorney General issued the *Department-wide Diversity Management Plan* to improve the effectiveness of the Department's efforts to recruit, hire, retain, and develop employees. The Division prepared and submitted its plan in accordance with the Department's plan. The ENRD plan includes an assessment of ENRD's current diversity efforts as well as statements of goals and strategies to continue efforts to reflect the American public by drawing the ENRD workforce from all segments of society.

--During the past year, to accommodate Department-wide hiring restrictions while continuing to provide the best possible support for ENRD's litigation mission, the Office of the Assistant Attorney General authorized filling 18 support staff vacancies from within the Division's ranks. This allowed high-performing ENRD staff to compete for and be rewarded with opportunities that offered higher promotion potentials than their existing jobs.

--In October 2011, Assistant Attorney General Moreno issued Directive No. 2011-04, entitled "Procedures for Appointing Senior Counsel and Senior Attorneys in the Environment and Natural Resources Division." The goal of the directive is to make the selection of these roles transparent, consistent, and fair throughout the Division. ("Senior Counsel" and "Senior Attorney" positions apply at the GS-15 level and are titles indicating that an attorney's experience warrants special recognition that may or may not carry supervisory responsibilities. These positions should not be confused with "Senior Level Attorneys," the allocation of which is approved by the Office of Personnel Management.)

--Last year, the Assistant Attorney General approved several other delegations empowering lower levels of Division management to consent to use of a U.S. magistrate judge or designation of a U.S. magistrate judge as a special master (Directive No. 2011-06); to approve certain de minimis amendments to state court water rights decrees for federally recognized Indian tribes (Directive No.

2011-07); to approve briefs for filing in certain petition-for-review actions under the Hobbs Act (Directive No. 2011-03); and to make unanimous no-certiorari recommendations to the Solicitor General (Directive No. 2011-02).

--Early this year, the Assistant Attorney General appointed the Division's Attorney Skills Development Coordinator. The *Department-wide Diversity Management Plan* directs each Department component to appoint an Attorney Skills Development Coordinator, who will work with management to establish a skills-based program aimed at developing the competencies and talents of attorneys in the components.

### **Conserving Financial Resources While Supporting the Department's Key Litigation**

Careful stewardship of resources enabled the Division to provide vital support for key case work, particularly the massive and time-sensitive Deepwater Horizon litigation. For this case alone, the Division's Office of Litigation Support processed over 40 million documents--comprising 30+ terabytes of data--and organized over 14,000 deposition and trial exhibits. Simultaneously, we continued to manage the contractor and in-house document and data processing services for the large and complex initiatives that continued alongside the Deepwater Horizon litigation, discussed throughout this document. Our litigation support staff provided varying levels of support to over 300 cases and matters during the year. We estimate that the Division avoided costs of over \$5 million by processing documents on-site, in the litigation support computer lab, when we had the ability to do so.

In this era of declining federal budgets, Assistant Attorney General Moreno also appointed a cross-section of staff to serve on a "\$SAVE Committee." The \$SAVE Committee identified several-million dollars in cost-saving options that the Division is now implementing.

### **Greening the Division**

In 2011, we achieved a substantial 15% reduction in energy use as compared to previous years in the Patrick Henry Building (PHB). The Division is the primary tenant of PHB. This marked decrease was largely attributable to two initiatives led by the Division's Greening the Government (GtG) Committee. From December 2010 to April 2011, more than 1,800 motion-activated light sensors were installed in PHB offices and public areas at the Division's request. The fiscal year also saw the continuation of the GtG Committee initiative to remove the middle bulbs in hallway ceiling fixtures throughout PHB. These changes, along with other improvements such as reducing by half the number of the Division's fax machines and installing water-saving aerators that reduced the building's water usage by over 20%, have qualified PHB for certification as an Energy Star building. ENRD is also working with building management to achieve Leadership in Energy and Environmental Design (LEED) certification for PHB due to these energy savings.

In January 2011, ENRD implemented environmentally friendly changes to its printing practices, including defaulting to double-sided printing and copying for the new convenience copiers, and switching to a new recycled toner cartridge program that saved ENRD over \$16,000 between June and October 2011.

In coordination with these improvements, the GtG Recycling Subcommittee developed and distributed updated best management practices for paper use and recycling. This guidance was publicized on the ENRD intranet, which also features best practices for energy use and computer power management.

The Division also held its 8th annual Earth Day service celebration at Marvin Gaye Park in April 2011, helping the park to plant trees, remove trash, garden, and landscape.

### **Improving the Security and Usability of the Division's Information Technology Systems**

Information technology (IT) security continues to be at the forefront of government and public concern. ENRD has made this critical issue a priority, even in an era of declining resources. Our technology staff maintained a "green" report card throughout the year, keeping up with ever-increasing requirements to strengthen IT infrastructure and software. ENRD also became one of the first divisions to upload contractor security data onto the Department's system last year, facilitating the sharing of resources between components and ensuring that personnel security regulations and standards are being uniformly applied within the Department.

The Division also expanded the use and capability of some of our older information technology systems and designed or moved others to web-based platforms, making them easier for Division staff to navigate. For example, we upgraded ENRD's Wiki, enhancing the ability of ENRD personnel to create and edit any number of interlinked web pages to collaborate and share information on Division-relevant projects. We also made critical operational upgrades to ENRD's Case Management System and Human Resources Information System.