

ENRD

Accomplishments Report Fiscal Year 2012



United States Department of Justice
Environment & Natural Resources Division

SUMMARY OF DIVISION ACCOMPLISHMENTS

FISCAL YEAR 2012



Salt Marshes, Alaska

NOAA Photo

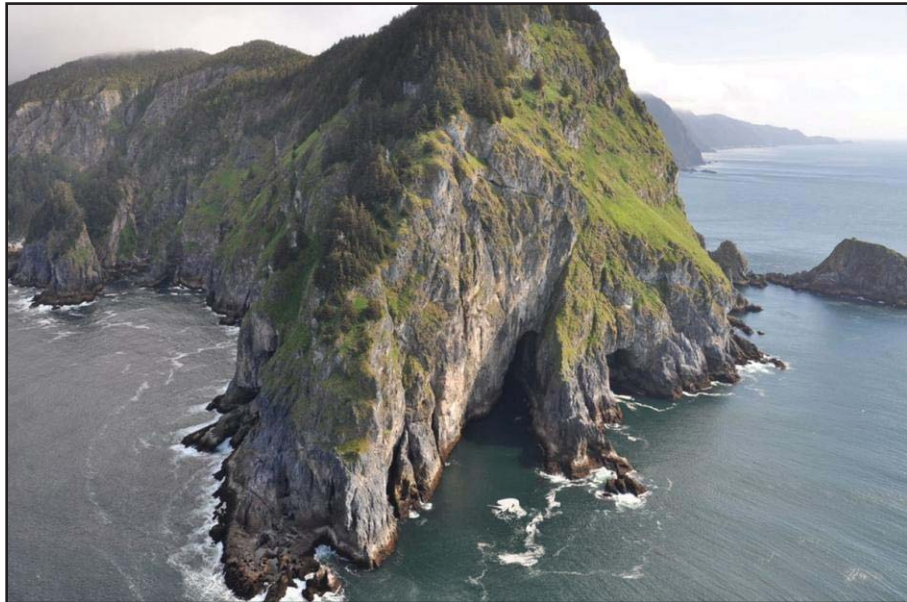
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Point Reyes, California

DOI Photo



Coronation Island, Alaska

NOAA Photo

FOREWORD



*Assistant Attorney General
Ignacia S. Moreno*

I am delighted to present the *ENRD Accomplishments Report for Fiscal Year 2012*. Every day, in partnership with our client agencies, the U.S. Attorneys' Offices, and our state, tribal, and local counterparts, the Environment and Natural Resources Division (ENRD or the Division) works to bring significant public health and other direct benefits to the American people through the reduction of pollution across the nation and the protection of important natural resources and wildlife. We defend client agency actions and rules when they are challenged in the courts. ENRD also handles a broad array of matters relating to our government-to-government relationship with and trust obligations to Native American tribes. As reflected in this report, the Division continued its distinguished record of legal excellence in fiscal year 2012. At the same time, ENRD continued to win recognition as one of the "Best Places to Work in the Federal Government" by the Partnership for Public Service.

Advancing the Division's Core Mission and Achieving Environmental Justice for the Benefit of All Americans

In managing its extensive, complex and diverse caseload, ENRD is guided by its core mission: (1) strong enforcement of civil and criminal environmental laws to ensure clean air, clean water, and clean land for all Americans; (2) vigorous defense of environmental, wildlife and natural resources laws and agency actions; (3) effective representation of the United States in matters concerning the stewardship of our public lands and natural resources; (4) vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights; and (5) protection of the public fisc. The remainder of this report describes the myriad ways in which the Division advanced its core mission over the past year.

In addition to advancing its core mission, a central priority of the Division is to ensure that all Americans enjoy the benefits of a fair and even-handed application of environmental and natural resources law. I am very proud to say that ENRD has taken a leadership role in advancing the goals of environmental justice. Our progress in making environmental justice a real and meaningful part of the Division's work is described in a separate chapter of the report.

Record-Setting Enforcement Results

ENRD's environmental enforcement efforts—both civil and criminal—have achieved dramatic reductions in emissions and discharges of harmful pollutants to America's air, water and land. Over the past four years, the Division has achieved record recoveries. Since 2009, we have obtained more than \$28 billion in corrective measures through court orders and settlements. We also secured almost \$2.375 billion in civil and stipulated penalties, cost recoveries, natural resource damages, and other civil monetary relief, including more than \$1.43 billion recovered for the Superfund. During that time period, we concluded 170 criminal cases against 319 defendants, and obtained 155 years in confinement and almost \$256 million in criminal fines, restitution, community service funds and special assessments.

The results obtained from ENRD's civil and criminal cases in fiscal year 2012 alone were outstanding. We secured over \$397 million in civil and stipulated penalties, cost recoveries, natural resource damages, and other civil monetary relief, including almost \$133 million recovered for the Superfund. We obtained over \$6.9 billion in corrective measures through court orders and settlements, which will go a long way toward protecting our air, water and other natural resources. We concluded 47 criminal cases against 83 defendants, obtaining nearly 21 years in confinement and over \$38 million in criminal fines, restitution, community service funds and special assessments.

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Holding Those Responsible for the Deepwater Horizon Oil Spill Accountable

The Division's number-one civil and criminal enforcement priority is to bring to justice those responsible for the Deepwater Horizon oil spill. On April 20, 2010, an explosion and fire destroyed the Deepwater Horizon offshore drilling rig in the Gulf of Mexico and triggered a massive oil spill amounting to millions of barrels of discharged oil that took 87 days to contain. Eleven people aboard the rig tragically lost their lives; many other men and women were injured. In December 2010, as part of multidistrict litigation in the U.S. District Court for the

Eastern District of Louisiana, the United States brought a civil suit against BP, Anadarko, MOEX and Transocean for civil penalties under the Clean Water Act and a declaration of liability under the Oil Pollution Act. Critical steps forward in this civil litigation occurred over the past year.

On February 17, 2012, the Department announced an agreement with MOEX to settle its liability in the Deepwater Horizon oil spill. MOEX paid \$70 million in civil penalties to resolve alleged violations of the Clean Water Act—the largest civil penalty paid to date under the Clean Water Act—and will spend at least \$20 million to facilitate land acquisition projects in several Gulf States that will preserve and protect in perpetuity habitat and resources important to water quality.

The Department also took criminal action against BP. The Deepwater Horizon Task Force, which includes ENRD, conducted the criminal investigation leading to the action, under the leadership of the Department’s Criminal Division. On November 14, 2012, the Department filed a 14-count criminal information charging BP with 11 counts of felony manslaughter, one count of felony obstruction of Congress, and violations of the Clean Water Act and Migratory Bird Treaty Act in connection with the spill. BP agreed to plead guilty to all 14 criminal charges—admitting responsibility for the deaths of 11 people and the events that led to this unprecedented environmental catastrophe. The company also agreed to pay \$4 billion in fines and penalties. Under the terms of the agreement with BP, about \$2.4 billion of the criminal recovery funds will



Deepwater Horizon Site

USCG Photo

be dedicated to environmental restoration, preservation and conservation efforts throughout this region—including barrier-island creation and river-diversion projects in Louisiana. An additional \$350 million will aid in the development of state-of-the-art oil spill prevention and

This resolution of criminal allegations and civil claims against Transocean brings us one significant step closer to justice for the human, environmental and economic devastation wrought by the Deepwater Horizon disaster. This agreement holds Transocean criminally accountable for its conduct and provides nearly a billion dollars in criminal and civil penalties for the benefit of the Gulf States. I am particularly grateful today to the many Justice Department personnel and federal investigative agency partners for the hard work that led to today's resolution and their continuing pursuit of justice for the people of the Gulf."

— Attorney General Eric Holder
Transocean Plea and Agreement
Announcement

response technologies, education, research and training. And more than \$1 billion will go to the U.S. Coast Guard's Oil Spill Liability Trust Fund, to be available for cleanup and compensation for those affected by oil spills in the Gulf and throughout the United States.

Transocean also has agreed to plead guilty to violating the Clean Water Act and to pay a total of \$1.4 billion in civil and criminal fines and penalties, for its conduct in the Deepwater Horizon explosion, fire and oil spill. Pursuant to the terms of a proposed partial civil consent decree lodged on January 3, 2013, the Transocean defendants agreed to pay \$1 billion to resolve federal Clean Water Act civil penalty claims, a record amount that significantly exceeds the \$70 million civil penalty paid by MOEX. Under the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act), approximately 80%

of the penalty will be used to fund projects in and for the Gulf States for the environmental and economic benefit of the region.

Landmark Decisions Reducing Greenhouse Gases

More than half of ENRD attorney time is spent on the important work of defending lawsuits against the federal government. This work preserves vital federal programs and interests, allowing the implementation of environmental and natural resources laws and regulations, and protection of the public fisc. In a landmark example of this work in the past year, the Division, with agency counsel, successfully defended rulemakings under the Clean Air Act that reduce the emission of greenhouse gases that contribute to global warming. Through a series of regulations, EPA (1) found that emissions of greenhouse gases from motor vehicles may reasonably be expected to endanger public health and welfare (known as the "endangerment finding"); (2) set standards for greenhouse gas emissions from motor vehicles; (3) specified how, and to what extent, regulation of greenhouse gas emissions from motor vehicles would trigger stationary source Clean Air Act permit requirements; and (4) established the measures that states and EPA must take to effectuate such stationary source requirements. In June 2012, in one of the most significant environmental regulatory decisions of the past decade, a unanimous panel of the D.C. Circuit in *Coalition for Responsible Regulation v. EPA* upheld EPA's greenhouse gas-related regulatory actions against all challenges. This victory was due in no small part to the outstanding briefing and argument by the Division's attorneys.

Safeguarding the Nation's Air

The Division's petroleum refinery enforcement initiative has produced settlements or other court orders that have addressed more than 90% of the nation's refining capacity, and will reduce air pollutants by more than 360,000 tons per year. Among the reduced air pollutants are nitrogen oxide, sulfur dioxide, and volatile organic compounds, which cause respiratory problems and are significant contributors to acid rain, smog and haze. Under the settlement achieved in fiscal year 2012 in *United States v. BP Products North America, Inc.*, for example, BP will pay an \$8 million penalty, invest more than \$400 million to install state-of-the-art pollution controls at its petroleum refinery in Whiting, Indiana, and spend an additional \$9.5 million on projects to reduce the emission of greenhouse gases. The United States was joined in this settlement by the State of Indiana as well as by several environmental organizations and citizens who had asserted claims against BP, including Save the Dunes, the Sierra Club, the Hoosier Environmental Council, the Natural Resources Defense Council, the Environmental Law and Policy Center, and the Environmental Integrity Project. As a result of the direct participation of the environmental groups and citizens in the settlement negotiations and input provided by the local community, BP agreed to the reduction in greenhouse gas emissions and to perform a Supplemental Environmental Project to install, maintain and operate a \$2 million fence-line emission monitoring system at the refinery and to make the data available to the public on a public website on a weekly basis. This will ensure that residents have access to critical information about pollution that may be affecting their community.

Protecting America's Waters

ENRD also has brought cases across the country to improve municipal wastewater and stormwater collection and treatment. From January 2009 through December 2012, courts have entered 42 settlements in these cases, requiring long-term control measures and other relief estimated to cost violators more than \$20.1 billion. These cases involve one of the most pressing infrastructure issues, the discharge of untreated sewage from aging collection systems found in older urban areas, where low-income and minority communities often live. Eleven such consent decrees with municipalities or regional sewer districts were entered in fiscal year 2012. Collectively, these consent decrees provide for the expenditure of more than \$6.3 billion in improvements, the payment of more than \$4 million in civil penalties, and the performance of Supplemental Environmental Projects valued at more than \$2.4 million.

One illustration is the case of *United States v. Metropolitan St. Louis Sewer Dist. (MSD)*, the environmental enforcement settlement requiring the largest injunctive relief in the nation's history. Under the terms of a consent decree resolving claims of violations of the Clean Water Act, MSD agreed to make extensive improvements to its sewer systems and treatment plants, at an estimated cost of \$4.7 billion over 23 years, to eliminate overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The injunctive relief, which is historic in its scope and importance to the people of St. Louis, also will significantly advance the use of large-scale green infrastructure projects to control wet weather overflows. MSD must invest at least \$100 million in an innovative green infrastructure program, for the benefit of environmental justice communities in St. Louis. The city also paid a \$1.2 million civil penalty to the United States. We worked closely with staff from the U.S. Attorney's Office for the Eastern District of Missouri, who provided invaluable assistance in achieving this historic settlement.

Another case that demonstrates the Division's strong commitment to enforcing the Clean Water Act to ensure the protection of human health and the environment is *United States v. Freedman Farms, Inc.* Freedman Farms is a 4,800-head hog farm in Columbus County, North Carolina. It is a "Concentrated Animal Feeding Operation" (CAFO), which is a large livestock or poultry animal feeding operation that meets the regulatory thresholds for Clean Water Act regulation due to the number of animals involved. These operations generate significant volumes of animal waste which, if improperly managed, can result in significant environmental and human health risks. Investigators determined that more than 332,000 gallons of hog waste had been discharged over a five-day period from the CAFO into Browder's Branch, a stream that leads to the Waccamaw River. Freedman Farms was sentenced to five years of probation and ordered to pay \$1.5 million in fines, restitution and community service payments for violating the Clean Water Act, making false statements and obstructing justice, in discharging the hog waste and lying about its cleanup. The company also is required to implement a comprehensive environmental compliance program and institute an annual training program. William B. Freedman, the president of Freedman Farms, was sentenced to six months in prison to be followed by six months of home confinement. We prosecuted this important case jointly with the U.S. Attorney's Office for the Eastern District of North Carolina, and with the strong investigative support of the State of North Carolina, EPA and the U.S. Army Corps of Engineers. The nearly \$1 million in restitution, to be made in a series of five payments to the North Carolina Coastal Land Trust, will be used to acquire and conserve land along streams in the Waccamaw watershed, which includes some of the most extensive cypress gum swamps in the state.

Ensuring the Proper Use of Pesticides

The Scotts Miracle-Gro Company, a producer of pesticides for commercial and consumer lawn and garden uses, pleaded guilty in February 2012 to illegally applying two insecticides that are toxic to birds (Actellic 5E and Storicide II) to its wild bird food products, falsifying pesticide registration documents, distributing pesticides with misleading and unapproved labels, and distributing unregistered pesticides. The case was jointly investigated by EPA and the State of Ohio and jointly prosecuted by ENRD, EPA and the U.S. Attorney's Office for the Southern District of Ohio. The company was sentenced to pay a \$4 million fine and contribute \$500,000 to organizations that protect bird habitat for committing 11 criminal violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which governs the manufacture, distribution and sale of pesticides. Sheila Kendrick, Scotts' federal registration manager, also pleaded guilty to FIFRA and false-statement violations and was sentenced to 90 days of incarceration. Because Scotts is the largest marketer in the world of residential use pesticides, it bears a special obligation to comply with the laws governing the sale and use of its products and was appropriately sentenced to pay the largest criminal penalty in the history of FIFRA enforcement to date.

Preserving Public Lands

The U.S. Forest Service manages about 58 million acres of inventoried roadless areas within the country's national forests. Inventoried roadless areas offer outstanding opportunities for recreation and provide habitat for numerous fish, plant and wildlife species. The Forest Service's 2001 Roadless Rule prohibits road-building and commodity-purpose timber harvests in these areas. In October 2011, the Tenth Circuit reversed a Wyoming district court judgment that had set aside and permanently enjoined the 2001 Roadless Rule. The court rejected all challenges raised by the State of Wyoming under the Wilderness Act, the National Forest

Management Act, the Multiple-Use Sustained-Yield Act, and the National Environmental Policy Act. After the Tenth Circuit decision, the Division worked closely with the Department's Office of the Solicitor General in successfully opposing the State of Wyoming's petition in the U.S. Supreme Court for a writ of certiorari to review the Tenth Circuit's decision. After a decade of protracted litigation, this victory now allows the Forest Service to apply the 2001 Roadless Rule in all states but Idaho and Colorado, which have state-specific rules developed collaboratively by the agency, the states, and broad coalitions of environmental and industry interests.

Defending the Country's Energy Agenda

This Administration is working to safely and responsibly develop additional sources of domestic energy. The country's energy development policy includes responsible development of fossil fuel and renewable energy. The Division is actively defending challenges to permits and rights-of-way issued by the Bureau of Land Management of the Department of the Interior to promote the development of renewable energy projects on western public lands. ENRD is defending more than 20 cases involving solar, wind and transmission projects located in California, Oregon, Tennessee, Delaware, Massachusetts and Vermont. We successfully defeated motions for temporary restraining orders and preliminary injunctions for the North Sky River Wind Project, Ocotillo Wind Energy Project, and Sunrise Powerlink Project in California. We also defeated requests for injunctive relief in two cases challenging smaller pilot projects for solar and wind energy in Tennessee and Delaware.

One example of this work is the Division's successful efforts in the Ninth Circuit to oppose a preliminary injunction against the Ivanpah Solar Energy Generating System (ISEGS). The ISEGS is the largest solar project under construction in the world. When completed next year, the \$2.2 billion system will use more than 170,000 computer-controlled mirrors to aim 1,000-degree rays at boilers mounted on three 459-foot towers, turning water into enough steam-generated electricity to power 140,000 homes. Our defense of the project in *Western Watersheds Project v. BLM* resulted in the first appellate decision to address new solar projects sited on federal land. The Ninth Circuit concluded that the district court correctly analyzed the balance of public interests favoring the project.

The Division's work in response to the Deepwater Horizon oil spill was not limited to the Department's civil and criminal enforcement actions. We defended cases challenging 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 responsible exploration and production plans and lease sales in the Gulf of Mexico and Alaskan waters. In 2012, the Fifth and Eleventh Circuit Courts of Appeals issued important opinions in Deepwater Horizon defensive cases handled by ENRD.

—In May 2012, the Fifth Circuit dismissed 12 petitions for review for failure to exhaust administrative remedies and four others as moot in *Gulf Restoration Network v. Salazar* and *Center for Biological Diversity v. Salazar*. These petitions challenged the Department of the Interior's approval of lessee-proposed exploration and development plans in the days shortly before and after the Deepwater Horizon explosion, fire and oil spill.

—In November 2012, the Fifth Circuit also issued a decision in *Hornbeck Offshore Services v. Salazar* reversing the district court's contempt finding against Secretary Salazar for deciding to suspend deepwater drilling in the Gulf of Mexico in the aftermath of the Deepwater Horizon oil

spill. The district court had granted plaintiffs' motion for a preliminary injunction on June 22, 2010. The Secretary ordered a new suspension of deepwater drilling in the Gulf on July 12, 2010 and, after finding that the concerns underlying the suspensions had been addressed, ordered the suspension lifted on October 12, 2010. The district court found that the second suspension decision rendered the Secretary in contempt of its preliminary injunction order. In reversing the contempt finding, the Fifth Circuit concluded that the district court abused its discretion in invoking its contempt power because the Secretary's actions and statements leading up to the issuance of the July 2010 drilling suspension did not clearly and convincingly violate the court's June 2010 order.

—In June 2012, the Eleventh Circuit denied consolidated petitions for review of Interior's approval of an exploration plan covering the drilling of up to 10 exploratory wells in a deepwater area of the Gulf of Mexico in *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.* The court rejected several challenges to the environmental assessment developed for the action under the National Environmental Policy Act, emphasizing that a reviewing court must be "extremely deferential 'when an agency's decision rests on the evaluation of complex scientific data within the agency's technical expertise.'"

Promoting National Security and Military Preparedness

Increasingly, the Division is responsible for defending agency actions that support the national security of the United States. For example, in fiscal year 2012, we defended against challenges to critical Department of Defense training programs that ensure military preparedness, various agency projects to secure the nation's borders and waters, and U.S. development of all forms of domestic energy to reduce our dependence on foreign oil. We also exercised the federal government's power of eminent domain to acquire lands or review title to lands needed to fulfill critical military and homeland security functions.

One important illustration is the Division's successful handling of a challenge to the Navy's proposed new \$100 million Undersea Warfare Training Range (USWTR), which is to be located 75 miles off the Atlantic coast of Florida. The USWTR facility will enhance and improve the Navy's anti-submarine warfare training activities essential to the Navy's ability to detect and defeat submarines operating in littoral (shallow water) environments where environmental conditions coupled with new noise reduction technologies make detection increasingly difficult. The USWTR will be the only training range of its kind on the East Coast, designed to provide ships, submarines and aircraft in the Atlantic Fleet with a realistic and challenging littoral training environment that mirrors the areas in which the Navy finds itself increasingly operating. In *Defenders of Wildlife v. U.S. Dep't of the Navy*, plaintiffs alleged that the Navy's decision to construct the USWTR violated the National Environmental Policy Act and the Endangered Species Act. After extensive briefing and oral argument, the district court ruled in favor of the United States on all claims, allowing the Navy to begin implementing the next steps of this vital project.

Protecting Tribal Rights and Resources and Addressing Tribal Claims

The United States holds almost 60 million acres of land in trust for tribes and individual members. Last year, ENRD handled a broad range of matters affecting Indian tribes and their members, including litigation on behalf of federal agencies to protect tribal resources and rights; policy and litigation work to ensure that tribes receive the protections of the natural resources and environ-

mental laws; and the respectful and responsible defense of lawsuits brought by tribes against the federal government. I would like to highlight two significant ENRD activities this past year—the issuance of the Eagle Feathers Policy and the resolution of a large number of tribal trust lawsuits.

Federal wildlife laws such as the Bald and Golden Eagle Protection Act generally criminalize the killing of eagles and other migratory birds and the possession or commercialization of the feathers and other parts of such birds. These important laws are enforced by the Department of Justice and the Department of the Interior and help ensure that eagle and other migratory bird populations remain healthy and sustainable. At the same time, eagles and other federally protected birds play a unique and important role in the religious and cultural life of many Indian tribes. On October 12, 2012, Attorney General Holder issued a new Department policy addressing the ability of members of federally recognized Indian tribes to use the feathers and other parts of eagles and other federally protected birds, an issue of great cultural and religious significance to many tribes and their members. ENRD led the initiative to develop the policy, working closely with the U.S. Attorneys’ Offices, the U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs and Solicitor’s Office of the Department of the Interior. The policy was developed after an extensive series of consultations with tribal leaders and organizations, involving an initial request for tribal input followed by a series of teleconference consultation sessions and in-person consultation sessions and meetings with tribal representatives in Indian Country.

The Division also has settled a number of tribal trust lawsuits over the past several years. Numerous federally recognized tribes and certain Indian groups have brought suit against the United States since 2002 alleging that the Departments of the Interior and Treasury violated the federal government’s trust duties and responsibilities to the tribes by failing to provide “full and complete” historical trust accountings and failing to manage the tribes’ trust funds and non-monetary trust assets or resources in an adequate manner. By 2009, the United States was defending approximately 97 breach-of-trust lawsuits brought by 114 Indian tribes in federal district courts in the District of Columbia and Oklahoma and in the Court of Federal Claims. Since that time, the United States has been involved in processes to resolve these cases. In 2012, the United States agreed to pay about \$1.25 billion to 62 tribes in compensation for the tribes’ claims regarding the government’s management of trust funds and non-monetary trust resources. The settlements also set forth a framework for promoting tribal sovereignty and



April 2012 Announcement of the Settlement of Tribal Trust Lawsuits

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. Under the settlements, the parties will implement measures that will lead to strengthened management of trust assets and improved communications between the Department of the Interior and the tribes. The tribes and the United States also have established an alternative dispute resolution process to address any disputes that may arise regarding the future management of the tribes' trust funds and non-monetary trust resources.

These settlements demonstrate the United States' strong commitment to resolving the pending tribal trust accounting and trust management cases in an expedited, fair and just manner. They are a powerful example of how, working together, we can resolve conflicts, despite decades of costly and burdensome litigation. They are an important legacy of the Obama Administration and set a path forward for reaffirming the trust relationship of the United States with tribal governments. At the Department of Justice, we will continue, through our cases, to vigilantly protect tribal sovereignty, safeguard tribal lands and resources, and honor tribal treaty rights.

Handling ENRD Cases in the Supreme Court

The Division frequently has cases that come before the U.S. Supreme Court. The U.S. Supreme Court also regularly solicits the Department's views on whether to grant petitions for writs of certiorari in cases that implicate Division interests. We support the Solicitor General's Office as it formulates positions in the Supreme Court in cases handled by the Division in lower courts and in non-government cases that are of interest to the Division. The 2011-2012 U.S. Supreme Court term proved to be an active one for ENRD. The Supreme Court decided four cases arising out of the Division's work. *PPL Montana, L.L.C. v. State of Montana* unanimously reversed a Montana Supreme Court decision which had held that riverbeds occupied by petitioner's hydroelectric facilities were state property because they were allegedly navigable for title purposes at the time Montana became a state. *Sackett v. EPA* unanimously held that administrative compliance orders issued under the Clean Water Act are subject to judicial review under the Administrative Procedure Act before EPA brings an enforcement action. *Salazar v. Patchak* concluded that an individual had prudential standing under the Administrative Procedure Act to challenge the Department of the Interior's decision to acquire land in trust for an Indian tribe and that the United States' waiver of sovereign immunity in the Administrative Procedure Act applied because the individual did not bring an action to quiet title under the Quiet Title Act for which there is no waiver of sovereign immunity as to challenges involving trust lands. And, finally, *Southern Union Co. v. United States* held that the U.S. Constitution, as interpreted in *Apprendi v. United States*, requires that the jury rather than the trial court determine the number of "days of violation" before a court may impose a fine for knowingly storing hazardous waste without a permit in violation of the Resource Conservation and Recovery Act. Our recent cases before the Supreme Court truly illustrate the remarkable breadth and importance of the Division's work.

Protecting the Public Fisc

We are committed to ensuring that American taxpayers receive a substantial return on their investment in ENRD. The Division strives to reduce monetary recoveries from litigation brought against the United States to the greatest extent possible, secure significant monetary recoveries and corrective measures through affirmative civil and criminal litigation, and operate

as efficiently as possible. ENRD estimates that its handling of defensive and condemnation cases closed in fiscal year 2012 saved more than \$1.8 billion (a comparison of claims made in those cases with the amounts ultimately imposed). For example, the Division's resolution of cases seeking compensation under the Fifth Amendment to the U.S. Constitution for the alleged taking of private property saved nearly \$30 million in fiscal year 2012.

Cost Savings and Efficiencies

Implementation of various internal cost-saving measures over the past four years also yielded significant reductions in annual Division expenditures. ENRD saved tens of millions of dollars by streamlining its administrative operations, expanding its use of state-of-the-art information and communications technology as an alternative to costly travel, and implementing in-house litigation support services, among other measures. For example, over the past four years, the Division's in-house automated litigation support lab alone has saved us more than \$19 million in discovery processing, database hosting, scanning, digital Bates numbering, and other litigation support services.

Named as One of the Best Places to Work in the Federal Government

In each of the last three years, the Partnership for the Public Service (PPS) has ranked ENRD as one of the "Best Places to Work in the Federal Government." Among all federal agency subcomponents surveyed by PPS and the Office of Personnel Management, ENRD's overall ranking has been in the top five for each of the past three years, including two #1 rankings. Within the Department of Justice, ENRD has been the highest-rated subcomponent in all three years. During this period, employee satisfaction has remained consistently high, and the Division has been recognized among the top subcomponents for effective leadership, empowerment, fairness, teamwork, and strategic management. I take this opportunity to congratulate ENRD's managers for these impressive results.

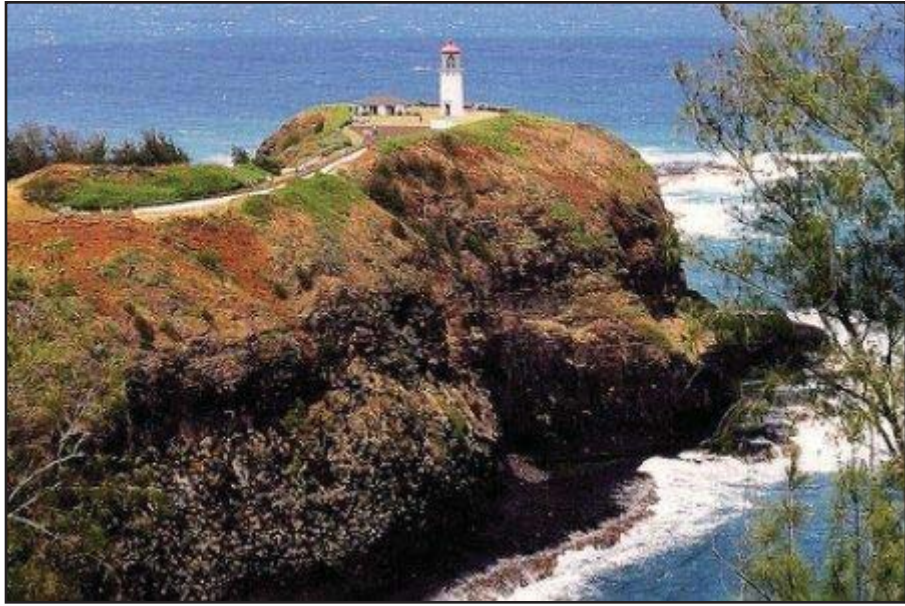
Diversity and Quality of Life

As this report demonstrates, the Division continues to make great strides in promoting diversity and quality of life.

Recognizing Division Staff and Partners

The extraordinary work reflected in this report is due to the dedication, expertise and professionalism of the Division staff. Thank you for the sacrifices that you and your families make each day in service to the American people. To our colleagues at the U.S. Attorneys' Offices, client agencies, and state, tribal and local governments, I am grateful for our shared vision and close partnership. As this report shows, we achieve the best results when we work together.

Ignacia S. Moreno
Assistant Attorney General
Environment and Natural Resources Division
January 17, 2013



Kilauea Point, Hawaii

DOI Photo



Hughes Creek, Washington

NOAA Photo

OVERVIEW OF THIS REPORT

In fiscal year 2012, the Environment and Natural Resources Division (the Division or ENRD) achieved significant results 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 key accomplishments 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 criminal pollution and wildlife laws; defending vital federal programs and interests; promoting national security and military preparedness; protecting tribal rights and resources and addressing tribal claims; and supporting the Division's staff.



*North Fork Toutle River
Cascade Mountain Range, Washington*

Photo by Jeffrey Bank



*Skyline Drive
Shenandoah Mountains, Virginia*

Photo by Jeffrey Bank

PRESENTING THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

The Division has a main office in Washington, D.C., and field offices in: Denver, Colorado; San Francisco, California; Sacramento, California; and Anchorage, Alaska. ENRD has a staff of about 650, more than 400 of whom are attorneys. The Division is organized into nine litigating sections plus the Office of the Assistant Attorney General and the Executive Office.

The Division has responsibility for cases involving more than 150 statutes and represents virtually every federal agency in courts across the United States and its territories and possessions. Our litigation docket contains almost 6,800 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 Oil Pollution Act, the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), and the Safe Drinking Water Act. The main federal agencies that the Division represents in these areas are the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps or USACE). The ENRD sections that carry out this work are the Environmental Enforcement Section, the Environmental Defense Section, and the Environmental Crimes Section.

A substantial portion of the Division's work includes litigation under 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

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

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

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 U.S. Department of Agriculture's Forest Service; the Department of the Interior's (Interior's or DOI's) many components such as the National Park Service, the Bureau of Land Management (BLM), and the Fish and Wildlife Service (FWS); the Corps; the Department of Transportation; and the Department of Defense. The Natural Resources Section is primarily responsible for these cases.

The Division's Wildlife and Marine Resources Section handles civil cases arising under the fish and wildlife conservation laws, including suits defending agency actions under the Endangered Species Act (ESA), which protects endangered and threatened animals and plants; the Marine Mammal Protection Act (MMPA), which protects animals such as whales, seals, and dolphins; and the Magnuson-Stevens Fishery Conservation and Management Act, which regulates increasingly depleted fishery resources. The Environmental Crimes Section also brings criminal prosecutions under these laws and under the Lacey Act against people who are found smuggling wildlife and plants into the United States. The main federal agencies that ENRD represents in this area are FWS and the National Oceanic and Atmospheric Administration's (NOAA's) National Marine Fisheries Service (NMFS).

Division cases frequently involve allegations that a federal program or action violates constitutional provisions or environmental statutes. Examples include regulatory takings cases, in which 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 (EIS). 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 CWA, or activities at federal facilities that are claimed to violate such statutes. The Division's main clients in this area include the Department of Defense and EPA. The Natural Resources Section and the Environmental Defense Section handle these cases.

Another portion of the Division's caseload consists of eminent domain litigation. This important work, undertaken with congressional direction or authority, involves the acquisition of land for projects such as national parks or the construction of federal buildings including courthouses, and for national security-related purposes. The Land Acquisition Section is responsible for this litigation.

The Division's Indian Resources Section litigates on behalf of federal agencies to protect the rights and resources of federally recognized Indian tribes and their members. This includes defending against challenges to statutes and agency action designed to protect tribal interests, and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. The rights and resources at issue include water rights, the ability to acquire reservation land, and hunting and fishing rights, among others. The Natural Resources Section also defends claims asserted by Indian tribes and tribal members against the United States. The main federal agency that the Division represents in connection with this work is the Bureau of Indian Affairs (BIA) in 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 (the Department's) Office of the Solicitor General on ENRD cases that reach the U.S. Supreme Court.

The Law and Policy Section advises and assists the Assistant Attorney General on environmental and natural resources legal and policy questions, particularly those that affect multiple sections in the Division. It handles the Division's response to legislative proposals and congressional requests, ENRD's comments on federal agency rulemakings, and 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.

The Executive Office is the operational management and administrative support section for ENRD, providing financial management, human resources, information technology, procurement, facilities, security, litigation support, and other important services to the Division's workforce. The Executive Office takes advantage of cutting-edge technology to provide sophisticated automation facilities to ENRD employees. By utilizing groundbreaking technologies and innovative business processes—and by in-sourcing traditional contractor-provided services and equipping employees to better serve themselves—the Executive Office is able to achieve significant annual cost savings for the American public.

ENRD CLIENT AGENCIES

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

United States Department of Agriculture

United States Forest Service

Animal and Plant Health Inspection Service

www.usda.gov

www.fs.fed.us

www.aphis.usda.gov

United States Department of Commerce

National Marine Fisheries Service

National Oceanic and Atmospheric Administration

www.nmfs.noaa.gov

www.noaa.gov

United States Department of Defense

United States Air Force

United States Army

United States Army Corps of Engineers

United States Marine Corps

United States Navy

www.af.mil

www.army.mil

www.usace.army.mil

www.marines.mil

www.navy.mil

United States Department of Energy

www.energy.gov

Environmental Protection Agency

www.epa.gov

General Services Administration

www.gsa.gov

United States Department of Homeland Security

United States Customs and Border Protection

Federal Emergency Management Agency

United States Coast Guard

www.dhs.gov

www.cbp.gov

www.fema.gov

www.uscg.mil

United States Department of the Interior

Bureau of Indian Affairs

Bureau of Land Management

Bureau of Ocean Energy Management

Bureau of Reclamation

Bureau of Safety and Environmental Enforcement

National Park Service

Office of Surface Mining Reclamation and Enforcement

United States Fish and Wildlife Service

United States Geological Survey

www.doi.gov

www.bia.gov

www.blm.gov

www.boem.gov

www.usbr.gov

www.bsee.gov

www.nps.gov

www.osmre.gov

www.fws.gov

www.usgs.gov

United States Department of Transportation

Federal Aviation Administration

Federal Highway Administration

Federal Transit Administration

Pipeline Safety and Hazardous Materials Administration

United States Maritime Administration

www.dot.gov

www.faa.gov

www.fhwa.dot.gov

www.fta.dot.gov

www.phmsa.dot.gov

www.marad.dot.gov

United States Department of Veterans Affairs

www.va.gov

REPORTING OUR PROGRESS TOWARD ACHIEVING THE GOAL OF ENVIRONMENTAL JUSTICE

All Americans—regardless of income or race—should breathe clean air, drink clean water, and be free from exposure to hazardous waste and toxic substances. Environmental justice does not mean special treatment, but equal treatment and full protection under the nation’s environmental, civil rights, and health laws. Ensuring that environmental justice is considered in all aspects of our work is a core mission of ENRD.

“Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

— <http://www.epa.gov/environmentaljustice/>

Environmental justice was first addressed by the federal government when Executive Order 12898 was issued in 1994. The Department has committed to the following goals for achieving environmental justice, as reflected in the *Department of Justice Guidance Concerning Environmental Justice* (1995):

— Protect environmental quality and human health in all communities;

“The burden of environmental degradation still falls disproportionately on low-income communities and communities of color—and most often, on their youngest residents: our children. This is unacceptable. And it is unconscionable. But through the aggressive enforcement of federal environmental laws in every community, I believe we can—and I know we must—change the status quo.”

— Attorney General Eric Holder

— Use environmental, civil rights, criminal, and civil laws to achieve fair environmental protection;

— Promote and protect community members’ rights to participate meaningfully in environmental decision making that may affect them;

— Analyze data that will assist the Department in law enforcement, mediation, and counseling efforts involving environmental justice matters; and

— Promote full and fair enforcement of the laws, increase opportunity for access to environmental benefits, and minimize activities that result in a disproportionate distribution of environmental burdens.

ENRD plays an important role in implementing these goals. In fiscal year 2012, the Division continued to achieve meaningful environmental justice results and to integrate the principles of environmental justice into its work.

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

COLLABORATIVE WORK WITH OTHER FEDERAL AGENCIES AND DEPARTMENT COMPONENTS IN FISCAL YEAR 2012

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

Working primarily through the IWG, the Division has played a leadership role in ensuring that there is a coordinated federal response to environmental justice issues. The IWG, which was originally established in 1994 under Executive Order 12898 and reinvigorated under this Administration, 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 federal agencies working collaboratively 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. As discussed below, ENRD has been actively involved in the work of the IWG this year.

Implementing an Interagency Memorandum on Environmental Justice

The Department continues to implement the *Memorandum of Understanding on Environmental Justice and Executive Order 12898* (MOU) signed by the Department and 16 other federal agencies in August 2011. The Division played an important leadership role in the conception and development of the MOU in 2011 and continues to play an important role in its implementation. The MOU promotes



Assistant Attorney General Ignacia S. Moreno with Other Members of the Interagency Working Group on Environmental Justice

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 an opportunity for ongoing public input on implementation of those strategies, and to produce annual implementation progress reports.

The Department has taken steps to fulfill its own obligations under the MOU and further the efforts of the IWG, such as:

— The MOU identified four focus areas for the IWG as agencies implement their environmental justice strategies: (1) implementation of NEPA; (2) implementation of Title VI of the Civil Rights Act of 1964, as amended (Title VI); (3) addressing impacts from climate change; and (4) addressing impacts from commercial transportation and supporting infrastructure (called “goods movement”). The IWG formed committees for NEPA, Title VI, and, more recently, goods movement. The Division actively participates in the NEPA committee.

— 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.

— In April 2012, ENRD Assistant Attorney General Ignacia Moreno and Deputy Assistant Attorney General Bruce Gelber attended the IWG Deputies’ Meeting chaired by White House Council on Environmental Quality Deputy Director Gary Guzy and EPA Deputy Administrator Robert Perciasepe. Among other topics, each agency shared its views on proposed initiatives.

— In June 2012, Cynthia Ferguson was selected as the Division’s environmental justice coordinator. Among other tasks, she is responsible for coordinating environmental justice issues throughout the Division and serves as the ENRD representative on the IWG.

Increasing Communication and Awareness Across Federal Agencies

The Division also continued to collaborate directly with other federal agencies to increase the dialogue on and awareness of environmental justice issues. 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. In fiscal year 2012, the group continued to serve as an important forum for open dialogue, continuing education, and informal counseling among the federal agencies. The discussions fostered by this effort improve 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.

ENRD attorneys assist 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 (DOE), for example.

Participating in Community and Other Outreach

The IWG continued to conduct listening sessions in communities around the United States. These sessions provide community members; federal, state, tribal, and local governments; businesses; academics; and other interested persons 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.

These regional IWG sessions allow us to hear first-hand from communities so that we can continuously improve how we address environmental justice concerns in the work that we do. For example, this year, Division representatives participated in a tour and listening session in Corpus Christi, Texas. We gain valuable feedback from these sessions, and look forward to continuing our participation in more of them.

DIVISION-SPECIFIC **FISCAL YEAR 2012 ENVIRONMENTAL JUSTICE ACHIEVEMENTS**

In fiscal year 2012, the Division took further steps to make environmental justice a routine and fully integrated part of its work and that of its client agencies.

Conducting Outreach on Environmental Justice Issues

The Division worked directly with other components in the Department, federal agency partners, state and local officials, and community representatives to organize direct outreach on environmental justice issues. For instance, in August 2012, Assistant Attorney General Ignacia Moreno and U.S. Attorney Kenneth Gonzales held a listening session on environmental and natural resources issues affecting New Mexico tribes in Albuquerque, New Mexico.



Assistant Attorney General Ignacia S. Moreno at the World Bank's "Colloquium on Environmental Justice: Access to Information and Public Participation"

Assistant Attorney General Ignacia Moreno and other ENRD senior staff spoke about environmental justice on a number of occasions. Examples are the 2012 Environmental Justice Conference and Training Program, a Hispanic Bar Association of the District of Columbia event, the ALI-ABA Conference on Criminal Enforcement of Environmental Laws, a New York Bar Association event, the World Bank "Colloquium on Environmental Justice: Access to Information and Public Participation," the D.C. Bar "Environmental Justice and Federal

Environmental Policy—A Conversation" event, and the July 2012 National Environmental Justice Advisory Council meeting in Crystal City, Virginia.

ENRD, partnering with EPA, also has fostered a dialogue with the corporate community regarding environmental justice. In July 2012, with Cynthia Giles, EPA's Assistant Adminis-

trator for Enforcement and Compliance Assurance, Assistant Attorney General Ignacia Moreno convened the first in a series of sessions with representatives from the corporate community to discuss environmental justice in enforcement matters. The listening session provided a forum for a fruitful discussion that would, among other things, raise awareness within the corporate community of the importance of environmental justice and encourage consideration of environmental justice as a basic component of enforcement and compliance matters. The corporate community has an essential role to play in the conversation on environmental justice and ENRD will continue to look for appropriate ways to engage the corporate community in a productive dialogue on these important matters.

Increasing Awareness Within the Division

ENRD has continued to increase awareness and understanding of environmental justice issues among its attorneys and staff. For example, in 2012, ENRD's Environmental Enforcement Section conducted highly successful environmental justice training for attorneys at its Advanced Civil Environmental Enforcement Seminar. Several U.S. Attorneys' Offices also attended the training, which focused on incorporating the principles of environmental justice into civil environmental enforcement work and, more specifically, on how to identify and address environmental justice issues that arise. The section collaborated with the Department's Civil Rights Division and Community Relations Service, the U.S. Attorney's Office for Montana, and EPA to conduct the training. Because community engagement is one of the cornerstones of environmental justice, a veteran environmental justice policy analyst who works on behalf of communities and an expert from academia also were included among the seminar faculty. These participants brought an invaluable perspective to the environmental justice conversation, helping to enhance the attending attorneys' understanding of community concerns.

Integrating Environmental Justice Principles into ENRD Litigation and Outcomes

Through enforcement of the nation's environmental and natural resources laws, ENRD seeks to ensure that all communities enjoy the benefit of a fair and even-handed application of the law, and have a meaningful opportunity for input in the consideration of appropriate remedies for violations of the law.

We continue to see the Division's commitment to environmental justice demonstrated in litigation results. For example, the following cases concluded by the Environmental Enforcement and Environmental Crimes Sections in fiscal year 2012 have furthered the principles or goals of environmental justice:

— *United States v. Metropolitan St. Louis Sewer Dist.* (MSD) is the largest environmental enforcement settlement in the nation's history. Under the terms of a consent decree resolving claims of violations of the CWA, MSD agreed to make extensive improvements to its sewer

“ In all of the work that we do, we are mindful of the principles of ‘environmental justice.’ That is, we strive to ensure that all communities enjoy the benefit of a fair and even-handed application of environmental laws, and we conduct outreach to provide affected communities with a meaningful opportunity to participate in decisions that affect their wellbeing.”

— Assistant Attorney General
Ignacia S. Moreno

systems and treatment plants, at an estimated cost of \$4.7 billion over 23 years, to eliminate overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The injunctive relief, historic in its scope and importance to the people of St. Louis, also will significantly advance the use of large-scale green infrastructure projects to control wet weather overflows by requiring MSD to invest at least \$100 million in an innovative green infrastructure program, focused in environmental justice communities in St. Louis.

— Residents in Memphis, Tennessee, will see significant public health and environmental benefits as a result of the comprehensive CWA settlement reached in *United States v. City of Memphis* to address overflows of untreated sewage. The City of Memphis will spend an estimated \$250 million to make improvements to its sewer systems as well as maintenance-and-repair programs. The parties conducted community outreach and incorporated environmental justice considerations into the remedy. For example, the settlement requires Memphis to consider “community input” as a factor in prioritizing preventative maintenance and the long-term assessment of its sewer system. Memphis is required to assess 70% of its sewer system, 10% of which must be done in the first year of the settlement. Of the 10% of the system assessed, nearly all of the assessment will be in neighborhoods with environmental justice concerns. The city also will prioritize rehabilitation of approximately six percent of its system and nearly all of this rehabilitation work will be done in neighborhoods with environmental justice concerns.



View of Memphis, Tennessee
USACE Photo

— In July 2009, the United States filed a complaint alleging an “imminent and substantial endangerment” to public health presented by the discharge of untreated sewage into a tributary upstream of the intake for drinking water supplied by the Town of Fort Gay. Fort Gay is a very small, low-income municipality in West Virginia. In a consent order, the town agreed to halt the discharge of untreated sewage and make urgently needed repairs to its sewage pumping stations. When Fort Gay subsequently violated the order, ENRD negotiated a consent decree entered in January 2012 to resolve CWA and Safe Drinking Water Act violations at the town’s waste water and drinking water treatment plants. The decree provides for \$1.8 million in injunctive relief in the form of extensive capital improvements and other measures to ensure proper operation, maintenance, and reporting relative to the plants. The decree also appoints the Wayne County Commission as receiver over both facilities until the capital improvements are completed to ensure that the settlement brings lasting health and environmental benefits to Fort Gay residents.

— Under the settlement in *United States v. BP Products North America, Inc.*, BP will invest more than \$400 million to install state-of-the-art pollution controls and cut emissions from its petroleum refinery in Whiting, Indiana. The United States was joined in this settlement by the State of Indiana as well as by several environmental organizations and citizens who had asserted

claims against BP. As a result of the direct participation of the environmental groups and citizens in the settlement negotiations and input provided by the local community, BP agreed to perform a Supplemental Environmental Project or SEP. The SEP requires BP to install, maintain, and operate a \$2 million fence-line emission monitoring system at the refinery and to make the data available to the public weekly on a public website. (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.) This information will allow the local community to monitor future emissions from the facility. The environmental groups and citizens also sought reductions in facility greenhouse gas emissions and as a result, BP is required to spend an additional \$9.5 million at the refinery on projects to reduce the emission of greenhouse gases.

— Salvaging company Watkins Street Project, L.L.C., and three individuals were convicted by a jury of conspiracy, CAA violations, obstruction of justice, and false-statement offenses related to the illegal demolition of a Chattanooga, Tennessee, factory which contained large amounts of asbestos. During the demolition of the factory, visible asbestos dust emissions engulfed surrounding businesses, residences, and a daycare center. Asbestos removed from the factory was left in open piles on the property.

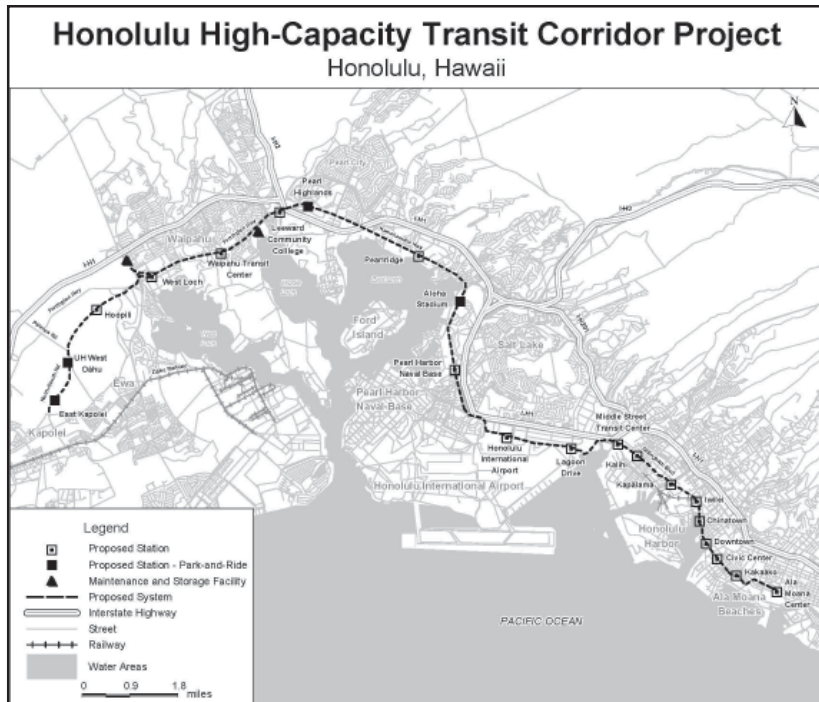


Demolition of Asbestos-Laden Factory in Chattanooga, Tennessee

Defendants attempted to conceal their illegal activities by falsifying documents, lying to federal authorities, and using low-paid day laborers to remove the material. Donald Fillers, an owner of Watkins Street Project, L.L.C., was sentenced to 48 months of incarceration, followed by a three-year term of supervised release, and ordered to pay a fine of \$20,000. David Wood, a supervisor for Watkins Street Project, L.L.C., was sentenced to serve 20 months of incarceration, followed by a three-year term of supervised release. James Mathis, an owner of Mathis Construction, Inc., was sentenced to serve 18 months of incarceration, followed by a three-year term of supervised release. The company was ordered to pay a fine of \$30,000. In addition, defendants were held jointly and severally liable for \$27,899 in restitution for the costs associated with the emergency response and cleanup of the former plant.

More than half of ENRD's work consists of defending the environmental or natural resources actions of federal agencies. The Division is incorporating the principles of environmental justice into the handling of these cases as well. Several examples of this aspect of ENRD's environmental justice effort in fiscal year 2012 are described below.

— Recent amendments to federal transportation law underscore the need to ensure that transit systems serve lower-income communities. A major goal of federal transportation planning and funding decisions made by the Department of Transportation is to further such “transportation equity.” In *Honolulu Traffic.com v. Federal Transit Admin.*, the Division vigorously defended the Federal Transit Administration’s decision to approve the City of Honolulu’s rapid rail project, which will serve lower-income communities in western Oahu and reduce traffic congestion in and out of Honolulu.



FTA Diagram

— In *Crenshaw Subway Coal. v. Federal Transit Admin.*, the Division supported the President’s number-two infrastructure priority project to bring light rail from Los Angeles International Airport through the minority and low-income Crenshaw neighborhood to intersect with another rail line in Los Angeles. The project will provide the broad benefits of public transportation, and we are working closely with the federal and local agencies involved to ensure that they have fully considered and addressed community impacts from building an above-ground light rail instead of a subway.

— In *Latin Americans for Social and Economic Dev. v. Federal Highway Admin.*, we defended a challenge to the Detroit River International Crossing project. Community-, ethnic-, and business-based organizations challenged the proposed construction of a new crossing in the Delray area of Detroit connecting Detroit, Michigan, and Windsor, Ontario. Plaintiffs claimed that the Department of Transportation illegally targeted the primarily Hispanic and poor community in siting the project in Delray. We closely scrutinized the claims and determined that the agencies had developed comprehensive mitigation measures and done extensive work to consider the impacts on the Delray area and the potential impacts to other environmental justice communities from different siting options. We also concluded that much of the impacted



International Freight Flows Through Michigan
FHA Map

community welcomes the expected employment and economic opportunities from the project. The district court found that the agency considered community issues, noting that throughout the NEPA study process, the Federal Highway Administration took a careful look at impacts to low-income and minority communities. Moreover, the district court held that there was no evidence in the administrative record that the agency downgraded the mitigation measures or that it otherwise misled the community.

PROTECTING OUR NATION'S AIR, LAND, AND WATER

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 2012, the Division obtained an important company-wide settlement in *United States v. Essroc Cement Corp.*, the second settlement obtained under the Division's national enforcement initiative to reduce air pollution from cement plants. There, a consent decree resolved claims that the company failed to comply with the CAA at six of its Portland cement manufacturing facilities in Indiana, West Virginia, Pennsylvania, and Puerto Rico. Essroc paid a civil penalty of \$1.7 million and agreed to invest approximately \$33 million in pollution control technology that will result in substantial reductions of sulfur dioxide (SO₂) and nitrogen oxide (NO_x)



Essroc Cement Silo
Photo Courtesy of Tim and Selena Middleton

“These comprehensive measures at multiple Essroc facilities will achieve substantial reductions in harmful air pollution and result in cleaner, healthier air for many people across the country. This will bring Essroc into compliance with the nation's Clean Air Act and marks significant progress in addressing the nation's largest sources of air pollution and protecting the most vulnerable among us, especially children and the elderly, from respiratory and other health problems.”

— Ignacia S. Moreno
United States v. Essroc Cement Corp. Press Release

emissions at the Essroc facilities. On full implementation, SO₂ and NO_x emissions will be reduced by approximately 7,500 tons per year. Additionally, Essroc will spend \$745,000 to mitigate the effects of past excess emissions by replacing old engines in several off-road vehicles at its facilities. The replacement engines will achieve approximately a 50-80% reduction in NO_x emissions per replacement engine.

Reducing Air Pollution from Power Plants

ENRD 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 2012, 22 of these matters settled on terms that will result in reductions of over 2.1 million tons of SO₂ and NO_x each year, once the more than \$13 billion in required pollution controls are fully functioning.

Twenty-two settlements with operators of coal-fired electric power generating plants as of September 30, 2012, will result in reductions of over 2.1 million tons of sulfur dioxide and nitrogen oxide, once the more than \$13 billion in required pollution controls are fully functioning.



Dairyland Power Cooperative near Genoa, Wisconsin
Photo Courtesy of Royalbroil

consent decree will result in annual reductions of SO₂ emissions by 23,000 tons and NO_x emissions by 6,000 tons from 2008 levels, in addition to significant reductions of particulate matter emissions. Dairyland also paid a civil penalty under the CAA of \$950,000, and will spend \$5 million on projects to mitigate the adverse effects of past excess emissions.

Last year, the Division obtained one more settlement under this initiative in *United States v. Dairyland Power Coop.* Under the consent decree, the company will install approximately \$150 million worth of air pollution controls at three of its coal-fired power plants located in Alma and Genoa, Wisconsin, and permanently retire three additional coal-fired units at the Alma plant. The permanent retirement of these units will ensure that they do not restart without first complying with the CAA. The actions taken by Dairyland to comply with the

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 2012.

— In *United States v. Hess Corp.*, the court entered a consent decree that requires the company to spend more than \$45 million in new pollution controls to resolve CAA violations at its refinery in Port Reading, New Jersey, which, when fully operational, will reduce annual air emissions of NOx by 181 tons per year and result in additional reductions of volatile organic compounds (VOCs). Hess also paid a civil penalty of \$845,000, split evenly between the United States and the State of New Jersey.

— A consent decree entered by the court in *United States v. Coffeyville Resources & Marketing, L.L.C.*, requires that refiner to invest more than \$4.25 million in pollution controls and \$6.5 million in operating costs to resolve claims under the CAA, Superfund, and Emergency Planning and Community Right-to-Know Act (EPCRA) at its Coffeyville, Kansas, refinery. Once the controls are installed, annual emissions of NOx and SO2 will be reduced by more than 300 tons per year from this facility. Coffeyville also paid a civil penalty of \$975,000, which will be shared with the State of Kansas, and will perform a SEP that is valued at more than \$1.2 million and will benefit the surrounding communities by reducing emissions of harmful air pollutants, reducing the frequency of future acid gas flaring incidents, and conserving 15 million gallons of water each year that would previously have come from the Verdigris River.

— In a settlement resolving claims of noncompliance with a 2008 consent decree, the court entered the sixth amendment to the consent decree in *United States v. Sinclair Tulsa Refining Co.* There, two subsidiaries of Sinclair Oil Corp. paid stipulated penalties of \$3.844 million and agreed to spend \$10.5 million on additional pollution control equipment and other projects, which will reduce emissions of NOx and SO2 by approximately 24,385 and 59 tons per year, respectively.

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 per year.

As part of the Division's national effort to reduce air pollution from refinery, petrochemical, and chemical flares, the Division negotiated an innovative consent decree that the court entered in *United States v. Marathon Petroleum Co.* The settlement requires Marathon to implement cutting-edge pollution control, monitoring, and operating systems, which it developed in close

"This agreement is a great victory for the environment and will result in cleaner and healthier air for the benefit of communities across the country in Illinois, Kentucky, Louisiana, Michigan, Ohio and Texas. By spurring corporate ingenuity, this settlement will dramatically reduce emissions from all 22 flares at Marathon's six refineries."

— Ignacia S. Moreno

United States v. Marathon Petroleum Co. Press Release

FLARES

A flare is a mechanical device, ordinarily elevated high off the ground, used to combust waste gases. The more waste gas a company sends to a flare, the more pollution occurs. The less efficient a flare is

in burning waste gas, the more pollution occurs. EPA wants companies to flare less, and when they do flare, to fully combust the harmful chemicals found in the waste gas.

EPA Website and Photos



Well-Operating Flare



Poorly Operating Flare

cooperation with EPA. Marathon began installing the systems in 2008 to improve the combustion efficiency of its flares and, through the end of 2011, eliminated approximately 4,700 tons per year of VOCs and 110 tons per year of hazardous air pollutants from the air. The settlement includes a “cap” on the amount of waste gas Marathon may flare, which is the first time a company has agreed to such a limitation. Marathon estimates that it will spend a total of \$51.5 million on flare controls. The consent decree also requires Marathon to implement a mitigation project that will further reduce VOC and benzene emissions at its refinery in Detroit, Michigan, and to pay a \$460,000 civil penalty to resolve its violations of the CAA.

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 2012, courts entered 40 settlements in these cases, requiring long-term control measures and other relief estimated to cost violators more than \$20 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.

Eleven consent decrees with municipalities or regional sewer districts were entered in fiscal year 2012. Collectively, they provide for the expenditure of more than \$6.3 billion in improvements, the payment of more than \$4 million in civil penalties, and the performance of SEPs valued at more than \$2.4 million. A few examples are the following cases:

— *United States v. Metropolitan St. Louis Sewer Dist.* (MSD), which also was mentioned in the environmental justice chapter, is the environmental enforcement settlement requiring the largest injunctive relief in the nation’s history. Under the terms of a consent decree resolving claims of violations of the CWA, MSD agreed to make extensive improve-

“We are fully committed to vigorous enforcement of the Clean Water Act, and will continue to work in partnership with EPA to advance the goal of clean water for all communities in our nation’s cities. The people of St. Louis, including those who live in minority and low-income communities, will receive tangible, lasting benefits from this significant settlement.”

— Ignacia S. Moreno
United States v. Metropolitan St. Louis Sewer Dist. Press Release

ments to its sewer systems and treatment plants, at an estimated cost of \$4.7 billion over 23 years, to eliminate overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The injunctive relief, historic in its scope and importance to the people of St. Louis, also will significantly advance the use of large-scale green infrastructure projects to control wet weather overflows by requiring MSD to invest at least \$100 million in an innovative green infrastructure program, for the benefit of environmental justice communities in St. Louis. The city also paid a \$1.2 million civil penalty to the United States.



St. Louis, Missouri
Photo Courtesy of Tyson Blanquart

— Under a consent decree entered in *United States v. Dekalb County* (Georgia), the county agreed to make major improvements to its sanitary sewer systems in an effort to eliminate unauthorized overflows of untreated sewage. The county’s sewer system is designed to convey only municipal sewage, not stormwater, and serves over 500,000 people. The system includes approximately 2,600 miles of sewer lines, 55,000 manhole covers, and 66 lift stations. The consent decree provides for targeted relief for priority areas, consisting primarily of the most aged sewer pipes, within eight-and-a-half years. These actions and other related relief are estimated to cost the county approximately \$700 million. The county also agreed to conduct a stream cleanup project at an estimated cost of \$600,000, focusing on segments of the South River, South Fork Peachtree Creek, and Snapfinger Creek. The county also paid a \$453,000 civil penalty, split evenly between the United States and the State of Georgia.

— A district court entered a consent decree in *United States v. City of South Bend* (Indiana) under which the city agreed to make an estimated \$506 million worth of improvements to its combined sewer system to significantly reduce overflows of raw sewage to the St. Joseph River, which is a tributary of Lake Michigan. The city’s sewer system has a history of being overwhelmed by rainfall when a portion of the sewage that would otherwise flow through the city’s treatment plant is instead discharged into the river through some or all of 36 outfalls. After implementing the improvements required under the consent decree, the city will reduce the number of raw sewage discharge events by 95%. The city also paid civil penalties totaling \$85,000, split evenly between the United States and the State of Indiana, and agreed to implement an environmental project that will reduce pollutants in Bowman Creek, a tributary of the St. Joseph River, at a cost of \$75,000.

Green infrastructure uses vegetation, soils, and natural processes to manage water and create healthier urban environments. At the scale of a city or county, green infrastructure refers to the patchwork of natural areas that provides habitat, flood protection, cleaner air, and cleaner water. At the scale of a neighborhood or site, green infrastructure refers to stormwater management systems that mimic nature by soaking up and storing water.

EPA Website

— A consent decree entered in *United States v. City of Memphis* (Tennessee), also discussed in the environmental justice chapter, represents the combined efforts of the United States and the State of Tennessee working with the Tennessee Clean Water Network to resolve claims under the CWA and the Tennessee Water Quality Control Act relating to the city’s

longstanding overflows of untreated raw sewage. The consent decree requires the city to establish specific programs designed to eliminate the unauthorized discharges of raw sewage and to implement a continuing sewer assessment and rehabilitation program to ensure that the integrity of sewer infrastructure is maintained to prevent system failures that would likely result in unauthorized overflows, at an estimated cost of \$250 million. The consent decree also requires the city to perform corrective measures in certain specifically identified priority areas. The city also agreed to pay a \$1.29 million civil penalty, half to be paid to the United States and half to be paid through the performance of state projects, including the implementation of an effluent color study to better delineate limits for the color of Memphis' permitted discharges to the Mississippi River.

EXAMPLES OF GREEN INFRASTRUCTURE



Rainwater Harvesting.

Rainwater harvesting systems collect and store rainfall for later use. When designed appropriately, rainwater harvesting systems slow and reduce runoff and provide a source of water. These systems may be particularly attractive in arid regions, where they can reduce demands on increasingly limited water supplies.



Green Parking.

Many of the green infrastructure elements described above can be seamlessly integrated into parking lot designs. Permeable pavements can be installed in sections of a lot and

rain gardens and bioswales can be included in medians and along a parking lot perimeter. Benefits include urban heat island mitigation and a more walkable built environment.



Bioswales.

Bioswales are vegetated, mulched, or xeriscaped channels that provide treatment and retention as they move stormwater from one place to another. Vegetated swales slow, infiltrate, and filter

stormwater flows. As linear features, vegetated swales are particularly suitable along streets and parking lots.



Green Roofs.

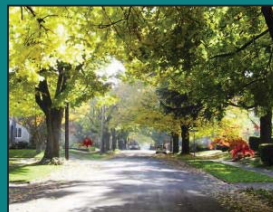
Green roofs are covered with growing media and vegetation that enable rainfall infiltration and evapotranspiration of stored water. Green roofs are particularly cost effective in dense urban areas where land values are high and on large industrial or office buildings where stormwater management costs may be high.



Permeable Pavements.

Permeable pavements are paved surfaces that infiltrate, treat, and/or store rainwater where it falls. Permeable pavements may be constructed from pervious concrete, porous

asphalt, permeable interlocking pavers, and several other materials. These pavements are particularly cost effective where land values are high and where flooding or icing is a problem.



Urban Tree Canopy.

Many cities set tree canopy goals to restore some of the benefits provided by trees. Trees reduce and slow stormwater by intercepting precipitation in their leaves and branches.

Homeowners, businesses, and cities can all participate in the planting and maintenance of trees throughout the urban environment.

EPA Website

— Consent decrees entered in *United States v. City of Euclid* (Ohio); *United States v. Boston Water and Sewer Comm'n*; and *United States v. City of Newport* (Rhode Island) require those municipalities to spend \$100 million, \$56 million, and \$25 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, the court entered the latest consent decree with a residential homebuilder under the initiative to resolve claims of CWA violations in connection with its construction projects. In *United States v. Ryland Group, Inc., d/b/a Ryland Homes*, one of the nation's largest homebuilders paid a civil penalty of \$625,000 to resolve alleged CWA violations at its construction sites in 13 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. The States of Colorado, Florida, Illinois, Indiana, Maryland, and Nevada, and the Commonwealth of Virginia joined in the settlement and will receive a portion of the \$625,000 civil penalty.

Following a settlement, the court entered a consent decree in *United States v. LaFarge North America, Inc.*, with LaFarge and four of its American subsidiaries, resolving claims of unpermitted discharges of stormwater and failure to comply with stormwater permits at 21 stone, gravel, sand, asphalt, and ready-mix concrete facilities in five states. Lafarge is one of the largest suppliers of construction materials in the United States and Canada. The company agreed to implement a nationwide evaluation and compliance program at 189 of its similar facilities in the United States to ensure that it meets CWA requirements, paid a \$740,000 civil penalty, and agreed to implement two SEPs at an estimated cost of almost \$3 million.

This year, the Division also obtained significant victories under its vigorous program to protect wetlands and other waters of the United States from illegal fill activity. In *United States v. Wright Bros. Constr. Co. & State of Georgia Dep't of Transp.*, a civil enforcement action for the unpermitted discharge of fill material in seven primary trout streams at four sites in Georgia, we negotiated a consent decree under which defendants are obligated to restore portions of two streams, purchase mitigation credits for impacts to streams that cannot be restored, and pay a civil penalty of \$1.5 million. We also obtained favorable consent decrees in *United States v. Century Homebuilders* (\$400,000 civil penalty) and *United States v. Staben* (\$225,000 civil penalty).



Sedimentation and Fill in Primary Trout Stream in Georgia

Reducing Air and Water Pollution at Other Diverse Facilities

In fiscal year 2012, the Division improved the nation's air quality by concluding a number of civil enforcement actions against industrial facilities. In addition to the company-wide settlement with Essroc Cement Corp. discussed above, the Division obtained another settlement in its national enforcement initiative to reduce air pollution from cement plants in *United States v. CalPortland Co.* There, CalPortland, which owns and operates a number of these facilities, agreed to resolve claims that it violated the CAA at its manufacturing plant near Mojave, California. The company paid a \$1.425 million civil penalty and agreed to install and operate appropriate emission controls at its kiln. The settlement resolved claims that the company had modified its plant without obtaining the required permit.

Courts entered consent decrees with operators of aluminum recycling and processing facilities in three cases resolving alleged violations of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) applicable to their industry, Secondary Aluminum Production. In each case, 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. J.L. French, L.L.C.*, two related companies paid a civil penalty of \$80,000 to resolve claims in connection with their facilities in Sheboygan, Wisconsin, and Glasgow, Kentucky.

In fiscal year 2012, the Division settled cases with industrial defendants under the Clean Water Act valued at more than \$20 million in injunctive relief (this does not include over \$23 million in Supplemental Environmental Projects) and over \$87 million in civil penalties.

In fiscal year 2012, the Division secured agreements with industrial defendants under the Clean Air Act to spend an estimated \$397 million on corrective measures to reduce harmful air emissions, to pay more than \$28.8 million in civil penalties, and to perform \$17 million in mitigation projects and more than \$2.5 million in Supplemental Environmental Projects to offset the harm caused by their unlawful emissions.

— In *United States v. Hydro Aluminum North America, Inc.*, the company paid a civil penalty of \$310,000 to resolve claims in connection with its facility in St. Augustine, Florida.

— In *United States v. Spectro Alloys Corp.*, the company paid a civil penalty of \$600,000 to resolve claims in connection with its facility in Rosemont, Minnesota.

In 2008, in a CAA case, the United States demanded \$72 million in stipulated penalties and interest from Volvo Truck Corp., claiming that Volvo had violated the provisions of a 1999 consent decree by allowing its facilities to be used by a sister company to produce engines that did not meet accelerated emission standards as provided in the consent decree. In April 2012, in *United States v. Volvo Powertrain Corp.*, the court agreed with the U.S. position and ordered Volvo to pay the entire \$72 million.

The Division also improved the nation's water quality by concluding a number of civil enforcement actions against industrial and commercial facilities. Among the industries agreeing to settle their noncompliance with the CWA are a seafood processor, a coal company, and a racetrack:

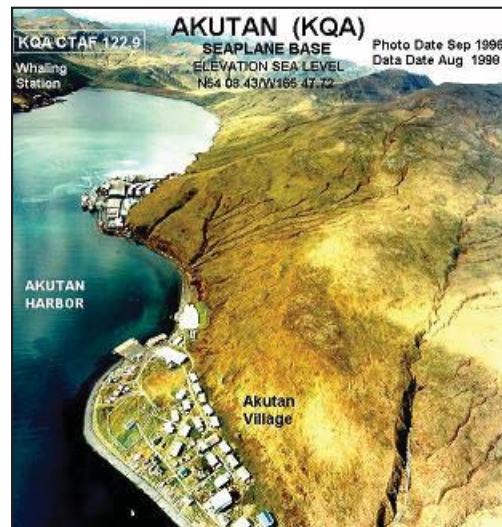
— One of the world's largest seafood processors paid a \$2.5 million civil penalty and will invest an estimated \$30-40 million in seafood processing waste controls under the terms of a consent decree entered in *United States v. Trident Seafoods Corp.* These measures will reduce Trident's fish processing discharges to Alaskan waters by a total of more than 105 million pounds annually.

— The second largest supplier of coal in the United States paid a \$4 million civil penalty to settle CWA claims at four of its mining complexes in Virginia, West Virginia, and Kentucky under a consent decree entered in *United States v. Arch Coal, Inc.* In addition to the penalty, Arch Coal also will take measures that will prevent an estimated two million pounds of pollution from entering the nation's waterways each year.

— In *United States v. Sterling Suffolk Racecourse, L.L.C.*, the owner of the Suffolk Downs racetrack facility in Revere and East Boston, Massachusetts, paid a civil penalty of \$1.25 million to resolve CWA violations at its facility, will spend more than \$3 million to prevent polluted water from entering nearby waterways, and will perform three projects worth approximately \$742,000 that will provide water quality monitoring and protection efforts for more than 123 square miles of watershed.



Trident Seafoods Cannery in Alaska
Photo Courtesy of James Brooks



Akutan, Alaska

FAA Photo

“This agreement will benefit the quality of Alaskan waters, which host a critical habitat for the seafood industry. The [seafood processing waste control] upgrades will enable Trident to achieve and maintain compliance with the Clean Water Act, and will protect Alaskan waters, eliminate waste, and create efficiencies that will serve as a model of best business practices for the seafood processing industry.”

— Ignacia S. Moreno
United States v. Trident Seafoods Corp. Press Release

Ensuring the Safe Treatment, Storage, and Disposal of Waste

North America's largest lead producer agreed to spend approximately \$65 million to correct violations of several environmental laws at 10 of its lead mining, milling, and smelting facilities in southeast Missouri under the terms of a consent decree entered by the court in *United States v. Doe Run Resources Corp.* The company paid a \$7 million civil penalty to resolve claims that it violated the CAA, CWA, RCRA, EPCRA, Superfund, and comparable Missouri environmental statutes. The company also will establish financial assurance trust funds, at an estimated cost of \$28 million to \$33 million, for the cleanup of its lead smelter in Herculaneum, Missouri, which the company is closing for business reasons by 2014, and six mining and milling sites when they are eventually closed. The company also will spend an estimated \$5.8 million on stream mitigation activities along Bee Fork Creek and an additional \$2 million on community-based mitigation projects to reduce pollution from other sources in southeastern Missouri.



Lead Smelter of the Doe Run Company in Herculaneum, Missouri

Photo Courtesy of Kbh3rd

ENSURING CLEANUP OF OIL AND SUPERFUND WASTE

In fiscal year 2012, the Division secured the commitment of responsible parties to clean up hazardous waste sites at costs estimated in excess of \$123 million; and recovered approximately \$98 million for the Superfund to finance future cleanups and more than \$16 million in natural resource damages.

Handling Civil Affirmative Litigation in Response to the Deepwater Horizon Explosion, Fire, and Oil Spill in the Gulf of Mexico

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. The discharge continued for 87 days, at which time BP regained control of the well.

Immediately, ENRD and the Department's Civil Division—along with local U.S. Attorneys' Offices, the Gulf States, and client agencies—launched a civil investigation into the matter. In December 2010, as part of a multidistrict litigation in the Eastern District of Louisiana, the United States brought suit against BP, Anadarko, MOEX, and Transocean for civil penalties under the CWA and a declaration of liability under the Oil Pollution Act.

Since filing, ENRD, along with the Civil Division, has taken or defended several hundred depositions, has produced some 96-million pages in discovery, and continues preparation for the first of what is expected to be several phases of trial. In Phase One of the trial, which is currently scheduled for February 25, 2013, the United States intends to prove BP grossly negligent for purposes of civil penalty and recovery of natural resource damages (NRD), as applicable, and that violations of federal safety and operational regulations caused and contributed to the oil spill.

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

Transocean also has agreed to plead guilty to violating the CWA and to pay a total of \$1.4 billion in civil and criminal fines and penalties, for its conduct in relation to the Deepwater Horizon explosion, fire, and oil spill. Pursuant to the terms of a proposed partial civil consent decree lodged on January 3, 2013, the Transocean defendants (Transocean Ocean Holdings, L.L.C., Transocean Offshore Deepwater Drilling, Inc., Transocean Deepwater, Inc., and Triton Asset Leasing G.M.B.H.) agreed to pay \$1 billion to resolve federal CWA civil penalty claims, a record amount that significantly exceeds the \$70 million civil penalty paid by MOEX. The unprecedented \$1 billion civil penalty is subject to the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act),

“Today’s announced settlement will aid the Gulf region’s recovery from the Deepwater Horizon oil spill and require Transocean to take important steps that will help guard against such incidents happening in the future. This resolution is the culmination of the tremendous efforts of many attorneys and staff in the Justice Department’s Criminal, Civil and Environment and Natural Resources Divisions—dedicated public servants whose hard work continues on behalf of the American people.”

— Acting Associate Attorney General Tony West
Transocean Plea and Agreement Announcement

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

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

which provides that 80% of the penalty will be used to fund projects in and for the Gulf States for the environmental and economic benefit of the region. This civil resolution reserves all other claims, including those for NRD and cleanup costs. Under the partial civil settlement, the Transocean defendants also must observe various court-enforceable strictures in drilling operations, aimed at reducing the chances of another blowout and discharge of oil and at improving emergency response capabilities. Examples of these requirements include certifications of maintenance and repair of blowout preventers before each new drilling job, consideration of process safety risks, and personnel training related to oil spills and responses to other emergencies. These measures apply to all rigs operated or owned by the Transocean defendants in all U.S. waters and will be in place for at least five years.

Case development for the Phase Two trial continues. It involves dozens of additional depositions and development of expert opinions concerning the amount of oil discharged from the well and whether defendants moved with sufficient speed to stop the discharges. Trial for that phase is tentatively set for June 2013.

Recovering Damages and Penalties for Other Oil Spills

The Division, working closely with the State of California, the City and County of San Francisco, and the City of Richmond, California, obtained a comprehensive settlement with the owners and operators of the marine vessel *Cosco Busan*, which struck the San Francisco-Oakland Bay Bridge in





Recovery of Oil from the M/V Cosco Busan Oil Spill

USCG Photos



2007. Under the terms of a consent decree entered in *United States v. M/V Cosco Busan*, the companies paid \$44 million to resolve claims for NRD, penalties, and response costs that resulted from the ship alliding with the bridge, and the subsequent oil spill in the San Francisco Bay. The event

killed thousands of birds, impacted a significant portion of the bay's 2008 herring spawn, spoiled miles of shoreline habitat, and closed the bay and area beaches to recreation and fishing. The settlement achieves compensation for the

significant natural resources that were injured as the result of the oil spill. It also forms the foundation for the restoration of precious lost natural resources and park system resources, and compensates the public for lost recreation uses for the benefit and enjoyment of the people of the San Francisco Bay and all Americans.

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 NRD on behalf of federal trustee agencies.

In fiscal year 2012, 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:

— The United States and the State of Texas reached a comprehensive resolution of their interests at the complicated, multiparty Malone Superfund Site in Texas City, Texas, when the court entered a consent

MALONE SUPERFUND SITE

- The Malone Services Company Site is located in Texas City, Texas. The site, which covers approximately 150 acres, is located in an industrial and petrochemical area on the shores of Swan Lake and Galveston Bay. Approximately 10,000 people live and/or work within a three-mile radius of the site.
- From 1964 to 1997, the site was a reclamation, storage, and disposal facility for waste oils and chemicals. Wastes received at the facility included acids and caustics from industrial cleaning and surface preparations; contaminated residues and solvents removed from processing and storage units during cleaning operations; spent drilling fluids; acids containing metals from etching and plating operations; inorganic slurries from sump cleaning; gasoline and crude oil tank bottoms; contaminated earth and water from chemical spill cleanup operations; general industrial plant wastes; phenolic tars; and waste oils.

— EPA Fact Sheet

decreed in *United States v. Alcoa, Inc.* More than 1,400 parties sent waste to this former waste processing and disposal site. The settlement requires 27 companies to clean up the site at an estimated cost of \$56.4 million and to pay the United States \$900,000 for its past and future costs. The federal and state natural resource trustees for the site will receive \$3,109,000 to implement environmental restoration projects.

— After trial and an appeal to the First Circuit in *United States v. General Electric Co.*, the General Electric Co. (GE) paid more than \$13 million to the United States in reimbursement of costs that it incurred in cleaning up the Fletcher’s Paint Superfund Site in Milford, New Hampshire. In February 2012, the First Circuit affirmed the district court’s finding in a CERCLA cost recovery action that GE was liable as having “arranged for the disposal” of a hazardous substance and affirmed the district court’s ruling that none of EPA’s cost recovery claims were barred by the statute of limitations. In this case, Frederic Fletcher, a small junk yard operator and paint manufacturer, had entered into an arrangement with GE in the 1950s to purchase a polychlorinated biphenyl-containing material called Pyranol that GE used in its manufacture of electric capacitors. When the material became contaminated with dirt or other materials, GE had no use for it and sold it to Fletcher at a cheap price. On appeal, GE argued, based on the Supreme Court’s intervening decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, that GE lacked “actual intent” that disposal occur, and that indifference on GE’s part was not enough. The First Circuit rejected GE’s argument.



— In *United States v. NuStar Terminal Services f/k/a Support Terminal Services, Inc.*, the company paid \$21 million to resolve the United States’ cost recovery claims for cleaning up soil and groundwater contamination resulting from the leakage of a pipeline at the Massachusetts Military Reservation.

The Massachusetts Military Reservation (MMR), Home to Five U.S. and State Military Commands
 Photo and Map Courtesy of MMR



Protecting Against Interference with Cleanup Actions

In *El Paso Natural Gas Co. v. United States*, a former uranium mill operator and the Navajo tribe brought suit under RCRA and the Uranium Mill Tailings Radiation Control Act, seeking to require the government to clean up a former dump site and another property used for disposal near a former uranium mill in Tuba City, Arizona. Having previously dismissed the Uranium Mill Tailings Radiation Control Act claims, the district court in March 2012 granted the U.S. motion to dismiss plaintiffs’ remaining claims, holding that section 113(h) of CERCLA removes jurisdiction over plaintiffs’ claims related to the Tuba City Landfill because EPA and BIA had already entered into an administrative order on consent providing for a CERCLA removal action at the site.

Protecting the Public Fisc Against Excessive or Unwarranted Claims

The Division also defends federal agencies that are sued for their activities at contaminated sites that are being remediated. In *Litgo New Jersey, Inc. v. Mauriello*, plaintiffs brought a CERCLA cost recovery action for alleged liability concerning the Somerville Iron Works Site in Somerville, New Jersey. In 2010, the district court found the United States liable under CERCLA for three percent of plaintiffs' recoverable costs, or \$51,878. Even though plaintiffs had dropped their claim for injunctive relief against the United States under RCRA, they filed a motion seeking \$4,700,000 in attorney fees from the United States based on their RCRA claim. In April 2012, the court denied the motion, finding that because plaintiffs had not obtained any relief from the United States on the RCRA claim, plaintiffs were not a prevailing party. Alternatively, the court held that even if plaintiffs could be assumed to have "prevailed," the circumstances of this case made an award of fees inappropriate.

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 2012, these included such multimillion-dollar settlements as *Nu-West Mining Company v. United States* (four phosphate mine sites located in and around Dry Valley in Caribou County, Idaho); *General Electric v. U.S. Air Force* (former Air Force Plant No. 36 in Evendale, Ohio); *Ford Motor Co. v. United States* (Ford's Rouge Manufacturing Complex in Dearborn, Michigan); *United States v. D & L Sales, Inc.* (Aircraft Components Superfund Site near Benton Harbor, Michigan); and *United States v. Bradley Mining Co.* (the Sulphur Bank Mine Site in California and Elem Indian Colony and the Stibnite Mine Site in Idaho).

Enforcing Cleanup Obligations in Bankruptcy Cases

From the beginning of fiscal year 2009 through the end of fiscal year 2012, ENRD obtained agreements in 32 bankruptcy proceedings, under which debtors committed to spend an estimated \$1.4 billion to clean up hazardous waste sites, reimburse the Superfund over \$686 million, and pay more than \$79 million in natural resource damages. Over that same time period, the United States also recovered an additional \$241 million for the Superfund and an additional \$101 million in natural resource damages as a result of payment of claims settled in earlier years.

The Division files claims to protect environmental obligations owed to the United States when a responsible party goes into bankruptcy. In fiscal year 2012, 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.

Pursuant to a settlement in the *In re Johns Manville Int'l, Inc.*, bankruptcy proceeding, the debtor paid \$7,196,654 to resolve claims for past costs incurred by EPA to clean up properties located in the Westbank Asbestos Superfund Site in Jefferson, Louisiana. Thousands of private, and some public, properties in the Westbank area of New Orleans were contaminated with asbestos-containing materials that had been removed from debtor's landfill and transported to properties in the Westbank area for use as fill in the construction of driveways, walkways, and servitudes. After investigating 2,209 properties, EPA excavated and removed waste material from 1,365 properties.

The court in the *In re DPH Holdings Corp. f/k/a Delphi Corp.* bankruptcy proceeding approved a settlement agreement under which the debtor and its affiliated reorganized debtors paid \$857,582 to resolve their environmental liabilities at two Superfund sites in Ohio, the Tremont City Landfill Site near Springfield and the South Dayton Dump and Landfill Site in Moraine.

The Division also received substantial payments from debtors as the result of settlement agreements obtained in bankruptcy proceedings in previous years, e.g., the *In re Motors Liquidation Co.* (formerly General Motors); *In re Old Carco, L.L.C., f/k/a Chrysler*; *In re LTV Steel Corp., Inc.*; and *In re Lyondell Chemical Co.* bankruptcy proceedings.

PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S WILDLIFE AND NATURAL RESOURCES

Protecting National Forest Roadless Areas

The Division continues to successfully defend the efforts of the U.S. Forest Service to manage and preserve the 58 million acres of inventoried roadless areas within the nation's national forests. Due to the resolution of longstanding litigation in fiscal year 2012, the 2001 Roadless Rule, which prohibits road-building and commodity-purpose timber harvests in inventoried roadless areas, remains the primary policy regarding these areas. In 2005, the Forest Service promulgated a replacement rule, but that action was invalidated and the 2001 Roadless Rule was reinstated by virtue of litigation in California and the Ninth Circuit. The Wyoming district court, taking up the 2001 rule for the second time, again held it invalid. On appeal, in October 2011, the Tenth Circuit rejected all challenges to the 2001 Roadless Rule raised by the State of Wyoming under the Wilderness Act, the National Forest Management Act, the Multiple-Use Sustained-Yield Act, and NEPA. After that, the Division worked closely with the Department's Office of the Solicitor General in successfully opposing in the U.S. Supreme Court the State of Wyoming's petition for a writ of certiorari to review the Tenth Circuit's decision. After a decade of litigation, this victory now allows the Forest Service to apply the 2001 Roadless Rule in all states but Idaho and Colorado, which have state-specific rules developed collaboratively by the agency, the states, and broad coalitions of environmental and industry interests.

In *The Ark Initiative v. Tidwell*, the Division successfully defended a challenge brought against a Forest Service project to expand skiable terrain within the existing boundaries of the Snowmass Ski Resort in Colorado. When complete, the project will add approximately 230 acres of advanced off-trail skiing opportunities to the Burnt Mountain area of Snowmass. The decision was based in part on the Colorado Roadless Rule, which allowed timber cutting to create skiing terrain at Snowmass. The matter was litigated under a very short time-frame, with the decision being made in time for the project to be completed prior to the start of the 2012-2013 ski season. The court ruled that the Forest Service appropriately responded to plaintiff's concerns. The court also held that the Forest Service could rely on the recently completed Colorado Roadless Rule.

In *Jayne v. Sherman*, we successfully defended the state-specific Idaho Roadless Rule in the district court, and the case remains pending on appeal.

Finally, in the case of *Alaska v. U.S. Dep't of Agriculture*, ENRD is litigating the last comprehensive challenge to the 2001 Roadless Rule, which was filed by the State of Alaska in district court in the District of Columbia.

Protecting National Park Lands

In *County of Inyo v. Department of the Interior*, Inyo County sought to quiet title to putative rights-of-way under a repealed federal statute known as “R.S. 2477” for four roads within Death Valley National Park, three of which were designated for closure under the California Desert Protection Act. That act enlarged the park and designated as part of the Death Valley Wilderness Area the area of the park in which three of the roads are located. In 2012, the district court entered an order denying the county’s motion for summary judgment and granting the U.S. cross-motion, thus dismissing for lack of merit the county’s remaining claim.



Death Valley National Park

DOI Photo

In *County of San Bernardino v. United States*, the County of San Bernardino sought to quiet title to 14 alleged rights-of-way established pursuant to R.S. 2477, in and around Mojave National Preserve—10 located on National Park Service land and four on BLM land. In 2012, the parties executed a settlement agreement prescribing actions by the parties as conditions precedent to the eventual entry of a judgment quieting title by the district court.

A former National Park Service employee contended in *Buono v. Norton* that the continuing presence of a “Latin cross” on Sunrise Rock—a rock outcropping in a remote area of the Mojave National Preserve that Congress placed under the jurisdiction of the National Park Service in the California Desert Conservation Act of 1994—violates the Establishment Clause of the First Amendment to the U.S. Constitution. In *VFW Post 385 v. United States*, the Veterans of Foreign Wars sought to quiet title to the land surrounding the cross, to which it contends it is entitled under the 2003 federal land-transfer statute at issue in *Buono*. In 2012, the district court approved the parties’ settlement, vacated a permanent injunction, dismissed one case, and stayed the other pending completion of the land transfer.

Defending BLM Management of Mineral Resources

The Division litigated 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. In 2011, the district court decided that BLM was not required to issue a new mining plan of operations and that BLM was not required to complete a 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. In 2012, the district court further decided that BLM had conducted adequate NEPA review of its decision to issue a free-use permit to mine gravel from public land for use in maintenance of a county road that provides access to the mine and many other resources. Plaintiffs have sought appellate review, but their motions for an injunction pending appeal (two before the district court and two before the court of appeals) have all been denied.

Successful Implementation of the ESA

Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . .” Congress authorized the Departments of the Interior and Commerce, acting through FWS and NMFS, respectively, to achieve this objective by listing imperiled species, designating critical habitat for such species, and applying the protections of ESA section 7 (requiring federal agencies to consult with the services if they propose to take an action that may affect listed species or their designated habitat) and section 9 (containing a prohibition against “taking” listed species). Such decisions are often challenged.

In fiscal year 2012, ENRD achieved favorable results in such cases, thereby allowing effective implementation of the ESA and its protections. For example, in *State of Alaska v. Lubchenko*, the State of Alaska and Escopeta Oil Co. challenged the listing of a Distinct Population Segment (DPS) of the beluga whale in Cook Inlet, Alaska, as an endangered species under the ESA.

BELUGA WHALES

- Beluga whales inhabit the Arctic and subarctic regions of Russia, Greenland, and North America. Some populations are strongly migratory, moving north in the spring and south in the fall as the ice forms in the Arctic. There are a few isolated populations that do not migrate in the spring, including those in the Cook Inlet, Alaska.
- Belugas are born dark gray. They turn white as they mature, taking three to eight years to reach their adult coloration. Adult beluga whales can grow up to 16 feet long. Beluga whales do not have dorsal fins. Dorsal fins would be a major hindrance during the winter when they live in the loose pack ice of the Arctic.
- Beluga whales live for 35-50 years. They are prey to killer whales and polar bears. They also can die when entrapped by ice. Some beluga whale populations have been greatly reduced as a result of hunting practices.
- In October 2008, NMFS issued a final determination to list a Distinct Population Segment of the beluga whale, *Delphinapterus leucas*, found in Cook Inlet, Alaska, as endangered under the Endangered Species Act. The Cook Inlet beluga whale is considered reproductively, genetically, and physically discrete from the four other known beluga populations in Alaska. The decline of Cook Inlet beluga whales was due to subsistence harvesting and other factors.

— NOAA Fact Sheets and Rule



NOAA Photo

TREATMENT OF SPECIES AS ENDANGERED OR THREATENED DUE TO SIMILARITY OF APPEARANCE: THE SHOVELNOSE STURGEON

- Section 4(e) of the Endangered Species Act authorizes the treatment of a species as endangered or threatened if (a) the species so closely resembles in appearance a listed species that law enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species; (b) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and (c) such treatment of an unlisted species will substantially facilitate the enforcement and further the purposes of the act. Species are infrequently treated as endangered or threatened due to similarity of appearance.
- In September 2010, the U.S. Fish and Wildlife Service determined that the shovelnose sturgeon (*Scaphirhynchus platyrhynchus*) would be treated as a threatened species under the Endangered Species Act due to its similarity of appearance to the endangered pallid sturgeon (*Scaphirhynchus albus*). The pallid sturgeon was listed as an endangered species in 1990. The shovelnose sturgeon and the endangered pallid sturgeon are difficult to differentiate in the wild and inhabit overlapping portions of various U.S. river basins. Commercial harvest of the shovelnose sturgeon has resulted in the documented take of pallid sturgeon where the two species coexist and is a threat to the pallid sturgeon.
- Section 9 of the Endangered Species Act prohibits the “take” of endangered or threatened species except where authorized by permit or special rule. By rule issued in September 2010, the U.S. Fish and Wildlife Service has prohibited the take of any shovelnose sturgeon, shovelnose–pallid sturgeon hybrids, or their roe when associated with or related to a commercial fishing activity in those portions of its range that commonly overlap with the range of the endangered pallid sturgeon. This includes portions of the Missouri, Mississippi, Platte, Kansas, Yellowstone, and Atchafalaya Rivers.

— FWS Fact Sheets and Rule



Pallid Sturgeon
FWS Photo Courtesy of Nebraska Game and Parks Commission

Alaska argued that NMFS had failed to comply with applicable procedural requirements. Escopeta challenged the modeling employed by NMFS and argued that existing regulatory mechanisms are sufficient to protect the DPS. On cross-motions for summary judgment, the court granted the U.S. motion in its entirety, finding that NMFS had complied with all procedural and substantive requirements of the ESA and rationally considered the ESA listing factors based on the best available scientific data.

Division attorneys had similar success in *Dow Agrosciences, L.L.C. v. NMFS*. In 2008, NMFS issued a biological opinion under ESA section 7 addressing the effects of the pesticides chlorpyrifos, diazinon, and malathion on 27 species of Pacific salmon in the Puget Sound area. The biological opinion concluded that EPA's registration of these pesticides is likely to jeopardize the continued existence of 26 of these species and destroy or adversely modify their designated critical habitat. Accordingly, it included a reasonable and prudent alternative which required, among other things, changes in pesticide labeling to implement larger buffers between the application of these pesticides and salmon habitat. This biological opinion was the first ever to address the effects of pesticides on ESA-listed salmon. A group of pesticide manufacturers led by Dow Agrosciences challenged virtually every aspect of the biological opinion. On extensive cross-motions for summary judgment, the district court ruled in favor of the United States, upholding NMFS's biological opinion against all challenges.

Similarly, in *Illinois Commercial Fishing Ass'n v. Salazar*, plaintiff, a commercial-fishing trade organization, sued to set aside protections conferred upon the shovelnose sturgeon under the ESA's "similarity of appearance" provision to benefit the look-alike endangered pallid sturgeon. FWS found that commercial fishing of the shovelnose sturgeon presents a significant impediment to the survival and recovery of the pallid sturgeon and issued a rule under the ESA prohibiting commercial shovelnose sturgeon fishing in areas where the two species overlap. On cross-motions for summary judgment, the district court entered judgment in favor of the United States on all claims, finding the FWS's rule to be well-supported by the administrative record.

Upholding the Constitutionality of Actions Directed by Congress for Endangered Species

In March 2012, in the case of *Alliance for the Wild Rockies v. Salazar*, the Ninth Circuit rejected a constitutional challenge to an appropriations rider that required the Department of the Interior to reissue a rule removing the protections of the ESA from gray wolves in the Northern Rocky Mountain area outside of Wyoming. The court of appeals found that the rider directing reissuance of the rule "without regard to any other provision of statute or regulation that applies to issuance of such rule" effectively amended underlying law, and thus did not violate the constitutional Separation of Powers by directing a court to make particular findings under existing law. The court also found no constitutional problem with the fact that the rider also barred judicial review of the delisting rule's reissuance.



Northern Rocky Mountain Gray Wolf
FWS Photo by C. Niemeyer

Successful Implementation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The United States is a signatory to CITES, a multilateral treaty that aims to protect wildlife that is vulnerable to or adversely affected by trade, by regulating trade in species that are listed in its three appendices. The treaty ensures that trade is regulated and sustainable by way of standardized import and export permits. Species threatened with extinction are listed in Appendix I, the most protective of the CITES appendices, and may be traded only in exceptional circumstances. Congress has charged the Department of the Interior, through FWS, with enforcement of CITES. Among other duties, FWS performs the functions of the CITES Management Authority and Scientific Authority for the United States. This authority includes the review of all applications for import of CITES species and specimens. Effective implementation of this import permitting program is a cornerstone to CITES implementation. The ESA is the U.S. domestic law that implements CITES.



**African
Elephant**

**FWS Photo by
John & Karen
Hollingsworth**

In fiscal year 2012, ENRD attorneys achieved favorable results in CITES cases, thereby allowing effective implementation of its protections. For example, in *Lawrence Franks v. Salazar*, plaintiffs challenged FWS's denial of their trophy-import permit applications for tourist-hunted African elephants taken in Mozambique. FWS had concluded that it could not make the requisite findings under the ESA special rule for African elephants or non-detriment under CITES because, despite having made repeated requests to the Government of Mozambique over the course of several years, it never received adequate information on the status of the species in Mozambique, the country's management and protection of the species, and the benefits of sport hunting to the species. The district court granted the U.S. motion for summary judgment in its entirety, rejecting all of plaintiffs' claims under the U.S. Constitution, CITES, the Federal Register Act, and the ESA.



Markhor

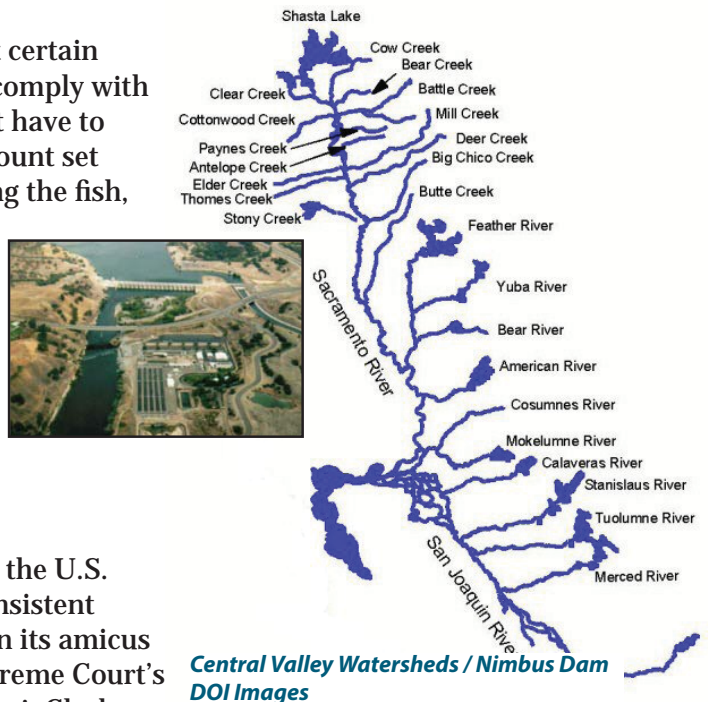
**FWS Photo by
Rich Lowell**

Similarly, *Conservation Force v. Salazar* involved plaintiffs' applications to FWS related to trophy-import permits for the markhor, a wild goat species that lives in the rugged mountainous areas of Afghanistan, India, Pakistan, Turkmenistan, and Uzbekistan. In a series of rulings, the district court rejected plaintiffs' challenges to FWS's handling of these permit applications, including rejecting plaintiffs' claims of Due Process violations under the U.S. Constitution. In so holding, the court found that plaintiffs did not have a constitutionally protected property-right interest in the import of markhor trophies and that the strict permitting requirements of CITES and the ESA are the least restrictive means to promote the government's compelling interest in protecting imperiled species.

Defending Interior's Water-Use Determinations for the Central Valley Project

In March 2012, in *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior*, the Ninth Circuit affirmed a district court ruling that Interior had properly accounted for certain releases of Central Valley Project (CVP) water from the Nimbus and New Melones Reservoirs. (The CVP is a system of canals, dams, and reservoirs that divert water for agricultural use in California's Central Valley.) The court unanimously found that certain Central Valley water authorities had standing to challenge Interior's 2004 accounting decisions. On the merits, the

majority upheld Interior’s determination that certain CVP releases made in June 2004 in order to comply with California water-quality requirements did not have to be charged against the 800,000 acre-feet account set aside for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by the Central Valley Project Improvement Act and for the secondary purpose of meeting water-quality and endangered-species requirements.



Determining the Navigability of Waters

In *PPL Montana, L.L.C. v. State of Montana*, the U.S. Supreme Court issued a 9-0 decision that, consistent with the position taken by the United States in its amicus brief, reversed and remanded a Montana Supreme Court’s decision. The state court held that the Missouri, Clark Fork, and Madison Rivers were navigable for the purposes of determining title at statehood such that the state acquired ownership of the riverbeds under the Equal Footing doctrine. The Division assisted the Department’s Office of the Solicitor General in filing the amicus brief in this case. The United States was interested in this case because it owns the beds of waterways adjacent to federal lands where the waters were nonnavigable for title purposes at statehood and because the scope of its regulatory authority under certain statutes, including the CWA and the Rivers and Harbors Act, is based in part on waters being navigable for purposes of commerce. The Court rejected the Montana court’s failure to consider rivers on a segment-by-segment basis to assess whether the segment of the river under which the riverbed in dispute lies is navigable or not. The Court concluded that the fact that a river segment had to be circumvented by portaging would generally be sufficient to establish that it was nonnavigable for title purposes. It contrasted this with the “doctrinally distinct” question of navigability for purposes of determining the scope of federal regulatory authority, which may exist on waterways where portages enabled goods to be transported interstate on the waters in question.

Defending NMFS Management of Ocean Fisheries

The Magnuson-Stevens Fishery Conservation and Management Act and other related statutes charge NMFS with the task of managing ocean commercial fishing to provide for conservation and sustainable fishing while, at the same time, optimizing fishing yield. In fiscal year 2012, ENRD again successfully defended various fishery management actions necessary to meet both of these objectives. One such case was the Division’s successful defense of a fishery management plan governing groundfish fisheries on the Pacific coast known as Amendment 20 to the Pacific Coast Groundfish Fishery Management Plan. This plan applied a catch-shares/limited-access privileges management approach for the first time to this fishery. The approach was designed to tighten restrictions on fishing for commercial groundfish in an effort to end overfishing and rebuild stocks under the strict deadlines set by Congress. A variety of groups representing diverse interests challenged the agency’s adoption of the amendment in *Pacific Coast Fed’n of*

Fishermen's Ass'ns v. Locke. The Division obtained summary judgment for NMFS on all issues, and that judgment was upheld by the Ninth Circuit in September 2012.

In *San Joaquin River Group Auth. v. NMFS*, plaintiff, an association of upstream water interests on the San Joaquin River in California, challenged NMFS's 2011 Pacific Salmon Fishery regulations. The association claimed that the measures were not protective enough of Sacramento River fall-run Chinook salmon (SRFC), a stock whose 2010 status had triggered an overfishing concern under the Pacific Fishery Management Plan. Two key issues were whether the forecasting tool used to estimate SRFC abundance was accurate and whether the fishing measures struck the appropriate balance between long-term sustainability and harvest goals. After summary judgment briefing and argument, the district court granted judgment in favor of NMFS on all issues, allowing the regulations to take effect.

The Division had similar success in *Charter Operators of Alaska v. Locke*, a challenge to NOAA's regulations 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 regulations violate the Northern Pacific Halibut Act of 1982 and the Magnuson-Stevens Act and sought to enjoin them. The regulations were intended to reduce pressure on the halibut fishery to ensure a sustainable fishery for the future. ENRD obtained a favorable summary judgment ruling, thereby allowing the regulations to take effect and provide needed protections for halibut.

ENRD also defended the NMFS action at issue in *Kahea and Food & Water Watch v. NMFS*. Plaintiffs challenged a Special Coral Reef Ecosystem Fishing Permit issued by NMFS to Kona Blue Water Farms (KBWF) pursuant to the Magnuson-Stevens Act. The permit allowed a pilot project for tuna aquaculture. In a ruling of first impression, the district court held that NMFS properly characterized KBWF's project as "fishing" under the act and that it acted appropriately in issuing a permit.

There are more than 90 species of groundfish managed under the Pacific Fishery Management Council's Pacific Coast Groundfish Fishery Management Plan and under the Magnuson-Stevens Fishery Conservation Act and other federal laws.

— NOAA Website

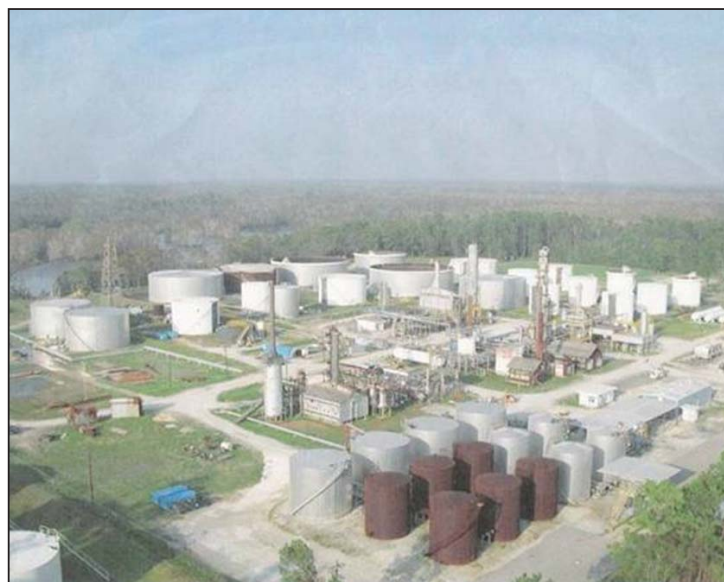


ENFORCING THE NATION'S CRIMINAL POLLUTION AND WILDLIFE LAWS

From January 21, 2009 through September 30, 2012, the Division concluded criminal cases against 227 individuals and 77 corporate defendants, obtaining over 134 years of confinement and more than \$252 million in criminal fines, restitution, and other monetary relief.

Keeping Our Nation's Air Clean

Between 2005 and 2007, the Pelican Refining Company, L.L.C., of Lake Charles, Louisiana, operated its refinery without properly functioning pollution prevention equipment as required by its CAA Title V permit. As a result, pollutants including benzene, toluene, ethyl benzene, xylene, and hydrogen sulfide were illegally released into the atmosphere through Pelican's main refinery stack, leaks at pipes and joints, the barge loading dock, and tanks with roofs that were improperly certified and fitted. Pelican pleaded guilty to two CAA felony violations and an obstruction-of-justice charge for submitting materially false deviation reports to the Louisiana Department of Environmental Quality, the agency that administers the federal CAA in Louisiana. Pelican was sentenced to pay a \$12 million penalty, which includes a \$10 million criminal fine and \$2 million in community service payments that will go toward various environmental projects in Louisiana, including air pollution monitoring.



Pelican Refining Co.

Pelican also was directed to implement an environmental compliance plan and complete a five-year term of probation. Pelican Vice President Byron Hamilton pleaded guilty to two CAA negligent endangerment violations and was sentenced to serve one day of incarceration, complete a one-year term of supervised release, and pay a \$5,000 fine. Pelican Manager Mike LeBlue pleaded guilty to one CAA negligent endangerment violation and was sentenced to serve one day of incarceration, followed by 90 days of home confinement and a one-year term of supervised release, and to pay a \$4,000 fine.

Safeguarding America's Waters

William Barry Freedman and his company, Freedman Farms, Inc., operated a 4,800-head hog farm in Columbus County, North Carolina. The farm is a “Concentrated Animal Feeding



Freedman Farms, Inc., Lagoon with Hog Waste

Operation” (CAFO), which is a livestock or poultry animal feeding operation that meets 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 or 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.

In December 2007, witnesses observed hog waste in the stream that led from the farm, known as Browder’s Branch. Investigators determined that more than 332,000 gallons of hog waste had been discharged from the CAFO into Browder’s Branch over a five-day period. State officials recovered only 169,000 gallons of the waste from the stream. Freedman falsely stated in documents that he properly disposed of the some of the waste. He and Freedman Farms were indicted for CWA violations, false statements, and obstruction of justice. Before the completion of the trial, the company pleaded guilty to a felony CWA charge and Freedman pleaded guilty to a misdemeanor CWA charge. The company was sentenced to pay a \$500,000 fine and \$925,000 in restitution. The company also was sentenced to make a \$75,000 community service payment to the Southern Environmental Enforcement Network and implement an environmental compliance plan to include an annual environmental training program. Freedman was sentenced to serve six months of incarceration followed by six months of home confinement.



Assistant Attorney General Ignacia S. Moreno announces the plea by Freedman Farms, Inc.

In December 2011, the Sixth Circuit affirmed the conviction of Charles D. Long, a plant manager at a waste management and treatment company near Detroit, Michigan. A jury convicted Long of violations of the CWA based on his bypassing the required treatment process and pumping untreated waste into the City of Detroit's sewer system. Among other things, the appellate court rejected Long's argument that the CWA is unconstitutionally vague. The Sixth Circuit also rejected his challenges to the jury instructions regarding the conspiracy, the sufficiency of the evidence, the admission of "other acts" evidence in this prosecution, and the prosecutor's remarks at closing argument.

Investigating the Deepwater Horizon Explosion, Fire, and Oil Spill in the Gulf of Mexico

During fiscal year 2012, the Department continued its criminal investigation of the catastrophic explosion, fire, and oil spill in the Gulf of Mexico that took place on April 20, 2010. Staffs from ENRD, the Department's Criminal Division, and the U.S. Attorney for the Eastern District of Louisiana participate in the Deepwater Horizon Task Force, which was formed in March 2011.

On November 14, 2012, the Department filed a 14-count information in the U.S. District Court for the Eastern District of Louisiana charging BP with 11 counts of felony manslaughter, one count of felony obstruction of Congress, and violations of the CWA and Migratory Bird Treaty Act in connection with the spill. BP agreed to plead guilty to all 14 criminal charges—admitting responsibility for the deaths of 11 people and the events that led to this unprecedented environmental catastrophe. The company also agreed to pay \$4 billion in fines and penalties. Under the terms of the agreement with BP, about \$2.4 billion of the criminal recovery funds will be dedicated to environmental restoration, preservation, and conservation efforts throughout this region—including barrier-island creation and river-diversion projects in Louisiana. An additional \$350 million will aid in the development of state-of-the-art oil spill prevention and response technologies, education, research, and training. And more than \$1 billion will go to the U.S. Coast Guard's Oil Spill Liability Trust Fund, to be available for cleanup and compensation for those affected by oil spills in the Gulf and throughout the United States. As part of its guilty plea, BP will retain a monitor for four years, who will oversee safety, risk management, and equipment maintenance in relation to deepwater drilling in the Gulf, as well as an independent auditor who will conduct annual reviews to ensure compliance with the terms of this agreement. The company will also hire an ethics monitor to improve its code of conduct and foster robust cooperation with the government.

In addition to the charges filed against BP, a federal grand jury in November 2012 returned an indictment charging the two highest-ranking BP supervisors who were on board the Deepwater Horizon oil rig on the

"The \$4 billion in penalties and fines is the single largest criminal resolution in the history of the United States and constitutes a major achievement toward fulfilling a promise that the Justice Department made nearly two years ago to respond to the consequences of this epic environmental disaster and seek justice on behalf of its victims. We specifically structured this resolution to ensure that more than half of the proceeds directly benefit the Gulf Coast region so that residents can continue to recover and rebuild."

— Attorney General Eric Holder
*BP Exploration and Production, Inc.,
Plea Announcement*

day of the explosion with 23 criminal counts—including 11 counts of seaman’s manslaughter, 11 counts of involuntary manslaughter, and alleged violations of the CWA. The grand jury also charged a former BP executive who served as a deputy incident commander and BP’s second-highest ranking representative at Unified Command during the spill response with hiding information from Congress and allegedly lying to law enforcement officials.

The task force investigation remains ongoing.

Protecting the Integrity of Pesticide Distribution, Sale, and Use Regulations

Scotts Miracle-Gro, the world’s largest marketer of branded consumer lawn and garden products, pleaded guilty to 11 violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, EPA must register pesticides. Registration assures that pesticides will be properly labeled and that, if used in accordance with specifications, pesticides will not cause unreasonable harm to the environment. Scotts’ federal registration manager submitted false documents to EPA and state regulators in an effort to deceive them into believing that numerous pesticides were registered with EPA. Accordingly, Scotts admitted to falsifying pesticide registration documents, distributing pesticides with misleading and unapproved labels, and distributing unregistered pesticides. Scotts also admitted to illegally applying insecticides to its wild bird food products. Specifically, Scotts applied the pesticides Actellic 5E and Storcide II to 70 million units of its bird food products to protect its bird food from insect infestation during storage. This occurred despite the fact that the labels on containers of Storcide II state that the pesticide is extremely toxic to fish, birds, and other wildlife. Scotts sold this bird food for two years and continued selling it for six months after company employees specifically warned Scotts’ management of the dangers of these pesticides. Scotts was sentenced to pay a \$4 million fine and a \$500,000 community service payment to organizations that protect bird habitats. Sheila Kendrick, Scotts’ federal registration manager, pleaded guilty to FIFRA and false-statement violations and was sentenced to 90 days of incarceration.

“As the world’s largest marketer of residential-use pesticides, Scotts has a special obligation to make certain that it observes the laws governing the sale and use of its products. For having failed to do so, Scotts has been sentenced to pay the largest fine in the history of FIFRA enforcement. The Department of Justice will continue to work with EPA to assure that pesticides applied in homes and on lawns and food are sold and used in compliance with the laws intended to assure their safety.”



Photo by Michael Ploujnikov

— Ignacia S. Moreno
Scotts Miracle-Gro Plea
Agreement Press Release

Reducing Pollution from Ocean-Going Vessels

In fiscal year 2012, the penalties imposed in vessel pollution cases prosecuted by the Division totaled nearly \$10 million and responsible maritime officials were sentenced to more than 37 months of confinement. This brought the penalties imposed as a result of ENRD's Vessel Pollution Initiative, which began in the late 1990s, to more than \$330 million in criminal fines and more than 26 years of confinement. The Division's most recent prosecutions of deliberate violations include the representative cases below.

Alejandro Gonzalez, a ship surveyor based in Miami, Florida, was responsible for inspecting and certifying the safety and seaworthiness of merchant vessels on behalf of foreign countries. In 2008, U.S. Coast Guard inspectors in San Juan, Puerto Rico, found that the *M/V Cala Galdana* was taking on water and requested records detailing the ship's last dry-dock inspection. Gonzalez falsely told U.S. Coast Guard officials that the vessel had undergone maintenance work that had never occurred. Gonzales also issued a false safety certificate to another ship, the *M/V Cosette*, without conducting a proper survey. When the ship entered New York Harbor in 2009, Coast Guard inspectors discovered exhaust and fuel pouring into the engine room, endangering the safety of the crew and the ship. A jury convicted Gonzalez of three false-statement violations and obstruction of justice. He was sentenced to serve 21 months of incarceration, followed by a one-year term of supervised release.



M/V Cosette

In September 2011, the U.S. Coast Guard conducted an inspection of the *M/V Gaurav Prem* in the Port of Mobile, Alabama. During the inspection, crew members told inspectors that senior officers had caused the overboard discharge of oily bilge waste from the vessel many times during the voyage from South Korea to Mobile. Such discharges, although illegal, are required to be recorded in the vessel's Oil Record Book, but they were not. On May 30, 2012, Target Ship Management Pte., Ltd., *M/V Gaurav Prem*'s operating company, pleaded guilty to violating the Act to Prevent Pollution from Ships (APPS) by failing to maintain an accurate Oil Record Book. Target was sentenced to pay a \$1 million fine and to make a \$200,000 community service payment to the National Fish and Wildlife Foundation. The company also must complete a three-year term of probation and implement an environmental compliance plan. The chief engineer and second engineer of the vessel also pleaded guilty, were sentenced to probation, and were ordered to leave the country. In a related case, the ship's captain, Prastana Taohim, was convicted by a jury of two counts of obstruction of justice. The convictions stemmed from his ordering crew members to throw hundreds of plastic pipes

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 2012 have totaled more than \$51.3 million, and responsible maritime officials have been sentenced to more than 77 months of confinement.



Pipes Being Discharged Overboard

overboard. These pipes had been used to fumigate a grain shipment with insecticide. Captain Taohim then ordered that the ship's Garbage Record Book be falsified to conceal the disposal. On August 15, 2012, Captain Taohim was sentenced to serve a year-and-a-day of incarceration, followed by three years of supervised release.

Guilty pleas were entered in seven additional cases involving deliberate violations by vessel operators and crew members: *United States v. Giuseppe Bottiglieri Shipping Co., S.P.A.*; *United States v. Rudolf Hofer*; *United States v. Vano*; *United States v. Koeje Marine Co.,*

Ltd.; *United States v. Ilios Shipping Co., S.A.*; *United States v. Efploia Shipping Co., S.A.*; and *United States v. A.E. Nomikos Shipping*. These companies and individuals were sentenced to pay a total of \$5.9 million in fines, \$1.7 million in community service payments, and \$200,000 toward environmental compliance plans, and to serve a total of four months of incarceration, with each serving a term of probation, for crimes including conspiracy, false statements, obstruction of justice, and Oil Record Book violations under APPS.

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. Division prosecutions in fiscal year 2012 included the following cases:

— From 2009 to 2011, Enrique Gomez De Molina illegally imported wildlife and wildlife parts from Southeast Asia to the United States in violation of the Lacey Act. Among the illegal shipments De Molina procured were cobras, pangolins, hornbills, babirusa (a species of pig), orangutan skulls, Java kingfishers, and slow lores (a primate), none of which were properly declared when imported or, if allowed for export, accompanied by the required CITES permit. De Molina incorporated the various wildlife parts into taxidermy pieces at his studio in Miami,

“Wildlife trafficking has become more organized, more lucrative, more widespread, and more dangerous than ever before. . . . By some estimates, the black market in wildlife is rivaled in size only by trade in illegal arms and drugs. Today, ivory sells for nearly \$1,000 per pound. Rhino horns are literally worth their weight in gold, \$30,000 per pound.”

— U.S. Secretary of State Hillary Rodham Clinton
November 8, 2012 Remarks at the Partnership Meeting on Wildlife Trafficking

EXAMPLES OF DE MOLINA TAXIDERMY INCORPORATING WILDLIFE PARTS



SOME DE MOLINA TRAFFICKED WILDLIFE SHOWN IN THEIR NATURAL HABITATS



L to R:
Pangolin
(Photo Credit: Sandip Kumar)
Babirusa
Slow Loris
Java Kingfisher
(Photo Credit: Lip Kee Yap)



Florida, and offered to sell the pieces through galleries and on the Internet for prices up to \$80,000. De Molina pleaded guilty to a Lacey Act violation for smuggling wildlife and was sentenced to serve 20 months of incarceration, followed by a one-year term of supervised release, to pay a \$6,000 fine, and to forfeit all of the smuggled wildlife in his possession.

— Black coral colonies serve as habitat for numerous aquatic species. The coral itself is slow growing, taking hundreds or thousands of years to develop. Black coral is especially prized by some for use in jewelry and art. It can be polished to a high sheen, worked into artistic sculptures, and inlaid. Because of its scarcity, black coral is subject to strict trade regulations under CITES. GEM Manufacturing, L.L.C. (GEM), a company incorporated in the U.S. Virgin Islands, frequently purchased black coral from a Taiwanese company, Peng Chia Enterprise Co., Ltd., for use in its high-end jewelry and sculpture. None of the shipments of black coral from Peng Chia to GEM complied with CITES trade regulations. The shipments to the United States violated the Lacey Act because the boxes of wildlife were falsely labeled in international commerce. In January 2009, 10 boxes of black coral labeled “plastic of [sic] craft work” were shipped by Peng Chia to GEM. For this illegal importation and for many other illegal shipments, GEM pleaded guilty to violating the Lacey Act and was sentenced to pay a criminal fine of \$1.8 million, to be apportioned between the Lacey Act Reward Fund and the National Oceanic and Atmospheric Administration Asset Forfeiture Fund. GEM also was required to pay \$500,000 in community service payments for projects to study and protect black coral and to implement an auditing, tracking, and inventory control program during its three years of probation. The sanction also included a criminal forfeiture of jewelry and raw black coral that exceeded \$2.17 million in value.



Black corals, which are named for their skeletons, come in many colors.

NOAA Photo Courtesy of Texas A&M University

Gem Corp. Black Coral Bracelet



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

In fiscal year 2012, the Division continued to partner with state and local agencies and working groups to ensure that pollution and wildlife prosecutions are given the attention and importance they deserve. We developed and participated in major training events and meetings, including the following:

- Division attorneys provided environmental crimes training to U.S. Coast Guard personnel, EPA Criminal Investigation Division agents, Wildlife Refuge officers, FWS agents, Occupational Safety and Health Administration officers, regional associations such as the Northeastern Environmental Enforcement Project and the Western States Project, Assistant United States Attorneys, academics, and the judiciary.
- ENRD worked closely with United States Attorneys' personnel on environmental task forces in Nebraska, the Southern District of Ohio, the Southern District of Texas, the Eastern and Western Districts of Virginia, the District of the District of Columbia, and elsewhere.
- The Division co-hosted the biannual meeting of the Environmental Crimes Policy Committee, which is comprised of Division prosecutors and Assistant United States Attorneys, and provided basic and advanced environmental crimes training to Assistant United States Attorneys and agency counsel in its week-long Environmental Crimes Seminar at the National Advocacy Center.
- The Division also participated in and presented at meetings of the Environmental Issues Working Group of the Attorney General's Advisory Committee.



Deepwater Horizon Incident and Aftermath
NOAA Photos

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

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

The Division continued to defend cases arising from the Deepwater Horizon explosion, fire, and oil spill, which occurred in the Gulf of Mexico in April 2010. 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. Cases resolved in fiscal year 2012 include the following district court cases:

- In *Center for Biological Diversity v. Salazar*, the district court dismissed nearly all of plaintiff's claims in 2011, including challenges to the Department of the Interior's policy of using categorical exclusion reviews under NEPA when approving exploration, development, and production plans, and drilling permits. The court also dismissed claims relating to several planned lease sales as constitutionally and prudentially unripe for decision. In August 2012, the court dismissed all remaining claims—those directed at Lease Sale 213—pursuant to the parties' stipulation of dismissal.
- In *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation & Enforcement*, plaintiff challenged oil and gas lease sales for deepwater wells in the Gulf of Mexico, alleging violations of NEPA, the ESA, and the Administrative Procedure Act arising from the Department of the Interior's alleged failure to modify offshore oil and gas leasing operations, policies, and practices following the Deepwater Horizon explosion, fire, and oil spill. The U.S. District Court for the Southern District of Alabama granted the U.S. motion to dismiss all claims other than those relating to Lease Sale 213 in fiscal year 2011. The court granted summary judgment for Interior on those remaining claims in May 2012.
- In *Oceana v. Bureau of Ocean Energy Mgmt., Regulation & Enforcement*, plaintiffs challenged Lease Sale 218, which is the first Outer Continental Shelf lease sale to be conducted in the Gulf of Mexico following the Deepwater Horizon explosion, fire, and oil spill. Plaintiffs voluntarily dismissed their NEPA claims with prejudice, and their ESA claims without prejudice, in September 2012.

In fiscal year 2012, two appellate courts issued opinions in Deepwater Horizon defensive cases handled by ENRD. In May 2012, the Fifth Circuit dismissed 12 petitions for review for failure to exhaust administrative remedies and four others as moot in *Gulf Restoration Network v. Salazar* and *Center for Biological Diversity v. Salazar*. These petitions challenged the Department of the Interior's approval of lessee-proposed exploration and development plans in the days shortly before and after the Deepwater Horizon explosion, fire, and oil spill. The petitions challenged the use of categorical exclusions under NEPA, and alleged that Interior should have considered new information regarding the Deepwater Horizon explosion, fire, and oil spill. However, petitioners did not raise any of their claims before the agency as it considered the plans, despite a requirement in the Outer Continental Shelf Lands Act that judicial review of plan approval is available only to those who participate in the administrative proceedings challenged in court. The court found that petitioners had provided no basis for excusing their failures to exhaust.

In June 2012, the Eleventh Circuit denied consolidated petitions for review of Interior's approval of an exploration plan covering the drilling of up to 10 exploratory wells in a deepwater area of the Gulf of Mexico in *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.* The court rejected several challenges to the environmental assessment developed for the action under NEPA, emphasizing that a reviewing court must be "extremely deferential 'when an agency's decision rests on the evaluation of complex scientific data within the agency's technical expertise.'" The court found that Interior had adequately considered the risks and potential impacts of oil spills and adequately considered site-specific data and impacts in concluding that there would be no significant impacts on the environment from the drilling. The court found that Interior was not required to wait until environmental studies of the effects of the Deepwater Horizon explosion, fire, and oil spill were complete, but could act on the basis of existing information. The court also rejected a claim that Interior could not approve the exploration plan until it had completed reinitiated consultations under the ESA with NMFS and FWS which it had initiated after the Deepwater Horizon explosion, fire, and oil spill occurred. The court found that Interior could rely on the pre-Deepwater Horizon biological opinions, which had not been withdrawn, in conjunction with more recent studies and the fact that Interior retained authority under the Outer Continental Shelf Lands Act to suspend activities if it determined during the consultation that such action was necessary to avoid jeopardy to threatened or endangered species.

Upholding Administrative Actions Related to Climate Change

Over the past several years, EPA has developed a regulatory program under the CAA to regulate greenhouse gas emissions that contribute to global climate change. In one of the most significant environmental regulatory decisions of the past decade, a unanimous panel of the D.C. Circuit in *Coalition for Responsible Regulation v. EPA* upheld EPA's four principal greenhouse gas-related regulatory actions. Through a series of regulations, EPA had (1) found that emissions of greenhouse gases from motor vehicles may reasonably be expected to endanger public health and welfare (known as the "endangerment finding"); (2) set standards for greenhouse gas emissions from motor vehicles; (3) specified how, and to what extent, regulation of greenhouse gas emissions from motor vehicles would trigger stationary source CAA permit requirements; and (4) established the measures that states and EPA must take to effectuate such stationary source requirements. Among other things, the court held that: (1) EPA had considered the proper factors and employed an appropriate legal standard in making the endangerment finding; (2) EPA had articulated a thorough and reasonable scientific and

KEY FEDERAL CLEAN AIR ACT REGULATORY INITIATIVES CHALLENGED IN THE D.C. CIRCUIT

“But for the reasons set forth below, we conclude: 1) the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious; 2) EPA’s interpretation of the governing [Clean Air Act] provisions is unambiguously correct; and 3) no petitioner has standing to challenge the Timing and Tailoring Rules. We thus dismiss for lack of jurisdiction all petitions for review of the Timing and Tailoring Rules, and deny the remainder of the petitions.”

— Decision in *Coalition for Responsible Regulation v. Environmental Protection Agency*, 684 F.3d 102, 113-14 (D.C. Cir.), *reh’g en banc denied*, 2012 U.S. App. LEXIS 25997, 26313 (D.C. Cir. 2012).

Greenhouse Gas Endangerment and Cause or Contribute Finding (the “Endangerment Finding”)

December 7, 2009

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

Standards to Reduce Greenhouse Gas Emissions and Fuel Use for New Passenger Cars and Light-Duty Trucks (the “Tailpipe Rule”)

April 1, 2010

EPA and the National Highway Traffic Safety Administration announced a joint final

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

Timing Rule Establishing When Stationary Source Permitting Takes Effect (the “Timing Rule”)

March 29, 2010

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

Tailoring Rule for Regulation of Greenhouse Gas Emissions from Large Stationary Sources (the “Tailoring Rule”)

May 13, 2010

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

technical basis for the endangerment finding; (3) EPA had acted consistent with the statute in determining that it was required to issue emission standards for new motor vehicles in light of the endangerment finding, and costs and other implications of stationary source regulation of greenhouse gases were irrelevant to this duty; (4) at least some newly regulated petitioners could challenge how, and to what extent, regulation of greenhouse gas emissions from motor vehicles would trigger stationary source CAA permit requirements, but on the merits, the statute unambiguously supports the longstanding view reflected in those regulations, i.e., that emissions of any pollutant regulated under the act can trigger stationary source CAA permit requirements; and (5) no one had standing to bring their claims challenging EPA's stationary source CAA permit requirements, primarily because the phased approach to greenhouse gas permitting reflected in EPA's regulations eased, rather than tightened, the regulatory burden facing the petitioners.

At the same time, the Division defended against efforts in two cases to force the federal government to do even more to address global climate change. In *Alec L. v. Jackson*, plaintiffs brought an unusual and broad-based challenge seeking to force seven federal agencies to take action with respect to climate change under a public-trust theory. We were successful in persuading the district court to dismiss the case on jurisdictional grounds. In *Center for Biological Diversity v. EPA*, plaintiffs alleged that EPA had unreasonably delayed in responding to rulemaking petitions and in making a finding under the CAA that greenhouse gas emissions from aircraft engines cause or contribute to air pollution endangering public health or welfare. In March 2012, the district court concluded that EPA had not unreasonably delayed in making such a finding, and denied plaintiffs' motion for summary judgment.

Defending EPA's Air Quality Standards Revisions and Implementation Plans

In two separate cases that the Division litigated during the past fiscal year, the D.C. Circuit upheld EPA's rules revising National Ambient Air Quality Standards (NAAQS) against industry challenges that alleged the standards were too stringent and unsupported by science. In *American Petroleum Inst. v. EPA*, a unanimous panel rejected a challenge to EPA's decision to update and strengthen the NAAQS for nitrogen dioxide. In *National Environmental Dev. Association's Clean Air Project v. EPA*, a separate unanimous panel upheld EPA's revised NAAQS for SO₂. Both cases reaffirm important precedent regarding the significant deference owed to EPA in making technical and scientific judgments.

Protecting Water Quality in the Everglades

Efforts to restore water quality in the Florida Everglades took a major step forward in 2012. After months of inter-governmental collaboration and negotiation, the Florida Department of Environmental

"Today's action is the culmination of an intensive seven-month process of discussions among EPA, the Florida Department of Environmental Protection, the South Florida Water Management District, and other key federal agencies, including Interior and the Department of the Army, on the plan to clean up the Everglades."

— EPA Region IV Administrator Gwen Keyes Fleming
Announcing the June 13, 2012 Approval of Florida's Submission to Address Water Quality Requirements in the Everglades

Protection issued a CWA National Pollutant Discharge Elimination System permit requiring the South Florida Water Management District to implement an \$880 million suite of projects. Issuance of the permit was at issue in *Miccosukee Tribe v. EPA*, a case handled by ENRD. These projects 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, as also required under a consent decree in *United States v. South Florida Water Mgmt. Dist.* This activity is a critical component of one of the largest ecosystem restoration efforts in human history—the Comprehensive Everglades Restoration Plan, which was approved by Congress in 2000.

Defending Water Quality Criteria for Nutrient Pollution in Florida

In *Florida Wildlife Fed'n v. EPA*, a set of 13 consolidated cases, the Division was largely successful in defending EPA’s numeric water quality criteria for nutrients for most Florida waters. EPA made a determination in January 2009 that new or revised water-quality standards—in the form of numeric nutrient criteria—are necessary for Florida to meet the requirements of the CWA, and then promulgated such numeric



Algae Covered Lake

EPA Photo

NUTRIENT POLLUTION

- Nutrient pollution is caused by excess nitrogen and phosphorus in the air and water.
- Too much nitrogen and phosphorus in the water causes algae to grow faster than ecosystems can handle. Significant increases in algae harm water quality, food resources, and habitats, and decrease the oxygen that fish and other aquatic life need to survive.
- Excess nitrogen in the atmosphere can produce pollutants such as ammonia and ozone, which can impair our ability to breathe, limit visibility, and alter plant growth.
- The primary sources of nutrient pollution are below.
- Agriculture: Animal manure, excess fertilizer applied to crops and fields, and soil erosion make agriculture one of the largest sources of nitrogen and phosphorus pollution in the country.
- Stormwater: When precipitation falls on cities and towns, it runs across hard surfaces—like rooftops, sidewalks, and roads—and carries pollutants, including nitrogen and phosphorus, into local waterways.
- Wastewater: Sewer and septic systems are responsible for treating large quantities of waste, and these systems do not always operate properly or remove enough nitrogen and phosphorus before discharging into waterways.
- Fossil Fuels: Electric power generation, industry, transportation, and agriculture have increased the amount of nitrogen in the air through use of fossil fuels.
- At Home: Fertilizers, yard and pet waste, and certain soaps and detergents contain nitrogen and phosphorus, and can contribute to nutrient pollution if not properly used or disposed of. The amount of hard surfaces and type of landscaping can also increase the runoff of nitrogen and phosphorus during wet weather events.

EPA Fact Sheets

nutrient criteria in November 2010. EPA's actions were challenged by both environmental and agriculture industry groups. The district court in Florida issued a mostly favorable opinion in February 2012. First, the court upheld EPA's determination of the need for numeric criteria. Second, the court upheld the criteria for lakes and springs and EPA's decision to adopt downstream protective values (DPVs), but found against EPA as to the stream criteria and DPVs for unimpaired lakes. The court, however, suggested that EPA could support the stream criteria with a more thorough explanation of whether the criteria do prevent a harmful imbalance of natural populations of aquatic flora and fauna.

Upholding Efforts to Deepen the Delaware River for Navigation

In *State of New Jersey Dep't of Environmental Protection v. United States Army Corps of Eng'rs*, the Third Circuit affirmed the judgments of two district courts upholding actions by the Corps in connection with a project to deepen the 102-mile shipping channel in the Delaware River. The State of New Jersey and a coalition of environmental groups led by the Delaware Riverkeeper Network alleged violations of NEPA, the Coastal Zone Management Act (CZMA), the CWA, and state water quality laws. The court upheld all aspects of the federal agency's actions. The court concluded that the Corps' NEPA analysis was procedurally and substantively adequate, the Corps' decision that it was not required to revisit its CZMA consistency determination was valid, and the Corps was statutorily exempt from the CWA's general requirements to obtain various state water-quality certifications and permits.

Defending the Corps' Permitting Decisions

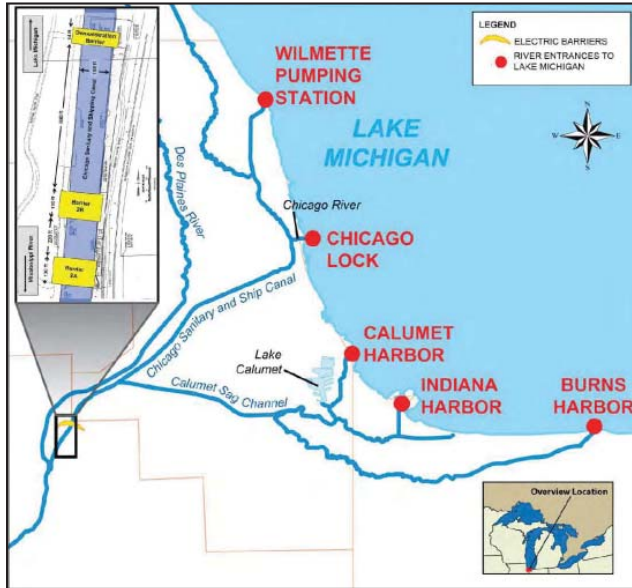
The Division handled litigation related to multiple decisions by the Corps to issue CWA section 404 permits authorizing the discharge of dredge and fill materials into various waters of the United States. Examples include *Sierra Club v. U.S. Army Corps of Eng'rs* (denial of a motion for preliminary injunction seeking to halt construction of Segment E of the Grand Parkway project near Houston, Texas); *Huron Mountain Club v. Corps of Eng'rs* (denying a motion for preliminary injunction seeking to enjoin defendant Kennecott Eagle Minerals Co. from further development or operation of the Eagle Mine, a nickel and copper mine beneath the Salmon Trout River in Marquette County, Michigan); *Charleston v. U.S. Army Corps of Eng'rs* (dismissal on ripeness and standing grounds of suit challenging a plan by South Carolina to put an intermodal rail yard on the former Charleston Naval Base); *Georgia River Network v U.S. Army Corps of Eng'rs* (grant of summary judgment on claims by environmental groups and Leon County, Georgia, challenging the construction of a 960-acre fishing lake on Tired Creek, a tributary of the Ochlocknee River in southern Georgia); *City of Dania Beach, Florida v. U.S. Army Corps of Eng'rs* (denial of a motion for preliminary injunction against a permit authorizing the discharge of dredge and fill materials with respect to the expansion of the southern runway at the Fort Lauderdale-Hollywood International Airport).

In the case of *Bd. of Mississippi Levee Comm'rs v. U.S. EPA*, ENRD also successfully defended EPA's decision to veto a Corps' permit under section 404(c) of the CWA. The Corps sought to build a major pumping station to reduce flooding in the Yazoo Backwater Area. The Board of Mississippi Levee Commissioners claimed that the pump project was exempt from certain requirements of the CWA, including section 404(c), because Congress approved it under section 404(r). To meet the requirements of section 404(r), a project must be "specifically authorized by Congress" and the EIS under NEPA for the project must be submitted to Congress prior to

project authorization or an appropriation of funds. The Fifth Circuit affirmed the district court, deferring to EPA's determination that section 404(r) did not apply because there was insufficient evidence in the record that an EIS for this project was provided to Congress.

Representing Federal Interests in Asian Carp Litigation

Invasive species are one of the greatest threats to the Great Lakes ecosystem. Asian carp, which can grow to five 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' multibillion-dollar fishery industry. In fiscal year 2012, 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



Electric Dispersal Barriers in the Chicago Area Waterway Designed to Prevent the Inter-basin Transfer of Fish Between the Mississippi River and Great Lakes Basins via the Chicago Sanitary and Ship Canal

Diagram Courtesy of the Asian Carp Regional Coordinating Committee

a way as to allow Asian carp to enter Lake Michigan. Plaintiffs sought a preliminary injunction, which the district court denied and the Seventh Circuit upheld. The appellate court held that the injunctive relief sought would only marginally decrease the likelihood of harm during the pendency of the litigation while imposing great costs on the government and the public. It concluded that any effort by the courts to intervene in the ongoing extensive interagency effort to stop the invasion of carp was unnecessary and might do more harm than good given the relative competency of the branches of government. Following affirmation by the Seventh Circuit of the denial of a preliminary injunction, the states filed a petition for a writ of certiorari in the U.S. Supreme Court. In February 2012, the Supreme Court denied certiorari.

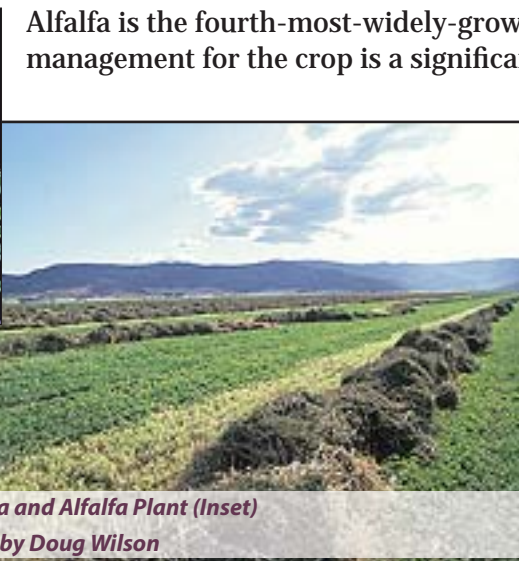


Asian Carp

Photo Courtesy of Asian Carp Regional Coordinating Committee

Defending the Animal and Plant Health Inspection Service's (APHIS's) Biotechnology Regulatory Program

The Animal and Plant Health Inspection Service of the U.S. Department of Agriculture regulates the nation's use and introduction of genetically engineered crops. In fiscal year 2012, the Division continued its defense of APHIS's biotechnology regulatory program with respect to several genetically engineered crops.



Field of Alfalfa and Alfalfa Plant (Inset)
USDA Photos by Doug Wilson

Alfalfa is the fourth-most-widely-grown crop in the United States, and weed management for the crop is a significant challenge. The case of *Center for Food Safety v. Vilsack* raised challenges to APHIS's deregulation of alfalfa that was genetically engineered to tolerate the herbicide known as "Roundup." The Division defended APHIS's interpretation of the limits of its regulatory authority under both the Plant Protection Act and the ESA as well as the sufficiency of its environmental impact disclosures. The district court issued a decision favorable to the United States on all counts.

"After conducting a thorough and transparent examination of alfalfa through a multi-alternative environmental impact statement and several public comment opportunities, APHIS has determined that Roundup Ready alfalfa is as safe as traditionally bred alfalfa."

— Agriculture Secretary Thomas Vilsack
January 27, 2011 Announcement of
Decision to Fully Deregulate Roundup
Ready Alfalfa

The Division also continued to defend APHIS in challenges to its decisions regarding sugar beets that also have been genetically modified to tolerate the same herbicide. Genetically modified sugar beets make up 95% of all sugar beets planted. In *Grant v. Vilsack* (Sugar Beets III) and *Center for Food Safety v. Vilsack* (Sugar Beets IV), ENRD defended APHIS from challenges brought by industry groups and environmental groups against its interim decision to partially deregulate the Roundup Ready sugar beet root crop production and to permit planting of the Roundup Ready sugar beet seed crop subject

to mandatory conditions while it prepared an EIS under NEPA regarding full deregulation of Roundup Ready sugar beets. In July 2012, APHIS issued its final regulatory determination on a petition for full deregulation of Roundup Ready sugar beets after preparing an EIS. The district court dismissed as moot all claims against the interim decision.

The Fish and Wildlife Service allows farming on national wildlife refuges, in some cases with genetically modified crops. ENRD successfully defended the FWS's decision to enter into Cooperative Farming Agreements with private parties on refuges in the Midwest Region that would allow genetically modified corn and soybeans to be grown. In *Center for Food Safety*

FARMING ON NATIONAL WILDLIFE REFUGE SYSTEM LANDS IN THE MIDWEST REGION

- For many years, the Fish and Wildlife Service has used row-crop farming as a tool in restoring native habitats, controlling noxious weeds, and providing food for migratory birds and resident wildlife.
- Its Midwest Region includes Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. Of the 54 national wildlife and 12 wetland management districts located in the Midwest Region, 31 are using row-crop farming as a method of managing wildlife habitat. In 2010, row crops were being raised on 20,418 acres, or 1.6% of the lands within the refuge system in the eight-state region.
- In April 2011, the Midwest Region issued a final environmental assessment allowing the continued use for five years of genetically modified, glyphosate-tolerant corn and soybeans on refuge lands for the purpose of habitat restoration.

FWS Fact Sheet

v. Salazar, the district court found that FWS had adequately evaluated the adverse impacts associated with the use of genetically modified crops on refuge land. The court also found that the FWS did not violate the National Refuge System Administration Act.

Supporting Investment in Transportation Infrastructure

In fiscal year 2012, the Division continued to support the Department of Transportation's investment in state and city efforts under applicable law to expand crucial transportation infrastructure across the nation with appropriate environmental protections. During construction, these projects will create jobs. Once completed, these projects further economic development in the regions in which they are located.

The United States has contributed well over \$1 billion towards Indiana's effort to build, between Evansville and Indianapolis, the longest continuous new-terrain interstate highway in decades. In *Citizens for Appropriate Rural Roads v. Federal Highway Admin.*, some property owners along the route filed a complaint and sought a preliminary injunction to stop the in-progress construction by alleging violations of NEPA, the Department of Transportation Act, the National Historic Preservation Act, the ESA, and the CAA. Plaintiffs raised concerns about impacts to the endangered Indiana bat. As part of its mitigation efforts, Indiana purchased two large caves that serve as important hibernacula for the Indiana bat. By working closely with state attorneys and the United States Attorney's Office for the Southern District of Indiana, we successfully opposed the preliminary injunction, and work on the project has continued uninterrupted.



Endangered Indiana Bat
FWS Photo by Rich Fields

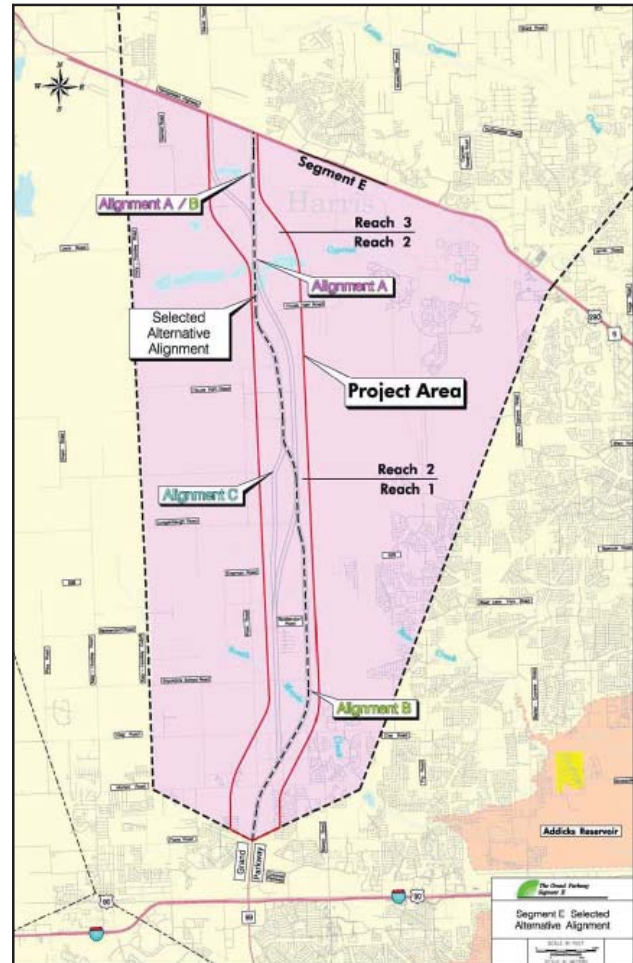
In *Sierra Club v. U.S. Army Corps of Eng'rs*, the Division successfully defended the Texas Transportation Commission's construction of Segment E of the Grand Parkway, which is part of the important outer beltway around Houston, in the face of challenges to the sufficiency of the Federal Highway Administration's environmental analyses.

Protecting the Public Fisc from Defective Takings Claims

Over the past year, the Division has successfully defended numerous cases seeking compensation under the Fifth Amendment to the U.S. Constitution for the alleged taking of private property. The following cases are worthy of special note:

— In January 2012, in *Otay Mesa Property v. United States*, the Federal Circuit vacated the trial court's \$3 million just-compensation award and remanded for the redetermination of an appropriate award. U.S. Customs and Border Protection had placed 14 seismic underground sensors on plaintiff's property to help stop illegal immigration along the border with Mexico near San Diego, California. The United States filed a stipulation in the trial court describing the property interest taken as a permanent easement. Disagreeing, the trial court concluded that the government's stipulation described a temporary easement and awarded compensation based on an analogy to the rental value of property in the area for skydiving and parachute training. The Federal Circuit agreed with the United States that it had stipulated to the taking of a permanent, not temporary, easement and that the trial court erred in basing its award on the rental value of property for skydiving and parachute training.

— In a long-running battle over the nature of rights on federal grazing lands, the Federal Circuit vacated the Court of Federal Claims' award of damages for a regulatory taking and compensation for range improvements, and reversed the finding of a physical taking of water rights in *Hage v. United States*. Plaintiff was a rancher who alleged that BLM's and Forest Service's efforts to enforce federal land management statutes worked a taking of his ranching operation by the government. The trial court awarded plaintiff \$14,243,542 in compensation for regulatory and physical takings of Hage's water rights, statutory compensation for range improvements, and interest. The Federal Circuit vacated the award of compensation on the regulatory taking claim, finding that it was not ripe due to Hage's failure to seek special-use permits to maintain irrigation ditches. As to the physical takings' claim, the court held that, pursuant to Nevada law, Hage could assert only a taking of water that he could put to beneficial



Grand Parkway Segment E
U.S. Department of Transportation Map

use, and found that Hage had presented no evidence that the federal government took any water that he could have put to beneficial use.

— In *Banks v. United States*, dozens of lakefront property owners along the shore of Lake Michigan alleged that the Corps’ construction and operation of harbor jetties caused extensive erosion to their properties. After two lengthy trials that included the use of several expert witnesses who undertook detailed examination of the physical characteristics of the shoreline, the court dismissed the case on statute-of-limitations grounds, resulting in a savings to the United States of more than \$120 million.

— In *Casitas Municipal Water Dist. v. United States*, a California municipal water provider alleged a Fifth Amendment taking and breach of contract resulting from certain actions they allegedly were required to undertake to protect the California steelhead, an endangered fish species. After a multiweek trial, the Court of Federal Claims dismissed the action, finding that the water district had not demonstrated that it had suffered a loss of water as a result of the government’s actions, thus defeating their \$87 million claim.

— In *Big Oak Farms v. United States*, individuals owning property within the Birds Point-New Madrid Floodway filed a class action alleging that the opening of the floodway by the Corps in the wake of historic water levels on the Mississippi River resulted in a Fifth Amendment taking. Plaintiffs’ \$300 million demand in that case was defeated. The Court of Federal Claims concluded that the flooding was not “inevitably recurring” and, therefore, plaintiffs failed to state a claim upon which relief could be granted.

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

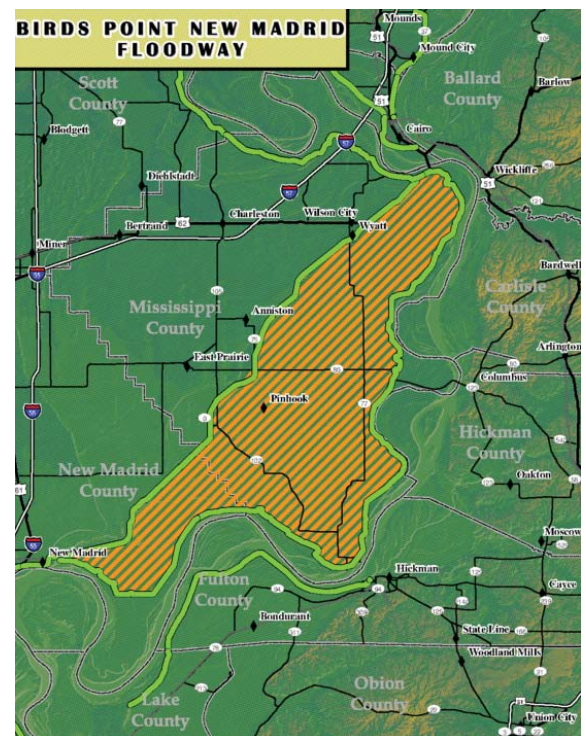
The Division continues to defend nearly 10,000 claims brought under the Fifth Amendment deriving from the implementation of the National Trails System Act. That statute has led to the conversion of abandoned railroad corridors throughout the United States into recreational trails. While these trails provide significant benefit to countless communities,



View of Lake Michigan



California Steelhead
NOAA Photo



USACE Diagram

they also have led to numerous lawsuits in which adjacent property owners argue that they should be compensated by the United States because the property interests conveyed to the railroads did not contemplate trail use. The Division is working diligently to bring these cases to a fair and efficient conclusion, and has successfully resolved numerous claims over the past year either through settlement or by obtaining court dismissal of those claims that did not have merit. Among those Court of Federal Claims cases in which we successfully have defeated takings claims are: *Gregory v. United States*; *Rhutasel v. United States*; *Rogers v. United States*; *Thomas v. United States*; *Thompson v. United States*; and *Whispell Foreign Cars, Inc. v. United States*.

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. We also assist many federal agencies through consultation in acquiring lands, buildings, and leases without the expense of litigation. In appropriate cases, we also provide assistance to federal agencies to ensure that they obtain clear title for negotiated land acquisitions completed without the need for the Division to file condemnation actions.

During fiscal year 2012, ENRD valuation and litigation advice to the General Services Administration (GSA) led to resolution of leasehold acquisitions where the disputes totaled over \$33 million. When the Division's pre-condemnation efforts are combined with its trial-level litigation efforts, the cost savings for the federal government in fiscal year 2012 quickly approaches \$100 million.

Examples of the Division's actions to acquire land or review title to lands in fiscal year 2012 include the following cases:



*Daniel Boone National Forest
Forest Service Photo*

— We provided guidance to the Forest Service in review of title for the acquisition of all right, title, and interest of the Stearns Company, Ltd., in mineral rights underlying Daniel Boone National Forest in Kentucky. Stearns conveyed its surface rights in approximately 46,842 acres of this land to the Forest Service in 1937, but reserved the underlying mineral rights. Litigation ensued in the 1970s over Stearns' requests to mine the reserved minerals. A separate dispute existed between Stearns and the United States over environmental contamination arising from mining activities. Acquisition of the mineral rights allowed the

Forest Service to consolidate ownership over thousands of acres of Daniel Boone National Forest and control all future mining on these lands.

— We also reviewed title for 29.92 acres of land in Dona Ana County, New Mexico. The International Boundary and Water Commission plans to use this property for environmental preservation and long-term river management along the Rio Grande.

— The case of *United States v. 156.0 Acres of Land Located in Lake Umbagog in the Town of Errol, Coos County, New Hampshire, and the Society for the Protection of New Hampshire*



Fall at Lake Umbagog

*FWS Photo by
Karen and John
Hollingsworth*

Forests was filed in district court at the request of the FWS to acquire the majority of “Big Island,” which is located on Lake Umbagog, a 7,000-acre lake stretching between New Hampshire and Maine. The Society for the Protection of New Hampshire Forests negotiated to sell the property to FWS for \$1,000,000, but was unable to convey clear title to an outstanding 0.027778 interest that had vested in unknown successors of a defunct corporation. The condemnation action was filed with the consent of all known interested parties to clear title and to add the land to Umbagog National Wildlife Refuge.

— The Division has continued representation of the Corps in eminent domain actions filed to compensate landowners for property taken to enable emergency repair of levees following Hurricane Katrina. In one group of cases, the Corps installed a pumping system on land adjacent to the Mariner’s Cove townhome development adjoining the 17th Street Levee, requiring acquisition of 14 townhomes. The Corps reached agreements on compensation with each of the homeowners, but was unable to settle the Townhomes Association’s aggregate claim for \$3,033,333 arising from a claimed right to levy ongoing assessments on the vacated lots. In November 2011, in *United States v. 0.073 Acres of Land Situated in the Parishes of Orleans and Jefferson, Louisiana, and Mariner’s Cove Townhomes Ass’n*, the district court held that the Townhomes Association did not have a continuing right to levy assessments on the taken properties, and was entitled to no recovery.

Working with the U.S. Congress on Environmental and Natural Resources Litigation 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. On May 31, 2012, with Acting Assistant Attorney General for the Civil Division Stuart F. Delery and Assistant Attorney General for the Tax Division Kathryn Keneally, Assistant Attorney General Ignacia S. Moreno appeared at an oversight hearing before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary to discuss the work of ENRD and the other divisions.



Assistant Attorney General Ignacia S. Moreno testifies before the Subcommittee on Courts, Commercial and Administrative Law of the House Committee on the Judiciary.

One example of federal legislation enacted in fiscal year 2012 with the assistance of ENRD is the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (the RESTORE Act) (title I, subtitle F of Pub. L. No. 112-141), which became law in July 2012. The RESTORE Act provides for 80% of any civil or administrative fines awarded in the ongoing enforcement action related to the Deepwater Horizon explosion, fire, and oil spill in the Gulf of Mexico to be paid into a special Gulf Coast Restoration Trust Fund, which will in turn be used for various coastal restoration purposes. The statute authorizes the trust fund monies to be expended for Gulf environmental and



Planting a Salt Marsh in Louisiana
NOAA Photo

economic restoration purposes, without further appropriation by Congress, and requires the Secretary of the Treasury to establish procedures related to the operation of the trust fund. The RESTORE Act also establishes the Gulf Coast Ecosystem Restoration Council, a federal entity comprised of senior-level representatives of the Department of the Interior, the Department of the Army, the Department of Commerce, EPA, the Department of Agriculture, and the U.S. Coast Guard, as well as representatives of the Governors of the States of Alabama, Florida, Louisiana, Mississippi, and Texas. The council is charged with developing a comprehensive plan “to

restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, and coastal wetlands of the Gulf Coast region,” and may expend funds from the trust fund in accordance with this comprehensive plan. The statute requires a proposed plan to be issued by January 2, 2013, and an “Initial Comprehensive Plan” to be published by July 6, 2013. Although the Department is not an official member of the council, ENRD has been assisting other interested agencies in this process, with a particular focus on potential legal issues that may arise during implementation.

Enforcing Environmental Law Through International Capacity Building

The Division actively implements a wide-ranging program of international activities, often in collaboration with partners from other federal agencies. The Division’s international activities serve the goal of protecting and promoting effective environmental enforcement and support important Administration and Department objectives:

- We successfully prosecute transnational environmental and natural resources crimes that involve foreign evidence or foreign assistance, or that rely on the violation of underlying foreign statutes.
- We provide critical training for law enforcement partners in other countries to ensure that they may work effectively with us in investigating and prosecuting transnational environmental crimes.
- We participate in the development and implementation of trade and investment agreements, treaties, international environmental agreements, and domestic implementing legislation in order to ensure that they protect and promote effective environmental enforcement.
- We also help to develop and facilitate international partnerships and networks that promote effective prosecution of transnational environmental crimes.

In carrying out these objectives in fiscal year 2012, ENRD attorneys spoke at joint training and cooperative activities and met with law enforcement counterparts in Brazil, Chile, China, France,

Gabon, Honduras, Indonesia, Peru, Portugal, Russia, South Africa, and Thailand. ENRD also met in Washington, D.C., with visiting officials representing governments and non-governmental organizations from Argentina, Australia, Belgium, Indonesia, Iraq, the Republic of Korea, Russia, Singapore, and Thailand.

The Division continued to participate in domestic and international outreach in order to disseminate information about the 2008 amendments to the Lacey Act, which added enforcement tools to combat international trafficking in illegally harvested timber and wood products. For example, a prosecutor from ENRD's Environmental Crimes Section spoke about the Lacey Act at a Congress of South American Environmental Prosecutors in Lima, Peru. ENRD attorneys also participated in U.S. delegations to Bilateral Forums on Illegal Logging and Associated Trade in China and Indonesia, and in the meeting of the Experts Group on Illegal Logging and Associated Trade at the Asia Pacific Economic Cooperation Forum in Russia. Division attorneys also conducted State Department-funded training programs for prosecutors and forestry officials on investigating and prosecuting illegal logging crimes in Brazil and Russia.

ENRD and the EPA Environmental Appeals Board conducted a State Department-funded training program on environmental adjudication for the Supreme Court of Chile. The Division also led a training program on environmental governance for officials of the Environment and Oil Ministries of the government of Iraq in conjunction with the Department of Commerce Commercial Law Development Program. The Division also conducted training for the International Convention for the Prevention of Pollution from Ships and the International Law Enforcement Academy.

We attended the INTERPOL International Chiefs of Environmental Compliance and Enforcement Summit held in July 2012 and the Division was involved in the INTERPOL Wildlife Crime and Pollution Crime Working Group.



Assistant Attorney General Ignacia S. Moreno speaks at the INTERPOL International Chiefs of Environmental Compliance and Enforcement Summit.

Finally, the Division participated in negotiations led by the Office of the U.S. Trade Representative for the environment chapter of the Trans-Pacific Partnership Trade Agreement with eight Asian and South American countries.

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 2012. One illustration is the case of *Decker v. Northwest Environmental Defense Center* (NEDC) and *Georgia-Pacific West v. NEDC*. This case concerns a citizen suit brought by NEDC under the CWA, and implicates a longstanding EPA rule addressing what silvicultural activities are and are not subject to National Pollutant

Discharge Elimination System (NPDES) permitting requirements under the CWA. The United States participated in the district court and Ninth Circuit as amicus in support of defendants, the State of Oregon and the private timber entities, arguing that EPA regulations exempted stormwater discharges from logging roads from the NPDES permitting requirements and that EPA's interpretation should be given deference. The Ninth Circuit disagreed, holding that the CWA precluded that interpretation of the EPA regulations. In its revised opinion after petitions for rehearing, the Ninth Circuit kept intact its entire opinion on the merits, but clarified in a new section that the court has subject matter jurisdiction to decide the issue. After issuance of the revised opinion, the State of Oregon and the timber defendants petitioned for writs of certiorari in the U.S. Supreme Court. On June 25, 2012, the Supreme Court granted the certiorari petitions. On September 4, 2012, the United States filed an amicus brief in the Supreme Court in support of petitioners.

Another case in which the United States filed an amicus brief at the request of the U.S. Supreme Court was *Corboy v. Louie*. The Supreme Court of Hawaii found that plaintiffs, five non-native Hawaiians, lacked standing under state law to challenge the preferential tax treatment afforded native Hawaiians who obtain a 99-year homestead lease under the Hawaiian Homes Commission Act. The Hawaii Supreme Court ruled that the taxpayers lacked standing because they had not established that they were interested in participating in the homestead lease program and thus failed to establish an injury in fact sufficient to confer standing. In its brief, the United States opposed the grant of a petition for a writ of certiorari in this case. On June 29, 2012, the U.S. Supreme Court denied certiorari.



Chinook Salmon
NOAA Image

The Division also conducts the Department's review of citizen-suit complaints and consent judgments under the CAA and CWA. These statutes contain provisions allowing citizens to file suit for violations of the statutes, and require that citizen-suit complaints and consent judgments be served on the Department and EPA. When served with complaints, we offer our assistance to counsel for the parties, and we review all

consent judgments to ensure that they comply with the requirements of the relevant statute and are consistent with the statute's purposes. An example of the citizen-suit settlements that we reviewed in 2012 was filed in *Swinomish Indian Tribal Community v. Skagit County Dike Dist.* The Swinomish Tribe, a federally recognized tribe with a reservation adjacent to Puget Sound in Washington State, brought suit under the citizen-suit provisions of the CWA and the ESA. The tribe claimed that defendants' actions in replacing and maintaining tide gates and other drainage infrastructure in the Skagit River delta were harming Puget Sound Chinook salmon, which are listed as threatened under the ESA. Although the case settled in 2009, the parties notified the United States in 2012 that they intended to amend the consent decree because necessary permits had not been obtained for a habitat restoration project contemplated



Skagit River
NOAA Photo



**Chinook Populations in Puget Sound
NOAA Map**

under the initial settlement. Working with EPA, we provided suggested edits to the amended settlement document that were incorporated by the parties into the amended consent decree filed with the court. Under the amended consent decree, defendants agreed to pay \$500,000 to be used to promote the recovery goals established in the federally adopted Puget Sound Chinook Salmon Recovery Plan.



Marine Corps Recruit Depot Graduation, San Diego

Photo by Jeffrey Bank



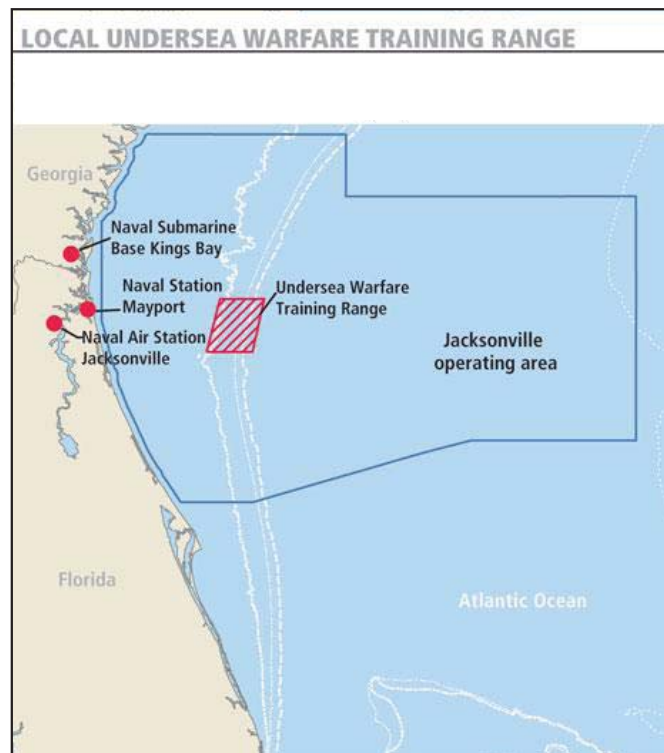
A U.S. Navy nuclear-powered attack submarine proceeds through the Suez Canal to the Red Sea, part of a group of U.S. Navy vessels that recently passed through the canal from the Mediterranean Sea. U.S. Navy Photo by Chief Journalist Alan J. Baribeau

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 a variety of agency actions that support the security of the United States.

Supporting Critical Military Training and Security Needs

The Division successfully defended against a challenge to the Navy's proposed new \$100 million Undersea Warfare Training Range (USWTR), which is to be located 75 miles off the Atlantic coast of Florida. The USWTR facility will enhance and improve the Navy's anti-submarine warfare training activities, which are essential to the Navy's ability to detect and defeat submarines operating in littoral (shallow water) environments where environmental conditions coupled with new noise reduction technologies make detection increasingly difficult. The USWTR will be the only training range of its kind on the East Coast, and it will provide ships, submarines, and aircraft in the Atlantic Fleet with a realistic and challenging littoral training environment that mirrors the areas in which the Navy finds itself increasingly operating. In *Defenders of Wildlife v. U.S. Dep't of the Navy*, plaintiffs brought suit, alleging that the Navy's decision to construct the USWTR violated NEPA and the ESA. Plaintiffs also challenged NMFS's associated



Location of Undersea Warfare Training Range
U.S. Fleet Forces Command Image

biological opinion. After extensive summary judgment briefing and oral argument, the district court ruled in the Navy’s and NMFS’s favor on all claims, putting the Navy in position to begin implementing the next steps of this vital project. In so ruling, the court accorded “great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest,” and held that the Navy had reasonably decided not to adopt mitigation measures that would have required sailors and marines to train in a manner different than what would be required in an actual combat scenario.

In February 2012, the Ninth Circuit affirmed the district court’s judgment in favor of DOE in the case of *Tri-Valley CARES v. Department of Energy*. This case represents plaintiffs’ second challenge under NEPA to the adequacy of DOE’s environmental reviews for construction of a new infectious biological-agents research facility at the Lawrence Livermore National Lab. In the instant appeal, plaintiffs challenged the adequacy of DOE’s analysis of the environmental impacts that could result from a terrorist attack on the facility. The Ninth Circuit held that DOE’s analysis of the risk of a terrorist attack was adequate in various respects.



Lawrence Livermore National Laboratory
DOE Photo

Defending Dredging Projects Necessary for National Defense and Economic Vitality

In *Town of Bald Head Island v. Army Corps of Eng’rs*, plaintiffs challenged a Corps’ dredging project that was essential to the operation of the Military Ocean Terminal–Sunny Point (MOTSU), which is located between Wilmington and Southport, North Carolina, on the west bank of the Cape Fear River. The MOTSU is the largest ammunition terminal in the United States. Ammunition and weapons are transported to MOTSU from all over the United States,



Military Ocean Terminal — Sunny Point

Army Photo

loaded onto ships at MOTSU, and transported to supply forward-deployed troops overseas. MOTSU serves a critical role in numerous operations plans supporting the European and Southwest Asia theaters. Ninety percent of the ammunition supplied to troops in Iraq and Afghanistan is shipped from MOTSU. Additionally, the dredging was required to keep the Port of Wilmington available for deep-draft ships and assure

sound economic development for the Wilmington area. ENRD successfully defended against an injunction and prevailed on a motion to dismiss, ensuring unfettered access to Cape Fear River channels serving MOTSU and the Port of Wilmington.

Supporting the Administration's Renewable Energy Agenda



Solar Energy Project
BLM Photo

“We can't have an energy strategy for the last century that traps us in the past. We need an energy strategy for the future—an all-of-the-above strategy for the 21st century that develops every source of American-made energy.”

— President Barack Obama, March 15, 2012

One component of U.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. ENRD is handling more than 20 cases involving solar, wind, and transmission projects located in California, Oregon, Tennessee, Delaware, Massachusetts, and Vermont. We successfully defeated motions for temporary restraining orders and preliminary injunctions for the North Sky River Wind Project, Ocotillo Wind Energy Project, and Sunrise Powerlink Project in California. We also defeated requests for injunctive relief in two cases challenging smaller pilot projects for solar and wind energy in Tennessee and Delaware.

The Division successfully opposed efforts in the Ninth Circuit to preliminarily enjoin the Ivanpah Solar Energy Generating System (ISEGS). The ISEGS is the largest solar project under construction in the world. The 377-megawatt solar complex uses mirrors to focus the power of the sun on solar receivers atop power towers. When completed next year, the \$2.2 billion system will use 173,500 computer-controlled mirrors to aim 1,000-degree rays at boilers mounted on three 459-foot towers, turning water into enough steam-generated electricity to power 140,000 homes. Our defense of the project in *Western Watersheds Project v. BLM* resulted in the first appellate decision to address new solar projects sited on federal land. The Ninth Circuit concluded that the district court correctly analyzed the balance of public interests favoring the project.

The Genesis Solar Energy Project is another of the first large-scale renewable energy projects to be constructed on federal public land managed by BLM. When complete, the project will provide up to 250 megawatts of clean solar energy to southern California. The Division has successfully defended this important project in three different lawsuits. In *California Unions for Reliable Energy v. U.S. Dep't of the Interior*, the district court granted our motion to dismiss the case for lack of standing because plaintiffs' allegations

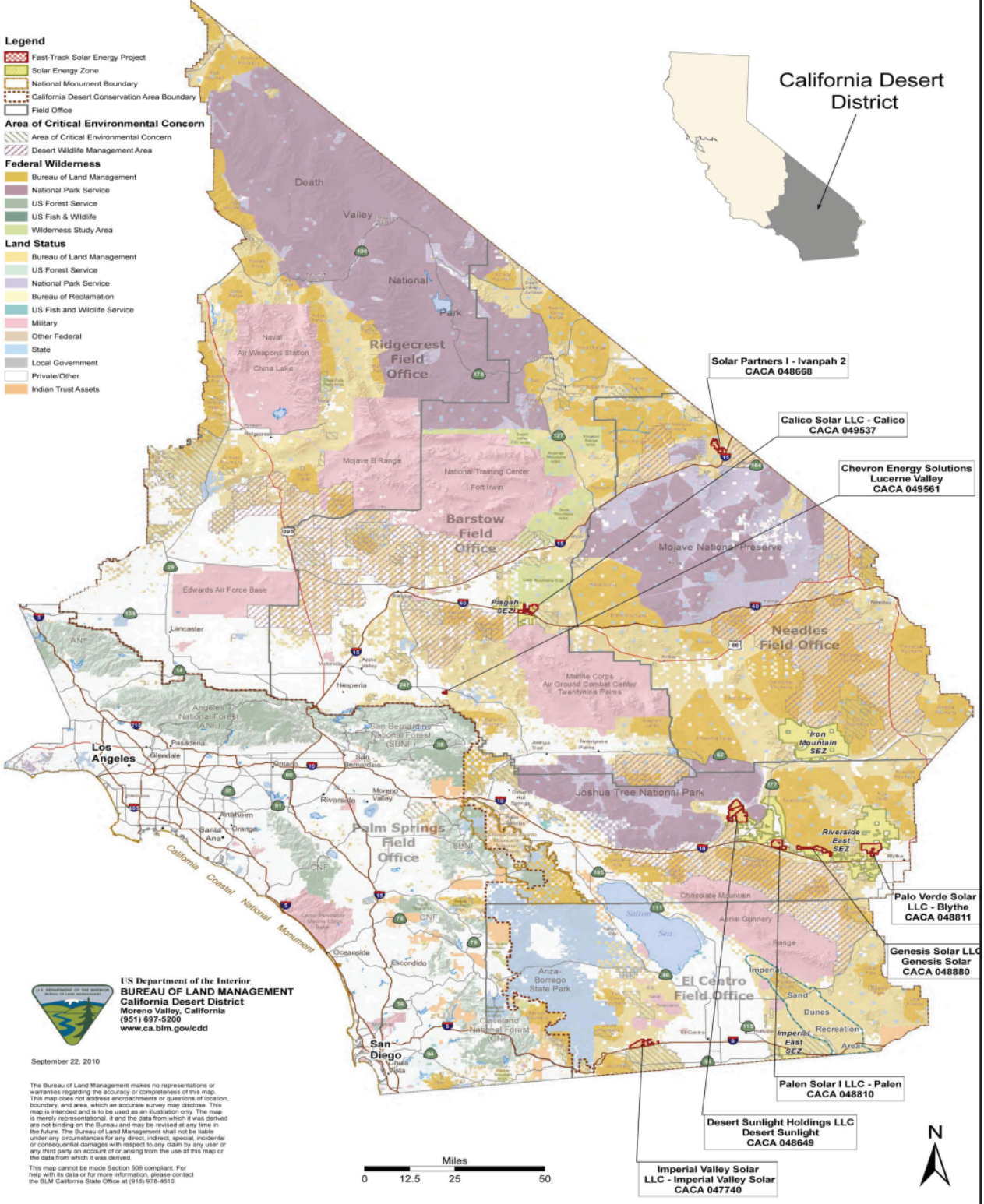


Genesis Solar Energy Project
BLM Image

California Desert BLM District Offices

Fast-Track Solar Energy Projects

Projects as of September 22, 2010



of injury to their domestic water supply were too speculative. In *Colorado River Indian Tribes v. U.S. Dep't of the Interior*, an Indian tribe alleged that BLM failed to adequately consult with the tribe and conduct additional analysis with respect to artifacts uncovered during the ongoing construction of the project. The district court denied the tribe's motion for emergency relief and found that BLM had adequately consulted with the tribe about the project. The court also found that BLM did not need to conduct additional analysis because the types of artifacts uncovered were precisely the types of artifacts that BLM expected to find when it authorized the project.

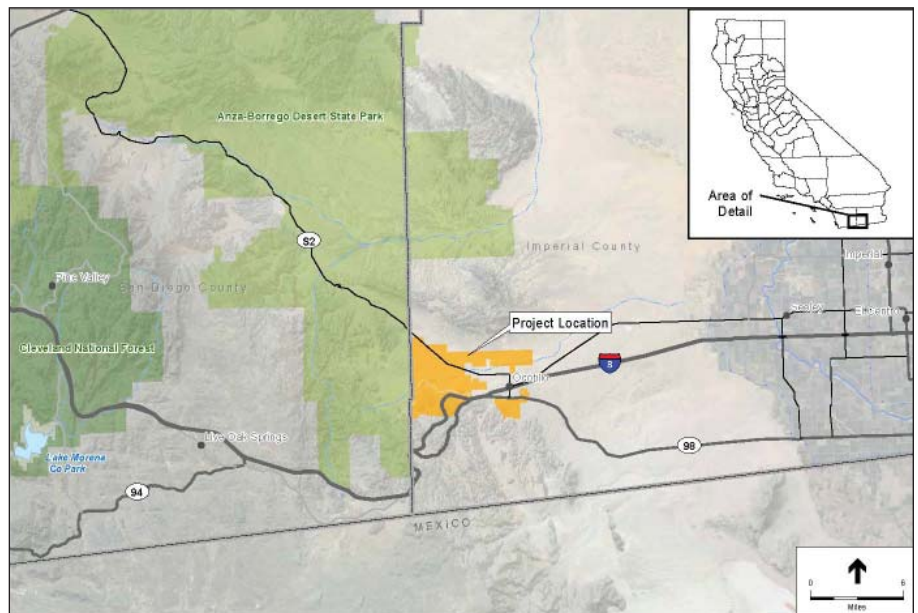
In *La Cuna de Aztlan v. U.S. Dep't of the Interior*, a group of individuals alleged that BLM violated various laws governing public lands and failed to adequately analyze the impacts of the project. The district court has granted the U.S. motion to dismiss certain of plaintiffs' claims, and we continue to aggressively defend against the remaining claims.

The Ocotillo Wind Energy Project will produce up to 465 megawatts of electricity. The project is located on 10,000 acres of BLM lands in western Imperial County in California. It is expected to generate enough electricity via wind turbines to power almost 94,500 homes and will employ 246 workers during peak construction times. The Division has been defending five separate actions regarding this project and has defeated each of the three requests for emergency injunctive relief filed to stop the development of the project. We have secured a dismissal in one of the cases. One example of our success in defending this project is the case of *Desert Protective Council v. U.S. Dep't of Interior*. There, the district court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs failed to show a likelihood of success on the merits, irreparable harm in the absence of preliminary relief, or a balance of equities tipping in their favor.



Wind Turbine

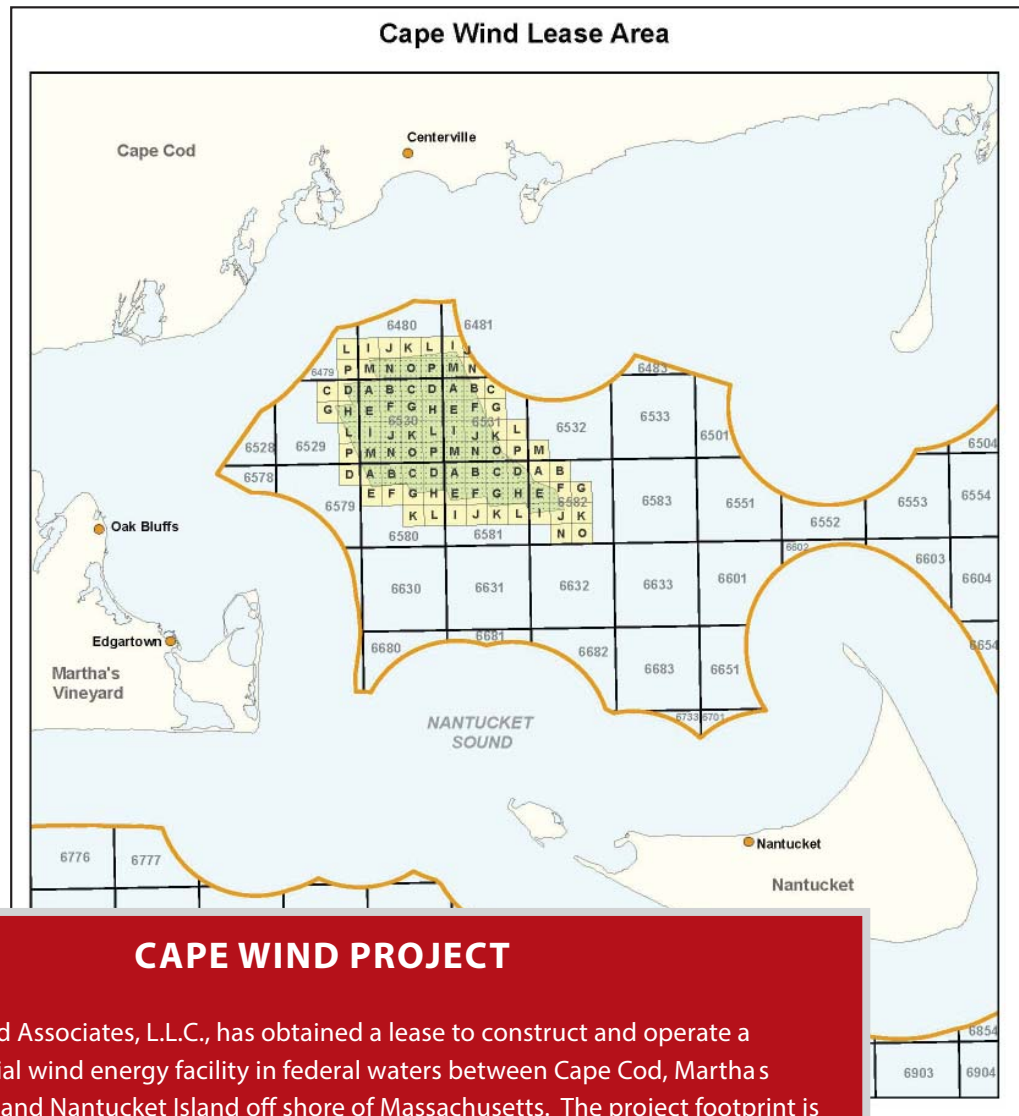
FWS Photo by Rachel London



Location of Ocotillo Wind Energy Project

DOI Map

We are working closely with BLM to defend a permit issued for the Cape Wind Project in Nantucket Sound, America's first offshore wind project. In four separately filed cases that have been consolidated, environmental groups, fishermen, a local township, and an Indian tribe seek to overturn the decision by the Secretary of the Interior to approve the construction of the project under multiple statutes. Putting together the very complex administrative record has led to substantial court proceedings. We have counseled the Department of the Interior and the U.S. Coast Guard on myriad record issues, resulting in resolution of all but three of the 12 issues plaintiffs had identified in a motion to compel.



CAPE WIND PROJECT

- Cape Wind Associates, L.L.C., has obtained a lease to construct and operate a commercial wind energy facility in federal waters between Cape Cod, Martha's Vineyard, and Nantucket Island off shore of Massachusetts. The project footprint is about 25 square miles, but the entire lease area (including a buffer zone) is 46 miles.
- The facility will include 130 3.6 megawatt wind turbine generators with a maximum blade height of 440 feet to be located on Horseshoe Shoal in Nantucket Sound. The project is planned to supply up to 75% of the electricity needs of Cape Cod as well as of the islands of Martha's Vineyard and Nantucket.
- The lease, which became effective on November 1, 2010, is of 33 years duration.

— BOEM Fact Sheet and Map

In *Backcountry Against Dumps v. Abbott* and *Protect Our Communities Foundation v. U.S. Forest Service*, local community groups in southern California challenged federal approval of a land-use management plan and authorization of a right-of-way for the Sunrise Powerlink utility line, which is designed to enable the San Diego Gas & Electric Co. to transmit electricity from alternative energy projects. In 2011 and 2012, the district court denied plaintiffs' motions for preliminary injunction and injunction pending appeal, finding that plaintiffs' claims under NEPA, the Federal Land Policy and Management Act (FLPMA), the National Forest Management Act, and the ESA lacked merit. In 2012, the Ninth Circuit affirmed these decisions. Construction of Sunrise Powerlink is now complete, and the project is operating to deliver electricity to the San Diego area.

Defending Fossil Fuel Development and Storage

This Administration pursues an "all-of-the-above" energy development strategy, including safe and responsible development of various forms of fossil fuel energy. Several ENRD cases have furthered fossil fuel energy development. In *Sierra Club v. Bostick*, plaintiffs challenged the Corps' application of Nationwide Permit 12 to the Keystone Pipeline Gulf Coast Project for development of oil and gas, and sought a preliminary injunction to forestall the commencement of project construction. In August 2012, the court denied the motion because plaintiffs failed to establish a substantial likelihood of success on the merits of their claims. As to their facial challenge to the validity of Nationwide Permit 12, the district court considered and rejected a series of attacks on the Corps' interpretations of the CWA and its implementing regulations, finding that the Corps' interpretations were not arbitrary or capricious. Similarly, the court rejected plaintiffs' as-applied challenge, concluding that the planned activities under Nationwide Permit 12 would not have more than minimal adverse environmental effects, both individually and cumulatively, in light of the Corps' planned mitigation. The court also briefly addressed the balance of equities, concluding that plaintiffs failed to establish that this project will have more than a minimal impact on the environment and that its benefits far exceed its costs.

In May 2012, in *Native Village of Point Hope v. Salazar*, the Ninth Circuit rejected challenges to the Department of the Interior's approval of an exploration plan under the Outer Continental Shelf Lands Act (OCSLA) for exploratory drilling by Shell in the Beaufort Sea off Alaska. The court first found that petitioners' argument that the agency violated OCSLA by approving Shell's exploration plan before certain revisions to Shell's separate oil spill response plan had been approved was moot, in light of Interior's recent approval of the spill plan. The court also held that Interior was not arbitrary or capricious in determining that the exploration plan contained an adequate description and discussion of Shell's plans for using a well-capping-and-confinement system in the event of a blowout. The court also found that Interior had not acted arbitrarily in finding that Shell provided a reasonable estimate of the time required for drilling a relief well in case of a blowout.

We supported the DOE's critical need to acquire land to serve as replacement storage capacity for a portion of the nation's Strategic Petroleum Reserve. The U.S. Strategic Petroleum Reserve is the largest stockpile of government-owned emergency crude oil in the world. It is designed to provide the President with a supply response option to support the U.S. economy and for national defense. The case of *United States v. 9,345 Acres of Land Situate in Iberville Parish, Louisiana, and Sidney Vincent Arbour, III*, was initiated in November 2011, with a determination of \$17.945 million in estimated just compensation to acquire an improved salt dome cavern. Because an existing salt dome facility used to store approximately 10 million barrels of oil was

STRATEGIC PETROLEUM RESERVE

- The Strategic Petroleum Reserve (SPR) is a U.S. complex of four sites with deep underground storage caverns created in salt domes along the Texas and Louisiana Gulf Coasts. The caverns have a capacity of 727 million barrels and store emergency supplies of crude oil owned by the U.S. government.
- As of November 2012, the SPR level was just below 700 million gallons. The maximum drawdown capacity per day is 4.4 million barrels and it takes approximately 13 days from a Presidential decision to release for oil to enter the U.S. market.
- The Energy Policy and Conservation Act authorizes some types of SPR drawdowns—full and limited by the President and test sale or exchange by the Secretary of Energy—if specified conditions are met.
- During the 34-year existence of the SPR, crude oil has been acquired from 25 countries.
- Crude oil is stored in salt domes because it is at least five times less expensive than storage in



Crude Oil Pipeline at the SPR Bryan Mound Site, Freeport, Texas

DOE Photo

above ground tanks. Also, because the salt caverns are 2,000-4,000 feet below the surface, geologic pressures seal cracks that develop in the formation and prevent leakage.

— DOE Fact Sheet

in danger of failure, we obtained the court's approval for an immediate transfer of possession to enable DOE to prepare the replacement cavern for oil transport from the failing facility.

The Division also successfully defended several BLM decisions concerning the leasing of coal on public lands in the Powder River Basin in Montana and Wyoming. In *Powder River Basin Resource Council v. Salazar*, the district court rejected claims that BLM's decision approving a competitive sale of two coal leases violated NEPA, FLPMA, and the ESA, and also determined that plaintiffs lacked standing to assert their climate change-related NEPA and ESA claims. In *WildEarth Guardians v. Salazar*, the district court rejected allegations that BLM had acted arbitrarily and capriciously when it denied a petition to recertify the Powder River Basin as a Coal Production Region under BLM's coal leasing regulations. (BLM had decertified the region as a Coal Production Region, which allowed land to be leased in the basin for coal production by application. Plaintiffs claimed that such leasing reduced competition and prevented BLM from adequately analyzing and addressing the environmental impacts of coal leasing in the basin.)

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 has worked closely with local U.S. Attorneys' Offices, the Department of Homeland Security, and the Corps to



U.S.—Mexico Border

The United States is on left side of photo; Mexico is on right side of photo.

DHS Photo by Gerald L. Nino

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 more than 180 cases (most from fiscal year 2009 forward) under the Strategic Border Initiative. The Division also works more generally with the Department of Homeland Security and U.S. Attorneys' Offices in litigating land acquisition cases to secure the nation's borders.

Fiscal year 2012 saw successful resolution of previously filed eminent domain actions as well as initiation of new ones as this important national security work continues. For example, an advantageous settlement was reached in *United States v. 14.30 Acres of Land Situate in San Diego County, California and the County of San Diego*, an acquisition by eminent domain to accommodate Strategic Border Initiative fencing. The United States' appraised value was \$1,145,000; the landowner's appraised value was \$6,200,000. The parties arrived at a settlement of \$2,000,000 inclusive of costs, expenses, fees, and interest. In addition, for this same project, we filed the cases of *United States v. 5.095 Acres, Located in San Diego County, California and the State of California*; and *United States v. 2.81 Acres in San Diego, County, California and the City of San Diego*, with estimated just compensation totaling \$595,332.

At the request of the GSA and U.S. Customs and Border Protection, the Division also filed the following actions to acquire lands in Orleans, New York; Van Buren, Maine; and Hamlin, Maine, for expansion and modernization of land ports of entry: *United States v. 3.851 Acres*

of Roadway and Land Located in the Town of Orleans, Jefferson County, New York and the State of New York; United States v. 2.239 Acres of Roadway and Land Located in the Town of Orleans, Jefferson County, New York and the Jefferson County Highway Department; United States v. 0.50 Acres of Land Situated in the Town of Van Buren, Aroostook County, Maine and Aroostook Maid Farms, Inc.; United States v. 2.96 Acres of Land Situated in Hamlin, Maine and Roland F. Corbin.



Land Port of Entry Facility

GSA Photo

LAND PORTS OF ENTRY

- A land port of entry is the facility that provides controlled entry and exit in and out of the United States for people and materials. It houses the U.S. Customs and Border Protection and various other federal inspection agencies responsible for the enforcement of federal laws. A land port of entry consists of the land, the buildings, the on-site roadways, and parking lots occupied by the federal agencies. GSA is responsible for the initial construction and ongoing maintenance of most of the nation's land ports of entry.
- On an average day, about \$2 billion in trade crosses the nation's 167 border crossings, along with more than 350,000 vehicles, 135,000 pedestrians, and 30,000 trucks.

— GSA Fact Sheets

Acquiring Additional Property to Improve Military Preparedness and National Security

We also acquire lands and review title to lands needed to fulfill other critical military and homeland security functions. The following cases illustrate this work in fiscal year 2012:

— In June 2012, the Ninth Circuit affirmed the final resolution of *United States v. 32.42 Acres in San Diego County, California, and San Diego Unified Port District*, a case which the Division filed at the U.S. Navy's request to acquire all remaining interests in filled tidelands in San Diego Bay used as the Navy's Anti-Submarine Warfare Training Center (ASW). In 2005, the United States acquired the property by eminent domain through a condemnation suit filed in the district court. The San Diego Unified Port District (a state agency) initially claimed its interest was worth in excess of \$50 million. After an April 2010 trial, the jury set just compensation at \$2,910,000. On appeal, the California State Lands Commission asserted that the U.S. government's title in the property was limited because the Equal Footing and Public Trust Doctrines prohibit the United States from exercising its power of eminent domain to extinguish Califor-

nia’s “public trust” rights in the ASW property. It claimed that its “public trust” rights become “quiescent” during the United States’ ownership and would “re-emerge” if the land is later sold to a private party. The Ninth Circuit rejected the commission’s arguments that the United States’ taking of the property does not extinguish public trust rights, holding that the United States established new title in the property through its use of eminent domain and that the federal government took its interest unencumbered and free of California’s public trust.

— A similar appellate victory was achieved in *United States v. 300 Units of Rentable Housing*, located on approximately 57.81 acres of Eielson Air Force Base, Fairbanks, Alaska, and *Polar Star Alaska Housing Corp.* We filed this condemnation action to confirm the government’s continuing right to use and occupy 300 units of military housing built by a private company on land leased from the U.S. Air Force at Eielson Air Force Base in Alaska. The private company claimed it was entitled to over \$26 million in damages. The district court ruled against the claim in 2008, holding that no compensation was owed by the United States. In February 2012, the Ninth Circuit affirmed the district court on all points.



Eielson Air Force Base, Fairbanks, Alaska

U.S. Navy Photo

— The Division initiated *United States v. 2.52 Acres More or Less, Situate in San Bernardino County, California* and *United States v. 10.00 Acres of Land More or Less, Situate in San Bernardino County, California* at the Army’s request to allow expansion of the National Training Center at Fort Irwin, California. These cases are the first of over a dozen acquisitions for this project. Each month, the National Training Center provides 4,000-5,000 troops with essential training opportunities, including the force-on-force and live-fire training of heavy-brigade-sized military forces necessary to maintain and improve military readiness and promote national security.

— We also initiated *United States v. 55.12 Acres in Evergreen, Conecuh County, Alabama*; *United States v. 41.32 Acres in Evergreen, Conecuh County, Alabama*; and *United States v. 0.13 Acres in Evergreen, Conecuh County, Alabama* at the Navy’s request to enable runway extension clear zones at Outlying Landing Field Evergreen for Naval Air Station Whiting Field in Milton, Florida. These cases are part of a nationwide effort to consolidate outer-landing fields and address light and development encroachment upon these important training facilities for pilots.

— The Department of Homeland Security requested review of title to seven parcels of land in Anniston, Alabama, purchased at a cost of \$3,500,000 for the Federal Emergency Management Agency’s Center for Domestic Preparedness. The center provides all-hazards training to state, local, and tribal responders on chemical, biological, radio-



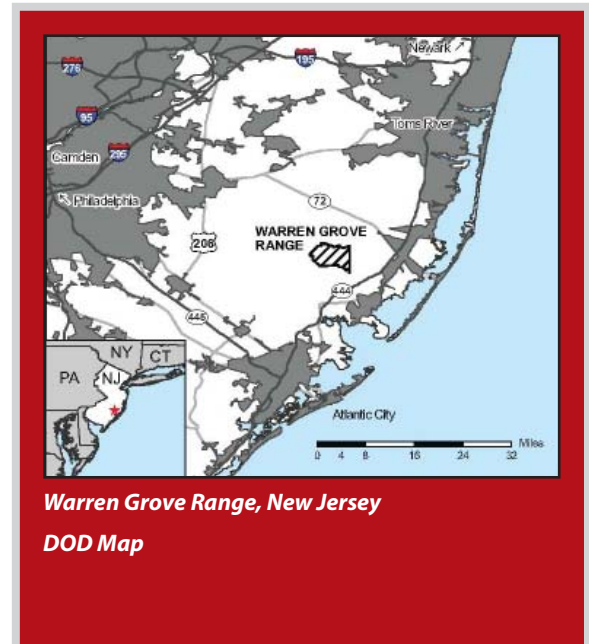
The Center for Domestic Preparedness, which is located in Anniston, Alabama, specializes in providing advanced hands-on, all-hazards training for America’s state, local, and tribal emergency responders in their mission to prevent, deter, respond to, and recover from terrorist acts and other catastrophic events.

DHS Photo

logical, nuclear, and explosive weapons in its capacity as the only federally chartered weapons-of-mass-destruction training center.

— The Division reviewed title for 0.1368 acres of land located on the 2600 block of Barry Road, S.E., in Washington, D.C. The General Services Administration will use this land in creating an access road to the Department of Homeland Security complex.

— We reviewed and approved title for U.S. Air Force acquisition of a conservation easement to limit development of over 51.894 acres of land for the benefit of the nearby Warren Grove Air National Guard Base in Burlington County, New Jersey.



PROTECTING TRIBAL RIGHTS AND RESOURCES AND ADDRESSING TRIBAL CLAIMS

In fiscal year 2012, the Division handled a robust and diverse array of matters affecting Indian tribes and their members. This includes litigation to protect and defend tribal resources and rights; policy and litigation work to help ensure that communities in Indian Country—like all communities across the country—receive the protections of the natural resources and environmental laws; and the respectful and responsible defense of lawsuits brought by tribes against the federal government. The United States has a government-to-government relationship with tribes, and we seek to work collaboratively with tribes in carrying out this work wherever possible.

Working Closely with Tribal Leaders and Communities

In the past year, ENRD senior management met with tribal leaders, visited tribal lands, and saw first-hand their unique environmental and natural resources challenges. For example:

- On December 2, 2011, Assistant Attorney General Ignacia Moreno and Deputy Assistant Attorney General Ethan Shenkman participated in the annual White House Tribal Nations Conference. Ms. Moreno represented the Department at a breakout session focused on natural and cultural resources, and Mr. Shenkman attended a session focused on the government-to-government relationship. ENRD staff also participated in region-focused tribal meetings held in conjunction with the White House Tribal Nations Conference.
- On February 2, 2012, Deputy Assistant Attorney General Shenkman spoke at the Second Annual Oil & Gas Summit hosted by the Mandan, Hidatsa, and Arikara Nation on the Fort Berthold Reservation in North Dakota.
- In September 2012, Deputy Assistant Attorney General Shenkman and other Division representatives joined United States Attorney Tim Purdon and other United States Attorneys in a meeting with North Dakota Indian tribes.
- Deputy Assistant Attorney General Shenkman addressed ENRD's Indian Country priorities in a speech at the University of Colorado Law School's American Indian Law Program in September 2012.

— The Division has long supported the treaty fishing rights of tribes in the Pacific Northwest. Healthy, productive fish habitat is necessary to ensuring that the treaty rights of taking fish are meaningful and not merely a paper right to dip nets into water and bring them out empty. In September 2012, Deputy Assistant Attorney General Shenkman and other Division representatives travelled to Seattle for a listening session and discussion with representatives from the Northwest Indian Fisheries Commission and leaders from most of the 20 western Washington tribes who have asserted that various federal agency activities in the Puget Sound and Washington coast region negatively impact salmon and salmon habitat.

— In November 2012, Assistant Attorney General Moreno and Division staff took part in listening sessions hosted by the United States Attorney's Office for the Eastern District of Wisconsin, in which they visited with a wide array of tribal officials on the reservations of the Oneida Nation of Wisconsin and the Menominee Indian Tribe of Wisconsin.

— ENRD officials also addressed important Indian law subjects at the Federal Bar Association's National Indian Law Conferences in Washington, D.C., in November 2011 and in Albuquerque, New Mexico, in April 2012; and addressed the National Congress of American Indians at its Mid-Year Conference in Lincoln, Nebraska, in June 2012, as well as its Annual Convention in Portland, Oregon, in October 2011.



Sign Welcoming ENRD to the Listening Session in Wisconsin

Preserving the Culture and Religion of Federally Recognized Indian Tribes

On October 12, 2012, Attorney General Holder issued a new Department policy addressing the ability of members of federally recognized Indian tribes to use the feathers and other parts of eagles and other federally protected birds, an issue of great cultural and religious significance to many tribes and their members. ENRD led the initiative to develop the policy, working closely with the U.S. Attorneys' Offices, FWS, and the Indian Affairs and Solicitor's Offices of the Department of the Interior. The policy was developed after an extensive series of consultations with tribal leaders and organizations, involving multiple requests for tribal input and meetings with tribal representatives in Indian Country. The Division's efforts to engage with tribal leaders and obtain tribal input on this issue included an in-person consultation with tribal leaders at the Midwest Alliance of Sovereign Tribes, several national telephonic consultation sessions, as

EAGLE FEATHERS POLICY

"This policy will help ensure a consistent and uniform approach across the nation to protecting and preserving eagles, and to honoring their cultural and spiritual significance to American Indians. The Department of Justice is committed to striking the right balance in enforcing our nation's wildlife laws by respecting the cultural and religious practices of federally recognized Indian tribes with whom the United States shares a unique government-to-government relationship."

— Attorney General Eric Holder
October 12, 2012 Announcement of the Policy on Tribal Member Use of Eagle Feathers

"From time immemorial, many Native Americans have viewed eagle feathers and other bird parts as sacred elements of their religious and cultural traditions. The Department of Justice has taken a major step forward by establishing a consistent and transparent policy to guide federal enforcement of the nation's wildlife laws in a manner that respects the cultural and religious practices of federally recognized Indian tribes and their members."

— Assistant Attorney General Ignacia S. Moreno
October 12, 2012 Announcement of the Policy on Tribal Member Use of Eagle Feathers



Bald Eagle (top) DOI Photo



Bald Eagle (top)
DOI Photo

Golden Eagle (below)
DOI Photo by David Restivo



Example of Headdress Made from Eagle and Other Feathers
DOI Photo

well as in-person discussions at the Mid-Year Conference of the National Congress of American Indians, the Native American Fish and Wildlife Society's Southwest Regional Conference, and other tribal listening sessions.

The policy clarifies and expands longstanding Department practice, consistent with the policy and practice of the Department of the Interior, of not prosecuting tribal members for possessing or using eagle feathers or the feathers or other parts of any federally protected birds while continuing to prosecute tribal members and nonmembers alike for killing protected birds or buying or selling their feathers or other parts.

Federal wildlife laws such as the Bald and Golden Eagle Protection Act generally criminalize the killing of eagles and other migratory birds and the possession or commercialization of the feathers and other parts of such birds. These important laws are enforced by the Department and the Department of the Interior and help ensure that eagle and other migratory bird populations remain healthy and sustainable. At the same time, eagles and other federally protected birds play a unique and important role in the religious and cultural life of many Indian tribes. Many Indian tribes and tribal members have historically used, and today continue to use, federally protected birds, bird feathers, or other bird parts for tribal cultural and religious practices.

The policy helps to address the concerns of tribal members who are unsure of how they may be affected by federal wildlife law enforcement efforts. This uncertainty may hinder or inhibit tribal religious and cultural practices. The policy balances accommodation of the cultural and religious needs of federally recognized tribes that regard the eagle or other birds as sacred with the need to protect at-risk bird populations.

Defending the Tribal Recognition Process

The Department of the Interior has established an administrative process for acknowledging groups as federally recognized tribes. Recognition acknowledges an Indian community's continuous existence, establishes a formal government-to-government relationship between the United States and a tribe, and recognizes the tribe's sovereignty over its members and internal disputes. We represent Interior in cases challenging its recognition determinations.

The integrity of this process was successfully defended in *Sandy Lake Band of Mississippi Chippewa v. Salazar* and *David Laughing Horse Robinson v. Salazar*. In *Sandy Lake*, individuals sought to be recognized as a separate tribe, although they were incorporated into another federally recognized tribe. The court dismissed the case because, among other reasons, the purported tribe did not attempt to establish the regulatory criteria for recognition under the acknowledgment process established by the regulations. In *David Laughing Horse Robinson v. Salazar*, a non-federally recognized Indian group and its purported chairman sought federal recognition based upon a nineteenth-century treaty. In dismissing the plaintiffs' third amended complaint, the court held that the claimed historical recognition of the group in a treaty, even if true, did not excuse the group from exhausting administrative remedies contained in the federal acknowledgment regulations, and, absent exhaustion, a judicial determination of the group's tribal status would violate Separation of Powers under the U.S. Constitution. The court deferred to the expertise of BIA in determining whether a group is the historical tribe and whether it satisfies the criteria for tribal status.

We prevailed in *Muwekma v. Salazar*, a case in which a group of Native Americans sought review of the Department of the Interior's final determination that the Muwekma Ohlone Tribe was not acknowledged to be a federally recognized tribe. In 2006, the district court remanded the case to the Department of the Interior to explain why it had recognized two other California tribes without requiring them to file a petition under the acknowledgment regulations. The Department of the Interior concluded on remand that the other tribes were not similarly situated, and this decision was upheld by the district court, which found that Interior had carefully applied the acknowledgment criteria and logically explained its reasoning with respect to the various evidence presented by the Muwekma as part of its recognition application.

Supporting Tribal Authority Over Tribal Lands and Resources

In fiscal year 2012, the Division continued to address questions related to reservation boundaries, the status of tribal land, and tribal governmental authority over that land. For example:

- In a case of first impression, ENRD secured dismissal of a case that raised the issue of the applicability of local stormwater management fees to Indian trust lands. The Oneida Nation of Wisconsin sued the Village of Hobart, Wisconsin, seeking to prevent the village from assessing a stormwater fee on tribal trust land on which the Oneida Tribe maintains its own stormwater system. The village filed a third-party complaint against the United States, alleging that the United States is liable for the fee. The district court agreed with the U.S. position that section 313 of the CWA, which waives the sovereign immunity of the United States respecting the control and abatement of water pollution under the CWA, does not apply to Indian trust lands, and dismissed the case.
- The Division filed, for the first time, an amicus brief in a tribal court. The brief, filed in *Village of Pender v. Parker*, supported the Omaha Tribe's argument that an act of Congress did not alter or diminish the tribe's reservation boundary. The Division's brief was based on the position articulated in an opinion of the Solicitor's Office of the Department of the Interior.
- For almost 60 years, the Department of the Interior has actively promoted tribe-specific employment preferences in leases relating to a particular tribe's trust resources. In 1988, the Equal Employment Opportunity Commission (EEOC) took the position that Title VII of the Civil Rights Act—which prohibits national origin discrimination—prohibited such tribe-specific preferences by private employers. The Department of the Interior, in contrast, takes the position that such preferences, when they involve resources held in trust for the tribe, are based on political (tribal) sovereignty, rather than national origin. This distinction is significant because if the classification is political rather than based on national origin, it falls beyond the scope of Title VII. In *EEOC v. Peabody Western Coal*, the Secretary of the Interior was pled into an EEOC enforcement action in the district court in Arizona due to Interior's role in approving the mineral leases in question. As a result, ENRD, on behalf of Interior, asserted the validity of the tribal employment preference provisions in a series of leases involving Navajo Nation lands. ENRD prevailed in the district court.

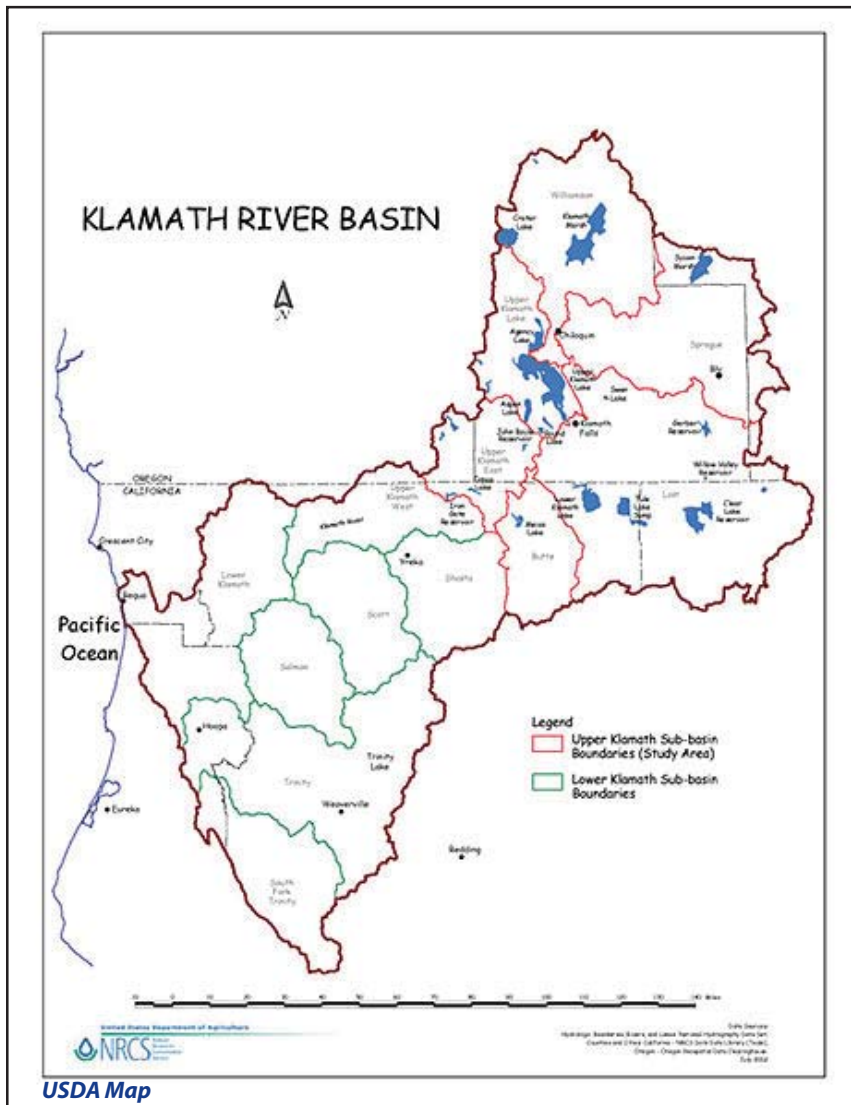
“By signing this agreement today, the Obama administration is taking another step toward honoring the U.S.’s promises to Indian nations and helping communities gain access to clean, safe water supplies. This settlement honorably closes a long chapter of litigation and will bring real benefits to the Navajo people and surrounding communities.”

— Interior Secretary Ken Salazar
 On His December 17, 2010 Signature of
 the Navajo-San Juan River Basin Water
 Rights Agreement

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 some 29 complex water rights adjudications in nearly every western state in the United States. Settlements are often the preferred way to resolve these complex matters. Division attorneys are actively involved in negotiating final agreements and seeking court approval under six landmark tribal water rights statutes enacted by Congress over the past

four years (Taos Pueblo, Aamodt, Navajo-San Juan River Basin, Crow Tribe, White Mountain Apache Tribe, and Duck Valley). These settlements, once approved and implemented, will resolve complex and contentious Indian water rights issues in four western states. With regard to the Crow Tribe Water Right Settlement in Montana and the Navajo-San Juan River Basin in New Mexico, the United States has signed the settlement agreement and Division attorneys have joined the tribe and the state in seeking the approval of the adjudicating court. Division attorneys are in the final stages of negotiating settlement agreements for the others. Each settlement is uniquely adapted to the needs of the tribes and non-Indians involved in the particular river basins, but they all resolve complex water rights controversies that



have existed for decades and ensure that the tribes have access to water on their reservations. These settlements 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.



One View of the Klamath Basin
FWS Photo

Settlements are not possible in every case. In those situations, resolution of these complex water issues falls to the adjudicating court or administrative agency. The Division in the past year successfully defended claims for the benefit of the Klamath

The Klamath Tribes:
the Klamaths,
the Modocs, and
the Yahooskin.

Tribes in the Klamath Basin Adjudication in Oregon. The Oregon administrative law judge affirmed sufficient water rights to support productive habitat for fish, wildlife, and edible plants on the Klamath Reservation in southern Oregon.

See <http://www.klamathtribes.org>.

Upholding Agency Authority to Acquire Land in Trust for Tribes

The Division continued to successfully defend the Department of the Interior's authority to take land into trust for tribes. The authority to acquire land for tribes is important to furthering tribal self-government and self-sufficiency. The following cases are examples of this important work:

- We successfully defended appeals involving the acquisition in trust of land for the Sisseton and Yankton Sioux Tribes. The Eighth Circuit affirmed the district court decisions, rejecting claims that BIA has a structural bias and refusing to entertain challenges to the constitutional authority of the Secretary of the Interior to take land into trust.
- In a case involving the Karuk Tribe, the Division defended on appeal a district court opinion interpreting an important aspect of the agency's trust acquisition policy deferentially. The court found that the Department of the Interior had properly determined that there was a need for land to be taken into trust and rejected claims that the agency had improperly applied its regulations.
- In *Redding Rancheria v. Salazar*, the Division successfully defended the Department of the Interior's regulations implementing authority to take land into trust that is intended to be used for Indian gaming. The Indian Gaming Regulatory Act (IGRA) bars gaming on land acquired after 1988 with certain exceptions, including an exemption for tribes that were restored to federal recognition. The Department of the Interior rejected Redding Rancheria's claim that 230 acres of newly acquired lands qualified for the exception. The tribe filed suit challenging regulations interpreting the IGRA. The court held that Interior had the authority to promulgate the regulations and had interpreted the IGRA's ambiguous "restored lands" exception in a permissible manner, consistent with the intent of Congress.

Addressing the U.S. Supreme Court's *Carcieri* Decision

In 2009, in *Carcieri v. Salazar*, the Supreme Court limited the Department of the Interior's trust land acquisition authority to those tribes that were "under federal jurisdiction" when the Indian Reorganization Act was enacted in 1934. The decision created uncertainty regarding Interior's trust acquisition authority, resulting in a backlog of trust applications. The Division worked closely with Interior to develop a framework for interpreting "under federal jurisdiction" in trust land acquisition cases. During fiscal year 2012, we continued to assist Interior in removing the backlog and defended agency determinations under the framework. For example, the Division is actively defending Interior's decision to take approximately 152 acres of land into trust for the benefit of the Cowlitz Tribe.

Empowering and Partnering with Tribes to Address Environmental Issues Affecting Tribes

Through strong enforcement of environmental laws, we ensure that all Americans—including Native Americans—have the benefit of a safe and healthy environment. To facilitate enforcement in Indian Country, on October 16-18, 2012, the Department conducted its first-ever joint federal-tribal training course on wildlife and pollution enforcement issues.



Participants in the October 16-18, 2012 Joint Federal-Tribal Training on Wildlife and Pollution Enforcement

The course was sponsored by the Department's National Indian Country Training Initiative and held at the National Advocacy Center. Working with other parts of the Department, EPA, and the Department of the Interior, ENRD developed this training over the past year in response to tribal requests for additional training for both federal and tribal officials who are involved in enforcing the wildlife and pollution laws that protect tribal lands and resources.

The course was designed for tribal and federal law enforcement officers and prosecutors, as well as other tribal and federal officials who work to protect tribal lands and resources. The training brought together 120 federal and tribal officials as students and faculty. More than

"This settlement will result in cleaner air for residents living on the Uintah and Ouray Reservation and allow the responsible development of energy resources in accordance with the Clean Air Act. It also will establish the Tribal Clean Air Trust Fund to fund environmental projects for the benefit of tribal members."

— Ignacia S. Moreno
United States v. Questar Gas Mgmt. Co. Press Release

60 different tribes signed up to participate as students and faculty. The course was designed to promote federal-tribal partnerships in this area and to help tribes develop the capacity to assume a greater role in enforcement of laws affecting tribal lands, consistent with the Department's focus on strengthening tribal self-governance. Topics included civil and criminal jurisdiction in Indian country, federal environmental and natural resources statutes, investigative and courtroom techniques, development of tribal wildlife codes, and models for federal-tribal cooperation in law enforcement.

In fiscal year 2012, ENRD also handled various environmental cases for the benefit of Indian tribes. For example:

— Under the consent decree entered in *United States v. Questar Gas Mgmt. Co.*, Questar paid a \$3.6 million penalty under the CAA to resolve violations at five natural gas compressor stations on the Uintah and Ouray Reservation in Utah. Questar also paid \$350,000 into a Tribal Clean Air Trust Fund to be established by tribal member intervenors. The consent decree requires Questar to reduce its emissions by removing certain equipment, installing additional pollution controls, and replacing its natural gas powered instrument control systems with compressed air control systems. The actions required in the settlement will eliminate approximately 210 tons of NO_x, 219 tons of carbon monoxide, 17 tons of hazardous air pollutants, and more than 166 tons of VOCs per year. It also will conserve 3.5 million cubic feet of gas each year, which could heat approximately 50 U.S. households. The reduction in methane emissions (a greenhouse gas that is a component of natural gas) is equivalent to planting more than 300 acres of trees.

— The Division successfully defended the Indian Health Service’s efforts to supply modern sewer and water supply systems for housing on the Santa Ysabel Reservation in San Diego County. In *Mesa Grande Band of Mission Indians v. IHS*, a nearby tribe sought to enjoin the installation and connection of sanitary facilities for homes on land that has been subject to a land dispute by the tribes. At the time the case was filed, occupants of the homes needing service purchased water from a communal water tank and hauled it daily to their homes. ENRD argued against an expedited motion for injunctive relief in the case, which the court denied. On the strength of the arguments presented, the nearby tribe voluntarily dismissed its complaint.

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

Since 2002, numerous federally recognized tribes and certain Indian groups have brought suit against the United States alleging that the United States—in particular, the Departments of the Interior and Treasury—violated the federal government’s trust duties and responsibilities to the tribes by failing to provide “full and complete” historical trust accountings and failing to manage the tribes’ trust funds and non-monetary trust assets or resources in an adequate manner. The tribes requested declaratory and injunctive relief and compensatory damages. By 2009, the United States was defending approximately 97 breach-of-trust lawsuits brought by 114 Indian tribes in federal district courts in the District of Columbia and Oklahoma and in the Court of Federal Claims.

In September 2009, counsel for 96 of the litigating tribes sent a letter to President Obama asking the administration to engage in expedited settlement discussions with their clients. Thereafter, federal government representatives undertook a two-year process of negotiating with tribal representatives and consultants. As part of this process to address the Settlement Proposal to the Obama Administration (SPOA), the federal government produced relevant information about certain tribal trust fund accounts and transactions to tribal representatives. The federal government also carefully developed certain trust data-driven methodologies for evaluating reasonable potential settlement values of the tribes’ trust accounting and trust mismanagement claims, which enabled the federal government to make fair and reasonable settlement offers to each tribe. In addition to the SPOA process, the Departments of Justice, the Interior, and the Treasury have been engaging in similar settlement processes involving other litigating tribes.

As a result of the SPOA process negotiations, on April 11, 2012, the United States announced that it had executed individual settlement agreements with 41 tribes. Between April and September 2012, the government executed settlement agreements with 15 other tribes. Through these processes, the United States reached settlements with 56 tribes, 45 of which were involved in the SPOA process. The federal government is continuing its efforts to resolve the trust accounting and trust management claims of the remaining tribes in a manner that is fair and reasonable to the tribes and the United States.

Under the settlement agreements, litigation brought by the settling tribes regarding the Department of the Interior's accounting and management of the tribes' trust accounts, trust lands, and other natural resources has ended. With monies from the Judgment Fund, which is used to pay settlements or final judgments against the federal government, the United States is compensating the tribes for their breach-of-trust claims, and the tribes have agreed to waive, release, and dismiss their claims with prejudice. Also, the tribes and the Department of the Interior have agreed to ongoing information-sharing procedures that will lead to strengthened management of the tribes' trust funds and non-monetary assets, through improved communications between tribes and the Department of the Interior. Further, the settlement agreements contained certain dispute resolution provisions to reduce the likelihood of future litigation.

“These settlements fairly and honorably resolve historical grievances over the accounting and management of tribal trust funds, trust lands and other non-monetary trust resources that, for far too long, have been a source of conflict between Indian tribes and the United States. Our commitment to tribes is the cornerstone of the Department of Justice's policies and initiatives in Indian Country, and these settlements will enable the tribal community to pursue the goals and objectives they deem to be appropriate while marking another step in our shared future built upon mutual respect and strong bonds of trust between tribal governments and the United States.”

— Attorney General Eric Holder
April 11, 2012 Announcement
of Settlement of Tribal Trust
Lawsuits

The SPOA process serves as a sound model for resolving pending or future tribal trust cases in a fair, reasonable, and expedited manner. This process also protects the public fisc by avoiding protracted and costly litigation. In addition to the SPOA process, the United States has used several different alternative dispute resolution (ADR) processes to achieve settlements of tribal trust accounting and trust mismanagement



*April 11, 2012 Announcement of Settlement of Tribal Trust Lawsuits
DOJ Photo by Lonnie Tague*

claims since the filing of the first tribal trust cases in 2002. Between 2002 and September 2012, the government has resolved the claims of 64 tribes, using various different ADR methods.

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

Many Indian tribes brought claims against the United States for breach of trust and mismanagement of trust funds and non-monetary trust assets in federal district court and the U.S. Court of Federal Claims simultaneously. A statute enacted by Congress in the 1860s, now codified at 28 U.S.C. section 1500, prohibits the filing of such multiple lawsuits against the federal government, by providing that the Court of Federal Claims lacks jurisdiction to adjudicate a lawsuit in that court if another lawsuit was pending in federal district court based on the same operative facts. In 2011, the Supreme Court reaffirmed this prohibition in *United States v. Tohono O'odham Nation*. In fiscal year 2012, the Division prevailed in its motions to dismiss five tribal trust cases filed in the Court of Federal Claims for lack of subject-matter jurisdiction under section 1500.

We also secured dismissal in *Blackfeet Housing Authority v. United States*, a \$30 million suit for breach of trust for the failure to provide safe and proper housing on a reservation under the Native American Housing Assistance and Self-Determination Act. The court held that the statute of limitations barred the action for breach of trust and, in any event, plaintiff failed to state a viable breach-of-trust claim. With regard to statute of limitations, the court held that actual knowledge is not required; rather, plaintiff is on notice of the material facts underlying the claim that are not inherently unknowable. In rejecting the breach-of-trust claim, the court ruled that the Blackfeet Housing Authority could not rely on general principles of trust law to state a claim for a breach of trust. The court held that control and involvement alone in the oversight of the provision of housing grants and assistance in the absence of the violation of statutory duties is insufficient to imply a damages remedy under the Tucker Act.

Defending Against Other Miscellaneous Tribal Claims

The Division also prevailed against tribal claims in cases that set important precedents for determining when it is appropriate to hold the United States liable. These cases involved multi-million-dollar claims against the public fisc. In *Samish Indian Nation v. United States*, the tribe contended that although it secured federal recognition as an Indian tribe in 1996, it should have been recognized since 1969. The tribe brought claims for federal program monies that the tribe would have received if it had been recognized. We prevailed both at the Court of Federal Claims and at the Federal Circuit, with the courts holding that that statutory language of the federal programs could not be fairly interpreted to create a damage remedy. The Federal Circuit, however, sustained the Court of Federal Claim's holding that the tribe was entitled to monies it would have received had it been federally recognized under the Revenue Sharing Act. In fiscal year 2012, we successfully petitioned the Supreme Court for a writ of certiorari and received a summary grant of certiorari, a vacated judgment of the Revenue Sharing Act claim, and a remand directing dismissal.



Attorney General Eric Holder acknowledges the exceptional work of the joint EPA-ENRD Greenhouse Gas Team at a small gathering preceding the 2012 Employee Award Ceremony.



Attorney General Eric Holder, Acting Associate Attorney General Tony West, and Assistant Attorney General Ignacia S. Moreno recognize ENRD's Environmental Justice Team at the 2012 Employee Award Ceremony.

SUPPORTING THE DIVISION'S STAFF

Promoting Diversity at Work



ENRD takes seriously its commitments to reflect the people it serves by drawing its workforce from all segments of society and to promote a culture of diversity and inclusion throughout the Division. During fiscal year 2012, the Division took a number of important steps in this area:

- We formally adopted a Diversity Committee Charter to provide a permanent governance structure for this work and to define the committee's responsibilities, authorities, and functions. The charter was designed to ensure that the Division will be able to comply with all Office of Personnel Management and Departmental requirements and guidance.
- A primary focus this year has been to update Division outreach materials. A team from the Diversity Committee rewrote the materials to include more information about the Division's work, particularly about more recent casework and cross-cutting initiatives such as environmental justice. These materials are expected to have greater visual appeal to all applicants as well as more relevance for applicants interested in environmental law and public service positions.
- We have strengthened ENRD hiring practices for all positions in three ways. First, the Diversity Committee worked with the Department's Office of Attorney Recruitment and Management to develop resume review seminars for career managers and hiring officials. The seminars were designed to capture common parameters used in attorney hiring. We hosted three this year and hope to host more in the future. Second, we developed a strategy for diversifying applicant pools. Third, in the area of strengthening hiring practices, the Division established a process for reviewing workforce data.

— The Division has instituted procedures to improve the transparency of the hiring process for promotional opportunities within the Division. We also are analyzing ways to restructure management positions to provide additional promotional opportunities while also improving the efficiency of Division operations.

— Law clerk hiring also has been a primary focus of the Diversity Committee this year. Despite curtailment of the Division’s travel budget, we have continued outreach efforts to attract law students to ENRD. We have continued to send ENRD ambassadors to career fairs that are local to D.C. and the ENRD field offices, and we have been fortunate to partner within the Department to send Division outreach materials to other career fairs. Several ENRD attorneys also participated in the new DOJ Ambassadors Program that began this year. Additionally, despite the Department’s hiring freeze, the Department—and by extension, the Division—continues to “hire” a large number of unpaid law clerks, many of whom go on later to apply to the Attorney General’s Honors Program. A subcommittee of ENRD’s Diversity Committee has begun studying our law clerk program to identify best practices within the Division and highlight ways to strengthen the program for the Division.

— We also required the Division management team, hiring officials, and Diversity Committee to participate in two seminars of the Attorney General’s Diversity Symposium (November 2011 and June 2012); all other interested employees have been encouraged, but not required, to participate.

— To better inform all ENRD employees of the diversity and inclusion information, activities, and resources available within the Division, we established an Intranet site in June 2012 which includes a message from the Assistant Attorney General, learning resources, news and events, ENRD’s Diversity Plan, and links to resources referenced in the training seminars and to additional information on related topics.

ENRD recognizes that a more inclusive federal government is a more effective federal government and that all federal employees are entitled to perform their jobs free from discrimination, whether that discrimination is based on national origin, language, race, color, disability, ethnicity, gender, age, religion, sexual orientation, gender identity, socioeconomic status, veteran status, or family structures. As such, ENRD strives to reflect the people it serves by drawing its workforce from all segments of society and promotes an atmosphere of fairness and collaboration among its employees.

— From Department and ENRD Policy Statements on Workforce Diversity

Recognition of Division Staff

This year, client agencies recognized the efforts of Division staff in many ways. Of particular note, on September 12, 2012, U.S. Forest Service Chief Tom Tidwell presented the Division’s Land Acquisition Section with the U.S. Forest Service Lands and Realty Meritorious Service Award. This award—the Forest Service’s highest—had never previously been given to a person or entity outside the U.S. Department of Agriculture. Since 1970, the Land Acquisition Section has condemned lands for addition to over 60 different parts of the National Forest System

in at least 25 states and territories. The Land Acquisition Section also has provided title review and valuation advice for tens of thousands of acres of land purchased by the Forest Service. Additionally, the U.S. Army Corps of Engineers presented its 2012 Chief Counsel's Excellence in Client Care Award to the team of litigators from the Environmental Defense,



Department Recipients of the 2012 U.S. Army Corps of Engineers Chief Counsel's Excellence in Client Care Award

Natural Resources, and Appellate Sections, as well as the Solicitor General's Office, for their handling of extremely fast moving litigation in the district court, the Eighth Circuit, and the U.S. Supreme Court challenging the Corps' operation of the Bird's Point—New Madrid Floodway during the historic flooding along the Mississippi River in the spring of 2011. ENRD staff also received awards from other agencies, including Environmental Defense Section attorneys from EPA for their work on several pieces of CAA litigation; Environmental Enforcement Section attorneys from EPA for their work to ensure the integrity of municipal wastewater treatment systems, to enhance air quality in areas impacted by oil and gas development, and on Superfund matters; Natural Resources Section attorneys from the Corps for the handling of litigation in the Court of Federal Claims and from APHIS for defending its biotechnology program; and cross-Division teams from USDA for assistance in the development of the Forest Planning Rule and from NOAA for defense of the Pacific groundfish trawl rationalization program.

Providing High-Quality and Cost-Effective Automated Services

In fiscal year 2012, the Division provided high-quality and cost-effective automated litigation support (ALS) and other automated services:

— ENRD led a Department-wide review of litigation support spending that resulted in the consolidated purchase of web-hosting hardware and software for all Department litigating components. This initiative is estimated to save the Department over \$16 million in web-hosting fees over the next three years. The Division also led an effort to issue a Department-wide contract for e-discovery software, which also is expected to result in cost savings for the Department based on consolidation of licensing and maintenance fees. As appropriate, the contract will allow for standardization of operating procedures and training, and we also expect to gain efficiencies from these added consistencies.

— We combined contracted and in-house ALS services to support ENRD casework. In addition to providing contract support for the Deepwater Horizon explosion, fire, and oil spill case—one of the largest cases ever undertaken by the Department—the Division's Office of Litigation Support also provided contract support to a number of large and complex cases and initiatives, including *Fox River*, *Goodrich*, *Nu West*, *Portland Cement*, Tribal Trust, *Tronox*, the Western Water Adjudications, and the Vessel Pollution, Power Plants, and Clean Air Initiatives. ALS services were provided in-house for more than 200 cases through the Division's Computer Lab

at a significant savings. Using our onsite capabilities, we are able to provide such services as document scanning, e-discovery processing, Bates numbering, optical character recognition, media duplication, and audio/video digitization. We also supplied secure online database hosting services to support 128 cases using state-of-the-art advanced analytics searching and collaboration with agency personnel and expert witnesses.

— The Division provided automated support for several congressional oversight information requests. The requests required the processing of over 50 million records from several components of the Department.

— ENRD developed a pilot program to apply ALS technologies to the Division's Freedom of Information Act (FOIA) Program. Through the pilot program, we timely processed nearly 24,000 pages of records that were potentially responsive to eight FOIA requests.

Providing Innovative Technology for ENRD's Workforce

In fiscal year 2012, ENRD expanded its program for providing e-discovery client consultation and assistance to defensive collections involving electronically stored information, assisting ENRD attorneys and client agencies to manage their electronic discovery obligations. We continued to provide guidance and training to employees within the Division, as well as throughout the Department and in other federal agencies, on e-discovery best practices. We held regular brownbag lunches, monthly training series hosted by the litigating components, and distance learning seminars for both civil and criminal practices at the National Advocacy Center.

To provide the latest automated litigation tools to Division managers and frequent travelers, ENRD piloted an iPad program this year. iPads have proven to be extremely valuable for certain classes of personnel, and furnishing specific staff with such a lightweight and portable device for managing emails and documents has provided increased functionality and efficiencies to a subset of ENRD's workforce. Based on the success of the pilot program, the Division plans to expand the program.

ENRD made several upgrades and changes to its Intranet site, ENRDNet, to assist with various areas of litigation practice and Division administration. Section sites were developed for two sections, with resources designed exclusively for their litigating practices.

Greening the Division

The Division held its 9th annual Earth Day service celebration at Marvin Gaye Park in April 2012. Enthusiastic participants planted trees, removed trash, gardened, and landscaped.

Earth Day 2012

Acting Associate Attorney General Tony West and Assistant Attorney General Ignacia S. Moreno cut the ribbon on a new shed at Marvin Gaye Park.



Supporting Records and Systems Management

To store the growing number of important records in the form of email and attachments, the Division introduced a new email archiving system. For managing file records pertaining to physical, hard-copy litigation files, ENRD's records management software, database, and server were migrated to a new application and a vendor-supported platform, replacing legacy software that was no longer supported.

The Division updated a number of out-of-date systems this year. ENRD was the first litigating Division in the Department to update its email system to MS Exchange 2010, establishing lessons-learned and prototypes for the remaining components to follow. We also developed new systems for internal personnel management and attorney timekeeping. We also migrated the Division's electronic learning system from one Departmental platform to another to avoid duplication, began implementation of the mandated requirement to maintain fully electronic official personnel files (eOPF), and configured the Division's computer infrastructure to allow access via Personal Identity Verification cards in addition to user names and passwords.

Promoting Division Security

To ensure the safety of Division personnel, facilities, and IT systems, ENRD volunteered to participate in security compliance audits at facilities in Washington, D.C., and the Sacramento field office. The Department's Security and Emergency Planning Staff evaluated ENRD on physical security, document security, contractor security, IT security, emergency planning, and health and safety planning. Minimal security issues were identified at the audited sites, and we were able to quickly resolve each item. The Division as a whole benefited from the thorough review. The Division performed additional self audits in the Denver and San Francisco field offices to ensure that these sites also were in compliance.

Saving Division Resources



Implementation of several cost-saving measures yielded significant reductions in annual Division expenditures. Fiscal year 2012 was the first full year that the Division was able to realize cost savings from implementation of measures identified by the Division's SAVE Committee, saving the Division an estimated \$300,000. Consolidating Division records warehouse storage space into shared warehousing for the Department saved an additional \$350,000. Renegotiating the Division's IT Help Desk contract resulted in a cost savings of nearly \$200,000.