UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION

SUMMARY OF LITIGATION ACCOMPLISHMENTS
FISCAL YEAR 2008

CONTENTS

Cover Photo Green Turtle (*Chelonia mydas*) (Virgin Islands National Park, St. John, Virgin Islands) ©: By Permission of Caroline S. Rogers

FOREWORD

I am proud to present this summary of the Environment and Natural Resources Division's litigation accomplishments for Fiscal Year 2008. This has been an outstanding year, in keeping with the Division's exemplary record of safeguarding the country's environment and natural resources. The Division handles cases involving more than 150 different statutes. We have a docket of more than 7,500 active cases and matters at every level of the federal court system as well as state courts. The Division both brings affirmative civil and criminal enforcement actions and defends federal agencies when their actions or decisions are challenged on the basis of our environmental or public lands and resources laws. As in past years, the Division achieved significant victories for the American people in each of the many areas for which it has responsibility. These responsibilities include protecting the nation's air, water, land, wildlife and natural resources, upholding our trust responsibilities to American Indians, acquiring needed lands for federal agencies, and otherwise defending important federal programs.

Turning to overall enforcement results, I am pleased to report that in Fiscal Year 2008 the Division secured nearly $115 million in civil penalties and $9.3 billion in corrective measures through court orders and settlements. In addition, the Division concluded 58 criminal cases against 108 defendants, obtaining 21 years and 3 months of jail time and nearly $52 million in fines.

Fiscal Year 2008 also featured some "firsts" in the history of federal civil and criminal enforcement.

—*The Largest Ever Single Environmental Settlement*. As I previewed in the foreword to last year's accomplishments report, the Division concluded the largest environmental settlement in history when the court this year entered the final consent decree in *United States v. American Electric Power* (AEP), resolving claims under the Clean Air Act's new source review/prevention of significant deterioration provisions. Under the decree's terms, AEP will install and operate $4.7 billion worth of air pollution controls on 16 coal-fired power plants. When the consent decree is fully implemented, these air pollution controls and other measures will reduce air pollution by 813,000 tons a year compared with pre-settlement emissions, making this the largest reduction in air pollution achieved by any single settlement. AEP also paid a $15 million civil penalty and will spend $60 million on projects to mitigate the adverse effects of its past excess emissions. An unprecedented coalition of 8 states and 13 citizen groups joined the United States in the settlement.

—*The Highest Superfund Cost Recovery*. In *United States v. W.R. Grace & Co.*, the Division recovered $252.7 million, the highest sum in the history of the Superfund program, in reimbursement of the United States' costs in connection with the cleanup of asbestos contamination in Libby, Montana.

—*The Largest Civil Penalty for Clean Water Act Permit Violations*. In *United States v. Massey Energy Co.*, the Division obtained a civil penalty of $20,100,500, the largest civil penalty ever levied against a company for wastewater discharge permit violations. Massey, the fourth largest coal company in the United States, also agreed to take additional measures at its facilities nationwide to prevent an estimated 380 million pounds of sediment and other pollutants from entering the nation's waters each year. These compliance measures are unprecedented in the coal mining industry.

The Division also pressed forward this year with key environmental litigation initiatives:

Power Plant Enforcement. The Division has successfully litigated a number of significant Clean Air Act claims against operators of coal-fired electric power generating plants. The violations at issue arose from companies engaging in major life extension projects on their aging facilities without installing required pollution controls. To date, 15 of these matters have settled on terms that will result in reductions of nearly 2 million tons of SO2 and NOx each year once the $11 billion in required pollution controls are fully functioning.

Vessel Pollution Prosecutions. The Division, in partnership with U.S. Attorney's Offices across the country, continued its great success in the Vessel Pollution Initiative, a concentrated effort to prosecute those who illegally discharge pollutants from ships into oceans, coastal waters, and inland waterways or those who falsely document their activities. Over the past 10 years, the criminal penalties imposed in vessel pollution cases have totaled more than $200 million and responsible shipboard officers and shore-side officials have been sentenced to more than 17 years of incarceration. The initiative has resulted in a number of important criminal prosecutions of key segments of the commercial maritime industry, including cruise ships, container ships, tank vessels, and bulk cargo vessels. This year, the Division's appeal of *United States v. Jho* obtained the first appellate ruling on the scope of federal jurisdiction to prosecute log book offenses such as these and the meaning of the duty to maintain log books.

Addressing Air Pollution from Oil Refineries. The Division has made significant progress in combating Clean Air Act violations within the petroleum refining industry. To date, the Division's petroleum refinery enforcement initiative has produced settlements or other court orders that have addressed more than 96 individual refineries and 87% of the nation's refining capacity, and will reduce air pollutants by more than 331,000 tons a year.

Ensuring the Integrity of Municipal Wastewater Treatment Systems. The Division continued its efforts to protect the nation's waterways, by using the Clean Water Act to ensure the proper operation of municipal sewer systems. Since January 2006, courts have entered more than a dozen settlements in these cases, requiring long-term control measures estimated to cost in excess of $5 billion. The settlements the Division reached in Fiscal Year 2008 will ultimately reduce the volume of untreated sewage discharged into our waterways by tens of billions of gallons. This year, for example, the Division concluded a final, comprehensive settlement with the City of San Diego, resolving our action against the city stemming from unlawful discharges of sewage from its sewer system. Two previous decrees required the city to undertake interim

measures at an estimated cost of $274 million. The third and final consent decree will require the city to continue to undertake capital projects and perform operations and maintenance through 2013, at a cost of an additional $1 billion, to prevent future spills of sewage from its system.

Record-breaking enforcement cases such as these, however, are only a part of the Division's work. A significant aspect of our case docket involves defending vital federal programs, including military and national security programs or taking affirmative action to support such programs. This year, working with several U.S. Attorney's Offices, the Division initiated almost 400 eminent domain cases referred by the Department of Homeland Security to acquire permanent interests in privately-owned lands along the United States/Mexico border needed to meet a Congressional mandate for secure fence construction. We also represented the Navy in several cases that challenged the Navy's use of mid-frequency active sonar throughout the world and in specific training exercises off the coast of California and Hawaii, as well as its use of low-frequency sonar, a new technology for anti-submarine warfare that is still in the experimental phase. These cases are critically important to the nation's security and military readiness, and our efforts culminated in success before the United States Supreme Court. On November 12, 2008, the Supreme Court, in *Winter v. NRDC*, reversed the Ninth Circuit's affirmance of a district court's preliminary injunction that imposed conditions on the Navy's use of sonar in training exercises in the Southern California Operating Area of the Pacific Ocean. The Supreme Court held that the lower courts had not given adequate weight to the harm the Navy said its training would suffer from certain of the conditions and that the lower courts had improperly assessed the equities and the public interest.

The Division promotes responsible stewardship of our natural resources by defending federal agencies charged with such tasks as determining whether a species should be listed as endangered or threatened, managing fishery resources in a way that balances various interests, overseeing water conservation projects, managing activities on federal lands that range from grazing to oil and gas leasing, and protecting the nation's forests from the risks of wildfire. This year, the Division had important successes in facilitating the work agencies do in all these areas.

The Division's work also secured critical water rights for the United States. In Fiscal Year 2008, the Division reached important settlements and secured favorable judgments ensuring access to the water necessary to maintain the vitality of natural resources and the water needed to support varied uses of the public lands, national forests, national parks, wildlife refuges, wild and scenic rivers, military bases, and federal reclamation projects throughout the West. As but one example, I joined the Secretary of the Interior, members of Congress, and representatives of the States of California and Nevada and the Pyramid Lake Paiute Tribe, among others, to sign an historic Truckee River Operating Agreement ("TROA"), the culmination of 15 years of negotiations the Division led. In addition to enhancing drought protection for the Cities of Reno and Sparks and securing Congressional approval of the interstate allocation between Nevada and California of the waters of Lake Tahoe, and the Truckee and Carson Rivers, TROA provides significant environmental benefits through more flexible and coordinated reservoir operations. This flexibility allows water to be stored and released for the benefit of threatened and

endangered fish species in Pyramid Lake, water quality in the lower Truckee River, and instream flows on the Truckee River and tributaries under the California Guidelines.

The Division also remains at the forefront in carrying out the United States' trust responsibility to Indian tribes and resolving issues pertaining to American Indians. We work to protect tribal fishing and water rights, most notably this year in the case of *United States v. Oregon*. Many years ago, the United States prevailed in establishing the treaty fishing rights of four Columbia River Basin tribes. The taking of those fish, however, impacts anadromous species that are listed pursuant to the Endangered Species Act. The parties, after a decade of negotiations, concluded the Management Agreement for Fish Harvests on the Columbia and Snake Rivers in Washington, Oregon and Idaho for 2008-2017, consistent with the Endangered Species Act. This plan will improve fish habitat and allow the tribes to increase their catch as the populations of threatened species increase.

I would like to close on a personal note. I've been with the Department of Justice, in various capacities, nearly 12 years and served in the position of Assistant Attorney General for more than 18 months. The Department is a place populated by dedicated public servants, committed to the high ideals of public service, and each has sworn an oath to see that the laws are well and faithfully carried out. Those in the Environment and Natural Resources Division do so, without exception, in a way that should make our citizens proud, and most certainly in a way that has made me proud to be their colleague. I extend to them my congratulations for this year's many accomplishments and offer them my best wishes for the future. It bears repeating that the Division's unparalleled service and commitment show what a powerful difference our national government makes in the lives of those we serve.

Ronald J. Tenpas
Assistant Attorney General
Environment and Natural Resources Division
January 2009

PROTECTING OUR NATION'S AIR, LAND, AND WATER

Reducing Air Pollution from Power Plants. During the past year, the Division continued to successfully litigate Clean Air Act (CAA) claims against operators of coal-fired electric power generating plants. The violations arose 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. To date, 15 of these matters have settled on terms that will result in reductions of nearly 2 million tons of SO2 and NOx each year once the $11 billion in required pollution controls are fully functioning.

In Fiscal Year 2008, the Division achieved the largest environmental settlement in history when the court entered the final consent decree in *United States v. American Electric Power* (AEP), resolving claims under the CAA's new source review/prevention of significant deterioration provisions. Under the decree's terms, AEP will install and operate $4.7 billion worth of air pollution controls on 16 coal-fired power plants. When the consent decree is fully implemented, these air pollution controls and other measures will reduce air pollution by 813,000 tons every year compared with pre-settlement emissions, making this the largest reduction in air pollution achieved by any single settlement. AEP also paid a $15 million civil penalty and will spend $60 million on projects to mitigate the adverse effects of its past excess emissions. An unprecedented coalition of 8 states and 13 citizen groups joined the United States in the settlement.

Addressing Air Pollution from Oil Refineries. The Division also made progress in its national initiative to combat CAA violations within the petroleum refining industry by obtaining a consent decree with Sinclair Oil. With this settlement, the Division's petroleum refinery enforcement initiative has produced settlements or other court orders that have addressed more than 96 individual refineries and 87% of the nation's refining capacity, and will reduce air pollutants by more than 331,000 tons a year.

Sinclair Oil agreed to spend more than $72 million for new and upgraded pollution controls to reduce air pollution from its 3 refineries. Under the terms of the consent decree, Sinclair will reduce annual NOx and SO2 emissions by 1,100 tons and 4,600 tons, respectively. Sinclair also agreed to pay a civil penalty of $2.45 million and spend $150,000 on supplemental environmental projects as part of the settlement.

Reducing Air Pollution from Mobile Sources. The Division obtained a consent decree from a Taiwanese manufacturer and three American corporations in *United States v. McCulloch*, resolving claims that the defendants failed to meet CAA standards. Under the consent decree, the companies agreed to pay a $2 million civil penalty for importing and distributing some 200,000 chainsaws that would emit a total

of 268 tons of excess hydrocarbons into the environment over their lifetime.

Controlling Contaminated Storm Water Run-off. The Division also fought for cleaner water by enforcing Clean Water Act (CWA) provisions governing discharge of storm water, which contains pollutants such as suspended solids, lead, and copper.

The Division achieved settlements with four of the largest home builders in the country: Centex, KB Home, Pulte, and Richmond. Together, they agreed to pay $4.2 million in civil penalties and to implement compliance programs at construction sites in 34 states and the District of Columbia that will prevent 1.2 billion pounds of sediment from polluting our waterways each year. Pulte agreed to complete a supplemental environmental project at a minimum cost of $608,000. Home Depot settled its storm water violations, agreeing to pay a $1.3 million civil penalty for violations at more than 30 construction sites in 28 states where its stores were being built. Home Depot also agreed to implement a nationwide compliance program with several St. Louis-area developers.

Republic Services agreed to construct and operate a comprehensive remedy for the Sunrise Mountain Landfill and to pay a $1 million penalty to resolve violations of the CWA. The remedy will be designed to withstand a 200-year storm and is expected to cost $36 million. Upon completion, it will prevent the release of more than 14 million pounds of contaminants annually, including storm water pollutants.

Ensuring the Integrity of Municipal Wastewater Treatment Systems. Through its aggressive national enforcement program, the Division continued to protect the nation's waterways by ensuring the integrity of municipal wastewater treatment systems. Since January 2006, courts have entered more than a dozen settlements in these cases, requiring long-term control measures estimated to cost in excess of $5 billion. The settlements the Division reached this year will reduce the discharge of untreated sewage into our waterways by tens of billions of gallons.

The Division achieved a final, comprehensive settlement with the City of San Diego, resolving our CWA action against the city stemming from unlawful discharges of sewage from its sewer system. Two previous decrees required the city to undertake interim measures at an estimated cost of $274 million. The third and final consent decree will require the city to continue to undertake capital projects and perform operations and maintenance through 2013, at a cost of an additional $1 billion, to prevent future spills of sewage from its system.

The Division also achieved an interim settlement with the City and County of Honolulu (CCH) that will correct the most significant problems in Honolulu's wastewater collection system. Under the terms of the consent decree, CCH will implement $300 million in projects. The United States and the State of Hawaii are continuing to work with CCH to resolve its remaining wastewater collection and treatment problems.

Protecting the Nation's Waters and Wetlands. The Division obtained a number of favorable settlements in enforcement actions to protect the nation's waters and wetlands from illegal fill. In *United States v. Johnson*, the Division sued an Arizona land developer and a contractor for violations of the CWA in bulldozing, filling, and diverting approximately five miles of the lower Santa Cruz River and a major tributary, the Los Robles Wash, without a permit from the Army Corps of Engineers. We negotiated a consent decree which, when entered, will require the defendants to pay a combined $1.25 million civil penalty, one of the largest penalties in the Environmental Protection Agency's (EPA) history under Section 404 of the CWA, which protects against the unauthorized filling of federally protected waterways.

The Division also negotiated a favorable settlement of *United States v. Sea Bay Development Corp.*, resolving allegations that the defendants discharged dredged or fill material into wetlands at an approximately 1,560-acre property in Chesapeake, Virginia, without a permit. Under several consent decrees, the defendants will pay civil penalties totaling $100,000. The consent decree with the site owner requires comprehensive restoration and mitigation on approximately 873 acres of the wetlands, which will be preserved in perpetuity under a conservation easement or deed restriction.

United States v. Fabian is a CWA civil enforcement action for the unauthorized filling of wetlands located along the Little Calumet River in Indiana. In 2007, the court granted our motion for summary judgment on liability. We subsequently resolved the remedy through a consent decree, under which the defendant will pay a small civil penalty and convey approximately 93 small parcels of real estate, including the site where the filling of wetlands occurred, into a trust. The decree then obligates the trust to effectuate restoration and off-site mitigation to the maximum extent allowable by the trust assets.

Reducing Air and Water Pollution at Other Diverse Facilities. The Division improved the nation's air and water quality by concluding regulatory enforcement actions against a variety of other facilities in diverse industries. In total, the Division obtained recoveries valued at more than $8.7 billion in injunctive relief; more than $105 million in civil penalties; and $25.4 million in supplemental environmental projects. One significant case was *United States v. Massey Energy Co.* There, the Division obtained the largest civil penalty ever levied against a company for wastewater discharge permit violations when Massey agreed to pay a $20,100,500 civil penalty. Massey, the fourth largest coal company in the United States, also agreed to take additional measures at its facilities nationwide to prevent an estimated 380 million pounds of sediment and other pollutants from entering the nation's waters each year. These compliance measures are unprecedented in the coal mining industry.

Protecting the Public Against Vinyl Chloride. The Division has begun taking enforcement actions against manufacturers of vinyl chloride, which EPA has classified as a Group A human carcinogen. Exposure to the chemical has been linked to adverse

human health effects, including liver cancer, other liver ailments, and neurological disorders.

In *United States v Georgia Gulf* (GG), the court entered a consent decree resolving claims under five statutes, including the CWA, CAA, and the Resource Conservation and Recovery Act (RCRA), arising out of violations at GG's facility in Aberdeen, Mississippi, a plant that manufactures PVC from vinyl chloride monomer. GG will pay a civil penalty of $610,000 and perform injunctive relief valued at $2.9 million.

Enhancing Pipeline Safety. The Division obtained a judgment on the merits following a five-week bench trial in *United States v. Apex Oil Co*. In entering judgment for the United States, the court directed Apex to perform substantial injunctive relief valued at more than $150 million. Apex had owned and operated a refinery and associated pipelines and sewers in Hartford, Illinois, from which releases of gasoline and other petroleum-based substances had contributed to a substantial subsurface plume of petroleum-based substances.

The Division secured additional relief in *United States v. Magellan Pipeline Co.* when the court entered a consent decree addressing 11 oil spills from Magellan's pipelines and other facilities. The consent decree requires Magellan to perform comprehensive injunctive relief valued at approximately $6.5 million to prevent future spills and to pay a civil penalty in the amount of $5.3 million.

ENSURING CLEANUP OF OIL AND HAZARDOUS WASTE

Conserving the Superfund by Securing Cleanups and Recovering Superfund Monies. The Division secured the commitment of responsible parties to clean up additional hazardous waste sites, at costs estimated in excess of $541 million, and recovered approximately $420 million for the Superfund to help finance future cleanups. Examples of some of the major Superfund cases resolved by the Division this year include: *United States v. Atl. Richfield Company* (the company agreed to pay $187 million to finance major cleanup along 120 miles of the Clark Fork River and other areas in southwestern Montana, with $103.7 million being available for remedial actions, $7.6 million to reimburse federal government for past costs, and $3.35 million for the federal government's natural resource damages (NRD); Atlantic Richfield will also pay the State of Montana an additional $72.5 million, which the state will use to finance additional natural resource restoration activities as part of the settlement); *United States v. City of Jacksonville* (the city agreed to clean up two Superfund sites at an estimated cost of $94 million); and *United States v. Exxon Mobil Corp.* (101 defendants will ensure a site-wide $48 million cleanup of the Beede Waste Oil site in Plaistow, New Hampshire, pay more than $9 million for future federal and state oversight costs, and pay $17 million in past federal and state response costs).

Enforcing Clean-up Obligations In Bankruptcy Cases. The Division's bankruptcy practice has continued to grow,

and this year we achieved notable success in several proceedings.

In *United States v. W.R. Grace & Co.*, the Division recovered $252.7 million, the highest sum in the history of the Superfund program, in reimbursement of the United States' costs in connection with the cleanup of asbestos contamination in Libby, Montana. The action settled a bankruptcy claim brought by the federal government to recover money for past and future costs of cleanup of contaminated schools, homes, and businesses in Libby. In 2003, after a 3-day trial, the federal district court in Montana awarded the United States more than $54 million for costs incurred by EPA through Dec. 31, 2001. That award was not paid due to W.R. Grace's filing for bankruptcy protection. The bankruptcy settlement resolved the 2003 judgment as well as continuing clean-up costs EPA has incurred since Dec. 31, 2001 and will incur in the future. EPA will place the settlement proceeds into a special account within the Superfund that will be used to finance future clean-up work at the site.

In *United States v. Apache Energy & Minerals Co.*, the court entered two consent decrees resolving three defendants' Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability at the California Gulch Superfund Site in Leadville, Colorado. The first, with Asarco LLC, resolves the United States' allowed unsecured claim in the Asarco bankruptcy proceeding by requiring the payment of $9.3 million for response costs, and $10 million for NRD. The second, with Newmont USA Limited and Resurrection Mining Company, requires these defendants to pay $8.5 million in response costs and $10.5 million for NRD, and to pay future oversight costs. Newmont and Resurrection are additionally required to undertake work to address the discharge of acid mine drainage at the site, at an estimated cost of $93 million.

In one of the most challenging bankruptcy proceedings, *In re: Asarco LLC*, the United States has continued to litigate and reach settlements on our claims for clean-up work and NRD at more than 50 sites, and is engaged in mediation in an effort to reach agreement on a plan of reorganization for the company. Asarco LLC, and its predecessor companies, operated in the mining, milling, and smelting industries for over 100 years. This left a legacy of environmental contamination in over 16 states. The bankruptcy, which was filed in 2005, is the largest environmental bankruptcy in history both in terms of the number of sites where Asarco is liable (approximately 80) and the total amount of Asarco’s liability at those sites. The environmental claims and liabilities asserted against Asarco in the bankruptcy by the United States and the states exceed $2 billion.

Defending the Constitutionality of the Superfund Law. In addition to its enforcement actions to secure the cleanup of hazardous waste sites, the Division has also successfully defended lawsuits aimed at interfering with clean-up actions by EPA and other federal agencies. For example, in *Goodrich Corp. v. EPA*, Goodrich brought a complaint alleging that EPA has engaged in an unconstitutional "pattern and practice" of issuing unilateral administrative orders under CERCLA. In 2007, the court held that the statutory regime on its face satisfies

due process requirements; however, the court initially allowed Goodrich to file an amended complaint challenging EPA's "pattern and practice" of administering the statute. In December 2007, the court dismissed the due process claim against EPA with prejudice, concluding that Section 113(h) of CERCLA deprived the court of subject matter jurisdiction over Goodrich's "pattern and practice" due process claim.

Protecting the Government Against Unwarranted Claims of Clean-Up Liability. The United States filed a counterclaim to recover response costs incurred by EPA in *Raytheon Aircraft Co. v. United States*, a cost recovery action under CERCLA involving the Tri-County Airport in Herington, Kansas, which was owned and operated by the Army Air Corps during World War II. Following a 10-day bench trial, the court found the United States not liable for any portion of the clean-up costs incurred by Raytheon (approximately $6 million) and found Raytheon liable for EPA's clean-up costs (approximately $3 million), with prejudgment interest accruing since May 2000.

Protecting the Public Fisc Against Excessive Clean-Up Claims. In *Basic Management, Inc. v. United States*, a contribution action under CERCLA concerning a former magnesium plant in Henderson, Nevada, owned by the United States during World War II, the court ruled that the plaintiff cannot recover any response costs paid by its insurance company and also declined to extend to CERCLA cases the collateral source rule that precludes defendants in tort cases from offsetting their tort liability with insurance recoveries. The effect of this ruling is to reduce the total of potentially recoverable costs to be allocated at trial from a claimed $70,000,000 to less than $1 million.

In CERCLA contribution cases in which the United States is a liable party, we have obtained favorable settlements that ensure the United States will not pay more than its fair share of clean-up costs. These include such multi-million dollar settlements in Fiscal Year 2008 as *E.I. DuPont de Nemours & Co. v. United States*; *Southern California Gas Co. v. United States*; *United States v. Albemarle Electric Membership Corp.*; *CBS Corp. v. United States*; *BASF Catalysts LLC v. United States*; *Lewis Operating Corp. v. United States*; and *Hercules v. United States*.

In *State of Ohio v. DOE*, a case involving claims for NRD under CERCLA in connection with the release of hazardous and radioactive material at the Department of Energy's (DOE) Feed Material Production Center, a former uranium processing facility in Fernald, Ohio, the Division completed negotiation of a consent decree requiring DOE to pay $13.75 million in NRD and assessment costs, record an environmental covenant restricting most types of future development at the site, and implement a natural resource restoration plan committing DOE to maintain a series of natural resource restoration projects at the site.

PROMOTING RESPONSIBLE STEWARDSHIP OF AMERICA'S NATURAL RESOURCES AND WILDLIFE

Defending Endangered Species Act Listings and the Critical Habitat Program. The Endangered Species Act (ESA) requires either the United States Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on the species, to determine whether a species should be listed as endangered or threatened under a set of five criteria and to designate critical habitat for listed species. In Fiscal Year 2008, we had notable success defending such determinations.

In *Arizona Cattle Growers' Ass'n v. Kempthorne*, the court upheld the FWS designation of critical habitat for the Mexican spotted owl against a variety of challenges. In *Marincovich v. Lautenbacher*, the court agreed with the Division that the factual and scientific determinations supporting the NMFS listing of the Lower Columbia River coho were rational and entitled to deference. The Division prevailed in *Home Builders v. FWS*, where the court upheld the FWS listing of the central California population of tiger salamander, concluding, among other points, that there was a rational connection between the threats to the species and the determination that it should be listed as threatened and that the Service had properly considered historical habitat loss. In *Defenders of Wildlife v. Kempthorne*, the court determined that the FWS decision not to list the Florida black bear because existing regulatory mechanisms were adequate was reasonable and supported by the administrative record in the case. Finally, in *Sierra Forest Products v. Kempthorne*, the court upheld the FWS determination that listing the West Coast distinct population of the Pacific fisher was warranted, but precluded by higher priority listing actions.

Defending NMFS Ocean Harvest Management. The Service is charged, under the Magnuson-Stevens Fishery Conservation and Management Act, with the difficult task of managing ocean commercial fishing not only to provide for conservation and sustainable fishing, but also to optimize yield. In several cases, the Division successfully defended the Service's balancing of these objectives. In *S. Offshore Fishing Ass'n v. Gutierrez*, the court upheld the emergency closure of a shark fishery where NMFS determined that overharvesting had occurred. Similarly, in *Starbound LLC v. Gutierrez*, the court upheld the Service's emergency rule prohibiting new entry into the 2007 Pacific Whiting Fishery where NMFS forecast overfishing if new entries were allowed. The Division prevailed in *North Carolina Fisheries Ass'n v. Gutierrez*, which upheld Service establishment of measures to end overfishing of certain snapper species.

Restoring the Florida Everglades. The Division continued to contribute to the restoration and protection of the Everglades ecosystem – including the 1.3 million-acre Everglades National Park, the largest, most important subtropical wilderness in North America – by acquiring lands within Everglades National Park and the Big Cypress National Preserve, as well as lands critical to the Army Corps of Engineers'

project to improve water deliveries in the area.

Maintaining an Appropriate Management Regime for the Missouri River System. The Army Corps of Engineers manages the Missouri River System (consisting of six dams and reservoirs) for a variety of overlapping purposes, such as navigation, flood control, irrigation, and hydropower. In order to ensure that water resource decisions best serve these varied needs, the Corps issues a Master Manual that describes its water control plan. In 2006, the Corps made changes to the Master Manual to protect the endangered pallid sturgeon. In *State of Missouri v. United States Army Corps of Eng'rs*, the State of Missouri sued the Corps, alleging that it had violated the National Environmental Policy Act (NEPA) by using the Master Manual to provide a spring pulse of water for aquatic habitat maintenance without fully evaluating the environmental impacts. The Division successfully explained the Corps' actions and secured sound precedent that permits the Corps to balance water, navigation, energy, and agricultural needs, as well as protect endangered species.

Facilitating Dredging Projects Critical for Commerce. The Port of New York and New Jersey must be dredged to maintain navigation and commerce estimated to generate about $200 billion annually in direct and indirect benefits. Due to past and present pollution, managing dredged material from the port has become increasingly difficult. *NRDC v. United States Army Corps of Eng'rs* challenged the environmental analysis of a Corps' project to deepen the navigational channels of the New York/New Jersey Harbor. While the court found the Corps' analysis to be partly inadequate, the court agreed that the dredging should not be enjoined. The Division ultimately achieved a favorable settlement that allowed essential dredging to continue while the Corps provided additional environmental analysis of the ongoing project. In *Jones v. Rose*, the Division also defended NEPA claims raised against maintenance dredging and channel deepening in Portland, Oregon. The court granted summary judgment for the Corps on all counts.

Litigating Federal Land Management Programs and Policies. The federal government manages vast swaths of land for a variety of purposes, some well-known (such as outdoor recreation) and others less well-known (such as pest control). Land management programs and policies are sometimes unpopular with one or more user groups and become the subject of litigation.

The Division is successfully defending policies related to the Sierra Nevada Forest Plan Amendment (Framework) governing 11.5 million acres in 11 national forests in the Sierra Nevada region of California. These policies include desperately needed fuel treatments to reduce the threats of catastrophic wildfire as well as to meet the habitat needs of species dependent on old growth forests. The Framework is the subject of four related lawsuits, *Sierra Forest Legacy v. Rey*; *California v. USDA*; *Pacific Rivers Council v. United States Forest Service*; *and California Forestry Ass'n v. Bosworth*. Recently, the court issued a decision in favor of the Forest Service on virtually all claims in the four lawsuits.

Other equally wide-ranging forest management activities of the Forest Service and the Bureau of Land Management have benefitted from the Division's legal efforts. For example, in *Lands Council v. McNair*, the Division prevailed against a challenge to the Mission Brush Project, a forest restoration project, on the Idaho Panhandle National Forest, under the National Forest Management Act (NFMA), NEPA, and the Administrative Procedure Act (APA). The project is designed to restore old-growth forest structures and address excessive stand density that is facilitating forest destruction by fire, insect infestation, and disease. The Ninth Circuit, in an *en banc* decision, concluded that it had erred in an earlier case by creating a requirement not found in any relevant statute or regulation and defying established law concerning the deference owed to agencies. The court disagreed that the Forest Service had violated the NFMA, found that the record supported the Forest Service's conclusions with regard to the effect of the project on species diversity, and approved the Forest Service's use of the amount of suitable habitat for a particular species as a proxy for the viability of that species. The court also rejected Lands Council's claim that the Forest Service violated NEPA by failing to include a discussion of the scientific uncertainty surrounding its strategy for maintaining species viability. Finally, the court held that the district court properly denied a preliminary injunction, noting that the standard for determining the appropriateness of a preliminary injunction does not allow a court to abandon a balance of harms analysis simply because a potential environmental injury is at issue.

In some instances, plaintiffs also challenge federal forest programs by seeking to invalidate ESA coverage for forest plans or projects. In Fiscal Year 2008, the Division was successful in defending against several such claims. In *Alliance for Wild Rockies v. United States Forest Service*, the court upheld a FWS and Forest Service determination that the challenged timber project was consistent with road density standards for grizzly bears. In *Western Watershed Project v. BLM*, the court upheld a broad programmatic biological opinion for a BLM resource management plan.

Ensuring the Limitations of Federal Jurisdiction Are Enforced. The APA and other special review provisions circumscribe federal jurisdiction, as do the requirements of standing and other jurisdictional prerequisites. This year, the Division successfully raised these defenses in appropriate cases. In *John R. Sand & Gravel Co. v. United States*, the Department, through the Solicitor General's Office with the support of the Division, prevailed before the Supreme Court in its view that the statute of limitations for bringing claims for compensation against the United States in the Court of Federal Claims was jurisdictional and could not be waived by failure to assert it at the trial court level.

In *Coos County Bd. of County Comm'rs v. Kempthorne*, the lower and appellate courts agreed that the plaintiffs could not compel FWS to take action based on its five-year species status review because that internal process did not result in a final agency action subject to judicial review. Similarly, in *Am. Forest Resource*

Council v. Hall, the court dismissed a challenge to the Service's five-year status review for the marbled murrelet.

The Division invoked the requirement to issue a 60-day notice of intent to sue under the ESA citizen suit provision, obtaining dismissal of claims in *Defenders of Conewango Creek v. Echo Developers*; *Nez Perce Tribe v. NOAA Fisheries*; and *Man Against Extinction v. Hall*.

We raised the defense of standing, obtaining dismissal of claims in *Center for Biological Diversity v. Kempthorne*, in which the plaintiffs sought relief under ESA regarding 50 species of foreign butterflies; *Glasser v. NMFS*, in which the plaintiff challenged a conservation plan, but did not allege injury with regard to the species covered by the plan; and *Miccosukee Tribe v. United States*, in which the tribe failed to allege that any of its members actually live in, hunt in, or otherwise use the area of Everglades National Park to be used for the challenged project.

The Division continued to obtain favorable rulings on the defense of mootness. In *Wilderness Soc'y v. Kane County*, the court found the case moot because Kane County had rescinded the challenged ordinance. In *Aquifer Guardians in Urban Areas v. FWS*, the court dismissed the case because the challenged transmission line was completed and the Army Corps of Engineers had verified compliance with ESA restrictions. In *National Parks and Conservation Ass'n v. United States Army Corps of Eng'rs*, claims against the challenged discharge permit and its ESA compliance were determined to be moot where the permit had expired, there was no existing authorization to declare invalid or set aside, and there was no authorized filling to enjoin.

Determining the Impact of the Religious Freedom Restoration Act on Land Management Agencies. In *Navajo Nation v. United States Forest Service*, four Indian tribes challenged the Forest Service's approval of an expansion of a ski resort on the San Francisco Peaks near Flagstaff, Arizona, under the Religious Freedom Restoration Act (RFRA). The expansion included snowmaking using reclaimed water, which in the view of Indian religious practitioners, desecrates the peak. The Ninth Circuit, in an *en banc* decision, held that the Forest Service's approval did not violate the RFRA because the proposal does not place a substantial burden on the plaintiffs' exercise of religion by forcing the plaintiffs to act contrary to their religion under the threat of a legal penalty or choose between their religion and the receipt of a government benefit.

CRIMINALLY ENFORCING OUR NATION'S POLLUTION AND WILDLIFE LAWS

Reducing Pollution from Ocean-Going Vessels. The Vessel Pollution Initiative is an ongoing, concentrated effort to detect, deter, and prosecute those who illegally discharge pollutants from ships into the oceans, coastal waters, and inland waterways, and those who falsely document their activities. Enforcement is primarily pursuant to the MARPOL Treaty, and its United States implementing legislation, the

Act to Prevent Pollution from Ships (APPS), which requires vessels to maintain log books recording all transfers and discharges of oily waste. When a vessel pulls into a U.S. port and presents a false log book, the consequences are severe. Over the past 10 years, the criminal penalties imposed in vessel pollution cases have totaled more than $200,000,000 and responsible shipboard officers and shore-side officials have been sentenced to more than 17 years of incarceration. The initiative has resulted in a number of important criminal prosecutions of key segments of the commercial maritime industry, including cruise ships, container ships, tank vessels, and bulk cargo vessels.

This year, the Division continued to have great success prosecuting deliberate violations as the representative cases below illustrate.

The Division's appeal of *United States v. Jho* obtained the first appellate ruling on the scope of federal jurisdiction to prosecute log book offenses and the meaning of the duty to maintain them under APPS. Here, the indictment charged the defendants with the failure to "maintain" oil record books for the M/T Pacific Ruby, a foreign-flagged oil tanker that delivered petroleum products to ports along the United States' gulf coast; and alleged that the defendants failed to record unlawful discharges of petroleum-contaminated wastewater that occurred at sea. The Fifth Circuit reversed the district court's dismissal of the indictment, holding that the regulatory duty to "maintain" the record books is not limited to the duty to make correct entries when discharges occur, but includes the obligation to "ensure that [the record book] is accurate . . . upon entering the ports of navigable waters of the United States." The court further determined that there are no principles of international law that prevent the United States from prosecuting entry of U.S. ports with inaccurate record books as violations of domestic law in port; and that various articles of the United Nations Convention on the Law of the Sea were inapplicable to violations of domestic law committed in port.

In *United States v. Nat'l Navigation Co.* (NNC), the defendant, an Egyptian shipping operator, pled guilty to 15 felonies involving conduct aboard 6 vessels in NNC's fleet, including APPS and making false statements to federal officials. NNC was sentenced to pay a total penalty of $7.25 million – the largest ever in the Pacific Northwest for a case involving the falsification of ship logs to conceal deliberate pollution from ships. Of this amount, $2,025,000 will go toward funding community service projects. The company was also required to implement a comprehensive environmental compliance plan (ECP).

In *United States v. Mark Humphries*, the defendant was convicted for violating APPS, obstruction of an agency proceeding, and two false statement violations. Humphries was sentenced to serve six months' incarceration followed by a two-year term of probation. Humphries was a former chief engineer for the M/V Tanabata, a vessel managed by Pacific Gulf Marine (PGM). In 2007, PGM was sentenced to pay a $1 million fine, make a community service payment of $500,000, complete a 3-year term of probation, and implement an ECP.

Guilty pleas or convictions were also reached in four additional cases involving vessel operators and crew members in *United States v. B. Navi Ship Mgmt. Servs.; United States v. Reederei Karl Schlueter*; *United States v. Pacific Operators Offshore;* and *United States v. Ionia Mgmt. S.A.* These defendants were sentenced to pay a total of $7.55 million in fines and $700,000 in community service, with each individual serving a term of probation for crimes including APPS violations, false statements, obstruction of justice, and violations of the Outer Continental Shelf Lands Act.

Protecting the Country's Wetlands. In *United States v. Lucas*, the defendants sold house lots and installed septic systems in wetlands, while representing that the properties were dry. The septic systems failed, rendering the properties uninhabitable and causing sewage discharges into the wetlands and adjacent waters. A jury convicted Lucas and the other defendants for conspiracy, mail fraud, and violations of Sections 402 and 404 of the CWA. The defendants asserted that under the Supreme Court's 2006 decision in *Rapanos v. United States*, which was decided after the convictions, EPA and the Army Corps of Engineers lacked regulatory authority over their actions. The Fifth Circuit affirmed the convictions, finding that the evidence was sufficient to satisfy the CWA jurisdictional standards set forth in the plurality, concurring, or dissenting opinions in *Rapanos* and rejecting an unconstitutional vagueness challenge due to abundant evidence that defendants should have known the wetlands might be regulated.

Safeguarding Our Nation's Groundwater from Hazardous Waste Pollution. In *United States v. Dennis Pridemore*, the defendant, the former president and manager of Hydromex Inc., was charged with having illegally stored and disposed of hazardous waste including heavy metals cadmium, chromium, and lead that he had been paid to recycle into marketable products. Pridemore admitted that instead of doing so, he buried the wastes in trenches and produced faulty products that leached heavy metals into the surrounding soil and groundwater. He created false documents making it appear to regulators that he had customers for the products he claimed to be making and selling. Pridemore pled guilty to committing four RCRA violations, and to making two false statements. He was sentenced to serve 41 months' incarceration followed by a 3-year term of probation.

Securing and Protecting our Nation's Highways from the Illegal Transportation of Hazardous Waste. In *United States v. Krister Evertson*, the defendant arranged for the transportation of sodium metal and several above-ground storage tanks which contained sludge without proper shipping documents. Sodium metal and the materials in the tanks are highly explosive when mixed with water, and Everston failed to take protective measures to reduce the risk that the transported material would react and damage persons or property. Evertson was convicted of two RCRA storage and disposal violations and with violating the Hazardous Materials Transportation Safety Act. He was sentenced to serve 21 months' incarceration followed by a 3-year term of probation and to pay $421,049 in restitution for illegally transporting hazardous

materials and illegally storing hazardous waste.

Protecting the Environment, Public Health, and Worker Safety. In *United States v. Spencer Environmental Inc.* (SEI), the corporate defendant pled guilty to a RCRA violation for accepting corrosive and ignitable hazardous wastes without a permit and to mishandling waste oil in violation of RCRA. SEI was sentenced to pay $150,000, half of which will go toward a community service payment. SEI's president, Donald Spencer, pled guilty to mishandling waste oil and was sentenced to serve six months' incarceration followed by a one-year term of probation.

In the *United States v. W.R. Grace & Co*, the Division obtained critical victories in several interlocutory appeals to the Ninth Circuit that will allow this important CAA case to go trial in early 2009. The company and several of its officers stand charged with conspiracy and substantive violations of the CAA for knowingly endangering the lives of workers at its vermiculite mine and of residents in the nearby town of Libby, Montana. The district court had entered a series of pre-trial rulings, in particular on the substantive elements of the CAA violations, that would have gutted the government's case.

Cracking Down on Illegal Asbestos Removal. In *United States v. Cleve-Allan George*, the defendant, who had been convicted in 2005 on 16 counts, including CAA and false statement violations, was sentenced to serve 33 months' incarceration, followed by a 3-year term of probation. George and his co-defendant did not follow asbestos work practice regulations, and filed false air monitoring reports related to a remediation project in a HUD-funded housing project.

In *United States v. Branko Lazic*, the defendant pled guilty to 1 CAA violation for the improper removal of asbestos at an elementary school, and was sentenced to serve 6 months' home confinement, followed by a 3-year term of probation, and to complete 50 hours of community service.

In *United States v. Robert Langill*, the defendant pled guilty to violating the CAA in connection with an illegal asbestos abatement at the U.S. Naval Air Station, Patuxent River, and was sentenced to serve 60 days' incarceration, followed by 10 months' home detention, and to serve a 2-year term of probation.

Safeguarding Our Fragile Ecosystem on the North Slope of Alaska. In *United States v. British Petroleum Exploration (Alaska), Inc. (BPXA)*, the corporate defendant failed to heed the many warning signs of imminent internal corrosion of oil transit lines that a reasonable operator should have recognized. This failure resulted in more than 200,000 gallons of crude oil on the North Slope spreading over 2 acres of tundra. BPXA's failure to allocate sufficient resources, due to cost-cutting measures, led to the failure of a section of the oil transit line which had not been inspected for eight years. BPXA pled guilty to a CWA violation for the largest-ever spill of crude oil on the north slope of Alaska. BPXA was sentenced to pay a $20 million fine, followed by a 3-year term of probation. Four million dollars will be used for research in support

of the arctic environment in the State of Alaska on the North Slope, and $4 million in restitution will be paid to the State of Alaska. A second spill involving approximately 1,000 gallons of oil, that led to the shut down of Prudhoe Bay oil production on the eastern side of the field, was also covered by the plea agreement.

Safeguarding Aquatic Life and Water Quality in and Around the Gulf of Mexico. In *United States v. Citgo Petroleum Group*, the defendant, who operated a Louisiana refinery, failed to maintain 2 storm water tanks and to build a planned third tank, which led to the discharge of 53,000 barrels of oil to the Calcasieu Estuary. The illegal discharge overran the company's storm water system resulting in limited commercial transportation on the waterways for approximately 10 days. Citgo pled guilty to a negligent violation of the CWA and was sentenced to pay a $13 million fine, the largest fine for a misdemeanor CWA violation. Additionally, the company implemented an ECP to ensure the estuary is protected from this kind of spill in the future.

In *United States v. Rowan Cos.*, the corporate defendant operated and cleaned offshore drilling rigs, creating substantial amounts of waste from routine maintance and sandblasting operations, including hydraulic oil, chemicals, paint, and other materials that were dumped directly into the Gulf of Mexico. Rowan pled guilty to three felonies and was sentenced to pay a $7 million dollar criminal fine along with $2 million in community service payments. In addition, the company will add an environmental division and implement an ECP to contain debris from future sandblasting operations. Nine supervisory employees of Rowan pled guilty and were fined and sentenced to terms of probation for their roles related to Rowan's violations.

Keeping Nuclear Power Safe. In *United States v. David Geisen*, the defendant was convicted of concealment and false writing violations for his role in a scheme to keep information from the Nuclear Regulatory Commission, and with making false statements to the Commission. Geisen was sentenced to serve four months' home detention. His co-defendant, Andrew Siemaszko, was convicted in a separate trial of three false statement violations and is awaiting sentencing.

Protecting Endangered Sea Turtles from International Smugglers. In *United States v. Esteban Lopez Estrada*, the Division achieved notable success in the investigation and prosecution of four wildlife smuggling rings – two based in Mexico and two in China – engaged in illegal trafficking in endangered or otherwise protected sea turtles and other protected species, and products made from their parts. The defendants bought and sold exotic leathers, including sea turtle, caiman, ostrich and lizard skins, and manufactured boots and belts from the skins to sell to customers in the United States. Other sea turtle parts were used to manufacture and sell guitar picks and violin bows. The investigation, known as "Operation Central," was a long-term undercover investigation run out of a store front in Denver, Colorado. Thus far, 7 defendants have pled guilty to charges including conspiracy, smuggling, and money laundering and have been sentenced to a

total of 107 months of incarceration. Four indicted defendants remain at large.

Safeguarding U.S. Consumers from the False Labeling of Fish. In *United States v. True World Foods Chicago LLC*, True World imported fish commonly known as basa or Vietnamese catfish, but falsely labeled as sole, thereby reducing the amount of duty legally due. True World pled guilty to a Lacey Act violation for its role in purchasing and re-selling the falsely labeled frozen fish fillets and was sentenced to pay a $60,000 fine. The company further forfeited $197,930, which represented the purchase value of the fish. One company employee, David Wong, pled guilty to violating the Lacey Act for his role, while co-defendant, Henry Yip, pled guilty to a misbranding violation for his involvement in this scheme.

Prosecuting Illegal Hunting and Fishing. In *United States v. Eric Leon Butt, Jr., d/b/a Outdoor Adventures*, Butt, a Colorado big-game outfitter, pled guilty to conspiracy to violate the Lacey Act stemming from the interstate sale and transport of deer, elk, and black bear. Sentencing is pending. His co-defendant, Scott LeBlanc, pled guilty to a misdemeanor violation of the Lacey Act and was sentenced to pay a $3,000 fine, pay $5,000 in restitution, and complete a 2-year term of probation, and is banned from hunting in Colorado for 5 years. A third co-defendant, Paul Ray Weyand, pled guilty to three misdemeanor Lacey Act violations.

In *United States v. Zane Fennelly*, the defendant, the captain of a commercial fishing vessel, pled guilty to disposing of and attempting to destroy three bags containing spiny lobsters that were illegally caught within the exclusive economic zone of the United States. Fennelly dumped the illegally caught lobsters as the United States Coast Guard was approaching his vessel. Fennelly was sentenced to serve four months' incarceration followed by a one-year term of probation.

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

Defending EPA's Air Pollution Standards for the Chemical Manufacturing Industry. *NRDC v. EPA* upheld EPA's final CAA rule setting National Emission Standards for Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry. The court held that EPA could reasonably determine that a standard that reduced cancer risk to 1-in-10,000 was sufficient to satisfy the statute. Further, the agency could consider costs in assessing the "ample margin of safety" it was required to provide in the standard, given that Congress referenced in the statute a benzene standard in which EPA had also considered costs. Finally, the court upheld the record basis for EPA's decision, finding that EPA reasonably relied on industry-supplied data in reaching its decision and had reasonably responded to comments regarding the agency's alleged failure to regulate all sources of emissions of hazardous air pollutants in the category.

Upholding EPA's CAA Permitting Decisions and Enforcement Discretion. In *Citizens Against Ruining the Environment v. EPA*, the Seventh Circuit upheld EPA's decision not to object to

Illinois' issuance of CAA Title V operating permits to six Midwest Generation power plants. The court first found that the Illinois Attorney General lacked standing, having failed to explain why the court should entertain a challenge by one state agency to a decision of a second agency of the same state. The court also ruled that EPA reasonably interpreted the CAA in deciding that petitioners had not "demonstrated" the permittee's noncompliance with the Act, where EPA had commenced judicial enforcement proceedings against the permittee, the permittee was contesting those allegations, and they had not been judicially resolved.

Similarly, in *Sierra Club v. EPA*, a petition for review of EPA's denial of a request to object to a CAA Title V permit for certain Georgia Power facilities, the Eleventh Circuit held that EPA acted reasonably and within its discretion in determining that a citizen petitioner had not made an adequate "demonstration" of a violation where the petition rested entirely on EPA's own allegations in an enforcement complaint that had not yet been adjudicated.

Protecting Against Premature Challenges to Agency Action. In *State of California v. EPA*, the petitioners sought review of the EPA Administrator's letter to California Governor Schwarzenegger informing him of EPA's intent to deny California's request for a waiver of CAA preemption for California's proposed regulation of motor vehicle greenhouse gas emissions. EPA subsequently published a formal denial decision in the Federal Register. The court granted our motion to dismiss the challenge to EPA's letter, finding that the letter did not constitute reviewable final agency action.

Upholding EPA's Safe Drinking Water Regulations. In *City of Portland, Oregon v. EPA*, the court denied the petitioners' request to overturn EPA's National Primary Drinking Water Regulations setting requirements to reduce levels of cryptosporidium and other microbial pathogens in drinking water. The court found that EPA had adequately considered and addressed all issues during the rulemaking.

In another case involving regulation of drinking water, *Miami-Dade County v. EPA*, the petitioners sought review of a final rule entitled "Underground Injection Control Program -- Revision to the Federal Underground Injection Control Requirements for Class I Municipal Disposal Wells in Florida." The court found that EPA had reasonably addressed in the rule the risks posed by non-biological contaminants, pathogens, nutrients, and other contaminants, and that EPA permissibly compared the utility of underground injection with other forms of waste disposal. The court also held that EPA reasonably considered geologic variation in determining where the final rule would apply. Finally, the court upheld as reasonable EPA's resolution of a number of record-based issues, including findings EPA made in a risk assessment and its decision to require high-level disinfection before injection of wastes.

Defending Against Liability for Damage Caused by Hurricane Katrina. In

Louisiana Envtl. Action Network v. United States Army Corps of Eng'rs, the plaintiff sued the Corps of Engineers under RCRA, alleging the existence of an imminent and substantial endangerment and seeking to force the testing and any necessary cleanup of sediments deposited in the vicinity of the Pratt Drive breach of the London Avenue Canal following Hurricane Katrina. The court dismissed two complaints because RCRA does not abrogate the immunity that Congress conferred on the Corps in the Flood Control Act with regard to its flood control activities.

Defending Agency Post-September 11 Conduct. In *Benzman v. Whitman*, a case jointly handled by the Environment and Natural Resources and Civil Divisions, the plaintiffs who lived, worked, or went to school in southern Manhattan, alleged that they were injured by EPA official statements (including by then-Administrator Whitman) claiming air quality after the collapse of the World Trade Center was better than it actually was. As we argued, the Second Circuit held that the alleged actions by Whitman and EPA did not rise to a constitutional violation. The court noted the competing considerations to which both Whitman and EPA were subject, and held that imposing liability for actions taken under these circumstances could seriously hamper government decision-making. The court affirmed the dismissal of the claims, holding that the plaintiffs had failed to identify duties that EPA was required to carry out.

Defending Untimely Challenges to Agency Action. *West Virginia Highlands Conservancy v. Johnson* involved a citizen suit under RCRA, alleging that EPA had failed to perform a nondiscretionary duty to conduct a study on coal mining wastes, prepare a report to Congress, and make a determination whether the regulation of coal mining wastes as hazardous is warranted. The court granted our motion to dismiss the complaint as untimely on alternative grounds.

Enhancing the Nation's Energy Infrastructure. With the nation's growing imperative to efficiently and economically produce energy for its citizens and businesses, the Division's work in securing the rights-of-way and other requisites attendant to energy production and delivery has become increasingly important. For instance, the Division has been called upon to litigate disputes related to the designation of electricity transmission corridors in the Mid-Atlantic and the Southwest. In related cases, *National Wildlife Fed'n v. DOE*, and *Piedmont Envtl. Ctr. v. DOE*, we succeeded in having NEPA, National Historic Preservation Act, and Energy Policy Act claims challenging designation of the Mid-Atlantic Corridor dismissed.

Naturally, in order to provide oil and gas for energy production, it has to be located. The Division has defended suits over permits issued under the Outer Continental Shelf Lands Act to conduct seismic explorations in the Chukchi and Beaufort Seas off Alaska. After hearing the Division's arguments, the court found in *Native Village of Point Hope v. Minerals Management Service* that the agencies appropriately issued their authorizations on the basis of an environmental assessment

and finding of no significant impact, even though they were still studying longer-term potential impacts. In *Center for Biological Diversity v. Kempthorne*, the Division successfully defended the FWS's issuance of a regulation and accompanying environmental assessment authorizing the incidental take of polar bears for five years during oil and gas operations in the Beaufort Sea. Of significance, the court concluded that the assessment adequately accounted for the combined effect of incidental take and climate change on polar bears. In yet another case, *North Slope Borough v. Minerals Management Service*, the Division presented persuasive evidence in support of an oil and gas lease sale in the Beaufort Sea challenged for its alleged impacts on polar bears, bowhead whales, and other wildlife.

Defending the Federal Highway Administration's Traffic Projects. As the nation grows more and more mobile and increases in population, it is increasingly important that our roads and bridges be safe, efficient, and minimize environmental impacts. The Division continues to play a significant role in defending the Federal Highway Administration's (FHWA) projects designed to address both traffic control and safety. This year saw some significant victories for the Division. In one example, the plaintiffs in the consolidated cases of *Audubon Naturalist Soc'y v. DOT* and *Environmental Defense v. DOT* challenged the Intercounty Connector highway project linking I-95/US 1 with I-270 across Prince George's and Montgomery Counties in the Maryland suburbs outside Washington, D.C. This high profile project has been in the works for years to alleviate congestion outside of the I-495 beltway, which is among the worst in the nation. Along with the State of Maryland, we successfully defended against the myriad claims raised under NEPA, the Department of Transportation Act Section 4(f), the CWA, the CAA, and the Federal Aid to Highways Act.

The State of Indiana has been searching for over half of a century for a major highway route across the southwestern quadrant of the state. The FHWA, along with the Indiana Department of Transportation, took a hard look at the benefits and detriments of a particular route to complete that search. While acknowledging differences of opinion as to the project, the court in *Hoosier Envtl. Council v. DOT* agreed that the FHWA and the Indiana Department of Transportation had properly analyzed the effects of the proposed new I-69 segment from Indianapolis to Evansville designed to facilitate the international trade route from the Canadian border at Huron, Michigan, to the Mexican border at Laredo, Texas. The court also found that there were no violations of the CWA, ESA, or the Department of Transportation Act.

Securing Needed Water Rights for the United States. The Division is involved in litigating federal water rights claims for a variety of purposes. For example, the Great Sand Dunes National Park and Preserve Act of 2000 directs the Department of the Interior to obtain water rights under Colorado law to maintain groundwater levels under the Great Sand Dunes National Park and to protect the wetlands, streamflows, and other hydrology-dependent surface resources of the park for

future generations. As a result of the Division's efforts, the Colorado water court granted the United States' claim and decreed to the National Park Service the rights to the groundwater underlying the park, which is critical to the look, the feel, and the ecology of the park.

In another water rights development this year, the Assistant Attorney General joined the Secretary of the Interior, members of Congress, and representatives of the States of California and Nevada and the Pyramid Lake Paiute Tribe, among others, to sign the historic Truckee River Operating Agreement ("TROA"), the culmination of 15 years of negotiations the Division led. Under the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, the TROA is a prerequisite for Congressional approval of an allocation of the waters of Lake Tahoe, and the Truckee and Carson Rivers among the states, tribe, and stakeholders. In addition to enhancing drought protection for the Cities of Reno and Sparks, TROA provides significant environmental benefits through more flexible and coordinated reservoir operations. This flexibility allows water to be stored and released for the benefit of threatened and endangered fish species in Pyramid Lake, water quality in the lower Truckee River, and instream flows on the Truckee River and tributaries under the California Guidelines.

Defending Federal Agency Program Assessments of Impacts on Species. In a variety of cases, plaintiffs assert that federal agencies have not adequately considered their obligations under species protection laws when carrying out actions. In Fiscal Year 2008, the Division had favorable results in many such challenges. In *Nat'l Wildlife Fed'n v. Harvey*, the court held that the FWS reasonably concluded that an Army Corps of Engineers project would not adversely affect the newly rediscovered ivory-billed woodpecker. Similarly, in *Salmon Spawning and Recovery Alliance v. Lohn*, the court found that the NMFS biological opinion on the fishery management plans of Washington State and 17 Tribes for Puget Sound fisheries was reasonable. The Division successfully argued in *Center for Biological Diversity v. HUD* that HUD loan guarantees did not cause residential development requiring ESA consultation.

Acquiring Property for Public Purposes. The Division exercises the federal government's power of eminent domain to enable agencies to acquire land for various purposes. In this work, the Division is mindful of its goal to achieve results equitable to individual landowners and to the taxpayers of the United States. This year, we assisted in the acquisition of property needed for new or expanded federal courthouses in Buffalo, New York, and Salt Lake City, Utah, and office space in Arlington, Virginia. Through settlements and trials, the Division saved about $32.7 million. We also worked with agencies to avoid the expense of litigation where possible.

Working with the United States Congress on Environmental and Natural Resources Legislation and Related Matters. Through the Department's Office of Legislative Affairs, the Division responds to relevant legislative proposals

and Congressional requests, prepares for appearances of Division witnesses before Congressional committees, and drafts legislative proposals in connection with its work, including those implementing litigation settlements. In Fiscal Year 2008, the Division led the Department's review of legislation revising the Lacey Act. Until it was amended this year, the Lacey Act, the country's oldest national wildlife conservation statute, served primarily as an anti-trafficking statute to protect a broad range of fish and wildlife. This year's amendments to the Lacey Act added new enforcement tools with respect to plants, including timber harvested in violation of a foreign country's laws and imported into the United States, as well as products made from illegally harvested plants. The amendments also require importers of plants and plant products to file a declaration upon importation.

The Division has also actively participated in an interagency group led by the Council on Environmental Quality tasked with implementation of the new provisions. Division attorneys have also spoken at conferences and meetings in the United States and internationally to explain the scope of the new Lacey Act provisions to government officials, industry representatives, and others.

Enforcing Environmental Laws Through International Capacity Building. Attorneys from the Division speak at conferences in foreign countries and provide training on a variety of subjects pertaining to civil and criminal environmental enforcement. This year, the Division engaged in such capacity building in Guatemala, France, Norway, Austria, the United Kingdom, the Kingdom of Bahrain, Thailand, Laos, Malaysia, Indonesia, China, and South Africa.

Division attorneys organized and served as instructors in workshops for judges, prosecutors, and investigators in Vietnam and Thailand, addressing prosecuting cases to combat trade in wildlife and wildlife parts in partnership with the Association of Southeast Asian Nations Wildlife Enforcement Network. The Division also conducted training for judges and law enforcement officials in Indonesia on prosecuting cases involving trafficking in illegally harvested timber. The Department of State funded this training pursuant to a Memorandum of Understanding Between the United States and Indonesia on Combating Illegal Logging and Associated Trade. The Division also received funding under the Central America-Dominican Republic-United States Environmental Cooperation Agreement to train judges in Central America on handling environmental enforcement cases.

Division attorneys took part in several rounds of negotiations in Peru and Washington, D.C., with officials of the Government of Peru, to review and provide comments on environmental and forestry laws and regulations being enacted by Peru to meet its obligations under the United States-Peru Trade Promotion Agreement.

Protecting the Interests of the United States in Litigation Involving Third Parties. The Division at times participates as amicus curiae in cases in which the

United States is not a party to protect the interests of the United States and its component agencies. Such participation may be in district court, in a court of appeals, or in the Supreme Court; we also participate at times in state court proceedings. The Division has filed briefs in a number of such proceedings in the past year. One example is a Fifth Circuit case involving the res judicata effect of a CWA consent decree on parallel citizen litigation, *ECO v. Dallas*. Here, the Division successfully argued that a citizen suit could not continue after the federal consent decree resolved all claims in the case. Such parallel claims are a recurring issue, and are especially prevalent in the largest and most complex enforcement matters. The favorable *ECO* opinion will help shape the case law and protect the settlement authority of the United States.

PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

Protecting the Navy's Ability to Use Sonar in Training Exercises. The Division represents the Navy in several cases that challenge the Navy's use of mid-frequency active sonar throughout the world and in specific training exercises off the coast of California and Hawaii, as well as its use of low-frequency sonar, a new technology for anti-submarine warfare that is still in the experimental phase. These high-profile cases are critically important to the nation's security and military readiness. In 2008, our efforts have resulted in significant success.

The plaintiffs challenged the Navy's plans to conduct 11 training exercises off the coast of southern California in *NRDC v. Dep't of the Navy*. Over a six-month period, this litigation involved three preliminary injunction hearings in district court; extensive use of classified materials, including submission of declarations from the Navy's highest ranking operational office (the Chief of Naval Operations); a site visit by the district court judge; the filing of emergency motions to stay before both the district and appellate courts, including one within hours of a court order; two oral arguments before the Ninth Circuit; settlement negotiations before the Ninth Circuit mediator; invocation of a statutory exemption by the President; and the filing of a petition for certiorari before the Supreme Court. Importantly, at each stage of this litigation, the Division has obtained relief allowing the Navy to proceed with training.

In the worldwide Navy sonar case, Division trial attorneys aggressively engaged in jurisdictional discovery initiated by the plaintiffs. Following receipt of a discovery order in July of this year authorizing the Navy to take certain depositions and instructing the plaintiffs to respond to written discovery, the plaintiffs re-started settlement discussions, and a settlement very favorable to the Navy was reached.

Supporting the Strategic Border Initiative. To enhance domestic security, the Illegal Immigration Act requires the Department of Homeland Security (DHS) to build fencing along the United States/Mexico border. The Act requires DHS to designate priority areas where fencing would be most practical and

effective in deterring smugglers and aliens attempting to gain illegal entry into the United States and to complete construction of fencing in those areas by December 31, 2008. DHS has identified over 350 miles of priority areas, and the Division has worked closely with DHS and the United States Army Corps of Engineers to facilitate land acquisitions necessary for construction in those areas. This effort has required acquisition by eminent domain of over 300 parcels of land located in Texas, New Mexico, Arizona, and California.

Some of these actions have been appealed to the Fifth Circuit. In *United States v. Muniz & Rivas*, various landowners challenged possession orders issued by the district court granting the United States possession of a temporary right of entry as to the subject properties. Agreeing with the United States, the Fifth Circuit dismissed for lack of appellate jurisdiction.

Acquiring Property to Improve Military Readiness and National Security. The Division also exercised the federal government's power of eminent domain this year to acquire land for military readiness and national security purposes, including for such diverse military installations as the U.S. Southern Command headquarters in Florida; Luke Air Force Base in Arizona; the Department of the Army's National Training Center in Fort Irwin, California; a Special Operations Force riverine training range in Mississippi; Dobbins Air Reserve Base in Georgia; and Travis Air Force Base's Anti-Terrorism Protection project requirements in California.

We also supported the military in other crucial ways, such as reviewing and approving title for the acquisition of a hundred acres of land in Florida and Pennsylvania by the Department of Veterans Affairs for medical facilities and national cemeteries.

The Division also asserted the federal government's power of eminent domain to assess environmental damage and then clean up contaminants stemming from military facilities in Montgomery County, Alabama, and Tooele Army Depot in Utah.

Defending the Army's Chemical Weapons Demilitarization Program. The Division has successfully defended the Army against challenges to its program to destroy aging stockpiles of chemical weapons pursuant to international treaty obligations. In *Sierra Club v. Army*, the plaintiffs challenged the Army's destruction of a chemical nerve agent under RCRA. The destruction process involves neutralizing the deadly liquid agent at one location, then shipping the resulting product to a commercial hazardous waste incinerator. The plaintiffs alleged that the chemical agent is not fully neutralized in the treatment process and that trucking the resulting product thus presents risks. The court ruled in favor of the Army on all counts, allowing destruction of chemical weapons at the facility, which is vital to national security, to be completed without interruption.

An Oregon court issued a largely favorable decision in *G.A.S.P. v. Army*, upholding state-issued permits for the

incineration of chemical weapons at the Army's facility in Umatilla, Oregon. The court remanded two relatively minor issues to the state permitting agency, but held that the facility may continue incinerating chemical weapons during the remand because petitioners had not shown that the operations had an adverse effect on public health or the environment.

Defending FBI Weapons Training. In *Pollack v. United States Dep't of Justice*, the plaintiffs sought injunctive relief, $35.2 million for environmental investigation and remediation, and $20 million in tort damages arising out of FBI and other federal agency firearms training at a regional training facility in Illinois, and live-fire training exercises by the Coast Guard in Lake Michigan. They contended that these activities violated the CWA, RCRA, and CERCLA, and constituted a public nuisance under the Federal Tort Claims Act. The court dismissed all claims for lack of subject matter jurisdiction, finding that the plaintiffs lacked individual and organizational standing insofar as they failed to demonstrate individualized harm from the alleged impacts to drinking water drawn from Lake Michigan and to their aesthetic interests in the vicinity of the training facility and Lake Michigan.

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

Defending Tribal and Federal Interests in Water Adjudications. In Fiscal Year 2008, the Division had continued success in representing the interests of Indian tribes in complex water rights adjudications. The Division was instrumental in reaching a major water rights settlement between the United States, the Soboba Band of Luinseno Indians, and three California water districts. The agreement, approved by Congress on July 23, 2008, and signed into law on July 31, 2008, brought to an end almost 60 years of litigation and over 10 years of settlement negotiations. The settlement provides that the Soboba Band has the paramount right to pump a stipulated amount of water for any use on the reservation, an amount guaranteed by the water districts should interference deplete the Band's groundwater reserves. In addition, the non-Indian water districts have contributed land to the Band and one of the districts will deliver water for the next 30 years to recharge the groundwater.

The Division also successfully defended a comprehensive settlement in *United States v. Washington Dep't of Ecology (Lummi Tribe)*, a lawsuit that sought to determine the Lummi Nation's rights to the use of groundwater underlying the Lummi Peninsula of the Lummi Indian Reservation. The Division, working with the State of Washington and private water users, entered into a settlement which protects the groundwater beneath the Lummi Peninsula.

Protecting Tribal Hunting, Fishing, and Gathering Rights. The Division litigates to protect treaty-based tribal hunting, fishing, and gathering rights. Many years ago, the United States prevailed in establishing the treaty fishing rights of four Columbia River Basin tribes. The taking of those fish, however, impacts anadromous species (those which are born in fresh

water, migrate to the ocean to grow into adults, and return to fresh water to spawn) that are listed pursuant to the ESA. In *United States v. Oregon*, the parties, after a decade of negotiations, concluded the Management Agreement for Fish Harvests on the Columbia and Snake Rivers in Washington, Oregon, and Idaho for 2008-2017, which complies with the ESA. This plan will improve fish habitat and allow the tribes to increase their catch as the populations of threatened species increase.

Upholding Agencies' Authority to Implement Indian Policies. The Division continued to achieve considerable success this year in defending the Secretary of the Interior's land trust acquisition authority against numerous constitutional, statutory, and administrative law challenges. The Division also successfully defended decisions by the National Indian Gaming Commission to approve tribal ordinances under the Indian Gaming Regulatory Act. For example, in *City of Vancouver v. Hogen*, the Division obtained dismissal of a lawsuit that challenged the Commission's approval of a Cowlitz Indian Tribe ordinance which addresses important environmental and health/safety issues. In *County of Sauk v. Kempthorne*, the court found that the Secretary acted within statutory authority in approving the contested trust acquisition on behalf of a Wisconsin tribe, which will provide important economic and cultural benefits to the tribe. Finally, in *Michigan Gambling Opposition v. Kempthorne ("MichGO")*, the Division secured rulings from district and appellate courts that rejected environmental and constitutional claims related to a proposed acquisition in Michigan.

Defending Tribal Trust Claims. The Division represents the United States in nearly 100 cases brought by Indian tribes demanding accountings and damages, and alleging breach of trust and other claims relating to funds and non-monetary assets (such as timber rights, oil and gas rights, grazing, mining, and other interests) on some 45 million acres of land. Many of these cases are in settlement negotiations and others are in the early stages of pre-trial preparation. The cases are complex and cover many decades of economic activity on tribal reservations. The Division has enjoyed great success in a program of engagement with the tribes on their claims and has fairly balanced its duties to defend client programs with an obligation to make whole any tribes wronged by asset management practices. The Division has settled some cases, had others dismissed on procedural grounds, and is prepared to go to trial in yet others.

Litigating Under the Indian Gaming Laws. With the Indian gaming revenue at tribal casinos exceeding the combined revenue of Nevada and Atlantic City casinos, the Division continues to be involved in litigation defending the Secretary's actions related to Indian gaming. The Division was successful in securing a dismissal of *State of Florida and Alabama v. Kempthorne*, which challenged the constitutionality of regulations implementing federal Indian gaming laws. In three separate actions, we successfully opposed emergency injunctive relief seeking to prevent a tribal-state compact from going into effect in the State of Florida. In doing so, we secured very favorable language that gives the Interior

Secretary discretion and flexibility in the Department's sensitive role in approving tribal-state compacts.

Navigating the Tribal Acknowledgment Process. No role of the Bureau of Indian Affairs in the Department of the Interior is more sensitive and at times more controversial than its responsibility to make decisions on whether a group should be federally recognized as a tribe. The decision means the group becomes sovereign over its members and internal disputes. A federally recognized tribe gains distinct federal benefits and may no longer be subject to state civil regulatory laws on its lands. Federal recognition also allows the tribe to establish Indian gaming activities that are consistent with federal law. As a result, the acknowledgment process has become a magnet for litigation. The Division had two prominent successes this year in upholding the acknowledgment process. In the first case, *MOWA Band of Choctaw Indians v. United States*, the court upheld the Interior Department's administrative consideration of the plaintiff's application for recognition and found that the Department had effectively notified the plaintiff of its decision, thus commencing the statute of limitations period which barred plaintiff's action. In the second case, *Schaghticoke Tribal Nation v. Kempthorne*, the plaintiff charged that political interference led to the denial of its petition for recognition. The court noted that, while the evidence showed that political actors had exerted public and private pressure on the Department, none of that political activity actually affected the outcome of the decision on the acknowledgment petition.

SUPPORTING THE DIVISION'S LITIGATORS

Expanding and Upgrading Technology Services and Resources. High priority was placed on technology services and resources in 2008. In keeping with the Division's unique responsibility to lead the Department in areas of environmental and energy efficiency, we replaced aging IT infrastructure and deployed new "virtual server" technology, which allowed the Division to purchase 37% fewer servers. The new servers include an energy-saving technology that exceeds EPA's Energy Star requirements. Together, these efficiencies will reduce the Division's power requirements and heat output by 50%. Technical support for Division staff also received a boost this year when the computer desktop support contract (help desk) was restructured to provide service 24 hours a day, 7 days a week.

The Division acquired software to save attorney time and effort during document review. We also continued to provide government attorneys with assistance in electronic discovery matters, including through training, client agency consultations, and documented standard practices.

Several new features were added to the Division's Internet site, www.usdoj.gov/enrd, including a subscription service by which members of the public can sign up for email alerts about items of interest.

The Division's internal Intranet site contains new connectivity tools to help

employees more quickly access information and complete tasks necessary for their jobs. One such tool completed in 2008 is a web-based expert witness and litigation consultant tracking system. The Division also improved the ability of trial teams to collaborate on case materials with agency counsel, investigators, and expert witnesses by routinely making case information available through our secure Internet portal.

We completed the Division's conversion to JUTNet, a managed enterprise local and wide area network that provides secured data telecommunications services to Division sites in Washington, D.C., and all field office locations. This Department-wide system meets new federal information sharing and security requirements.

Greening the Division. The Division is an active participant in the Department's Greening the Government effort. This year, the Division's Greening the Government Committee took concrete steps to reduce the environmental footprint of the Division, and also conducted research that should lead to future reductions in energy use and material waste.

Much of the committee's work to date has focused on informational outreach to Division employees to encourage environmentally-friendly behaviors while at work. "Best Practices" memoranda for paper conservation and energy use were distributed to staff, and weekly messages on the Division's Intranet have provided other tips for being "green" at work. To reduce paper waste, the committee has posted informational placards near recycling bins and the Division will be purchasing paper with a higher percentage of recycled content. And in a step that will conserve paper, all sections of the Division have elected to standardize double-sided printing as their default printing option. The Division has also enrolled in the EPA-ABA Climate Challenge, a program for law offices seeking to document improvements in their environmental performance.

Supporting Litigation. The Office of Litigation Support participated in the Division's most complex cases in 2008, making use of contract staff and in-house expertise. Careful attention to case requirements analysis and attorney trial team needs allowed the Division to apply a $27 million litigation support budget to document management, processing, staffing, training, and trial support services for over 300 matters and initiatives.

As part of ongoing efforts to provide better, more efficient services to attorneys at the most affordable rates for the government, we relocated contract litigation support operations for two of the Division's largest cases to a large, convenient, and less expensive support center location, later integrating other Division cases into the new support center. We closed a large document center in Boise, Idaho, and consolidated all western water case activities in Denver, Colorado.

On-site trial support was provided for major civil and criminal cases across the country, in locations as diverse as Cincinnati, Ohio, Los Angeles, California, Portland, Oregon, Providence, Rhode Island, and Corpus Christi, Texas.