

UNITED STATES DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION

SUMMARY OF LITIGATION ACCOMPLISHMENTS
FISCAL YEAR 2007



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FOREWORD

I am honored to present this summary of the Environment and Natural Resources Division's litigation accomplishments for Fiscal Year 2007. This has been an extraordinary year. 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.

The Division's vigorous enforcement of our environmental laws again resulted in recordbreaking achievements in both the civil and criminal arenas. Enforcement is a critical component of environmental protection and helps ensure that our citizens breathe clean air, drink clean water, and will be able to enjoy the country's public lands, wildlife and other natural resources for generations to come.

In civil enforcement, the Division obtained nearly \$6.7 billion in injunctive relief, through contested judgments or judicially approved consent decrees – the second largest single year amount ever. The injunctive measures secured will ensure that harmful sediments are removed from rivers, state of the art pollution control devices are added to factories to provide cleaner air, sewage discharges are eliminated, and damaged land and water aquifers are restored. This record result does not include one of the largest enforcement cases of all time, the massive case against American Electric Power for alleged Clean Air Act violations, which was resolved by consent decree lodged on October 9, 2007. Working jointly with eight states and thirteen environmental groups, the Division led the effort to bring the company into compliance with the law and obtain extraordinary pollution reduction. The settlement will require American Electric Power to undertake remedial actions to reduce its emissions of pollutants at an estimated cost of \$4.6 billion, the highest value of injunctive relief ever obtained in an environmental case. The environmental impact is enormous. When fully implemented, the settlement will secure more than 800,000 tons per year of air pollution reductions. The foundation for this result was laid by the Supreme Court's recent – and unanimous – decision in which the Division vindicated the Environmental Protection Agency's position on a key liability issue related to power plant emissions.

The Division also secured a record penalty in a settlement with the East Kentucky Power Cooperative that included the highest fine ever imposed under the Clean Air Act's acid rain program. And in a wide range of other cases, the Division continued to protect the nation's air quality by successfully pursuing Clean Air Act claims against oil refineries, automobile manufacturers, and diverse industrial facilities.

The Division also worked successfully to ensure the integrity of municipal wastewater treatment systems. Each year, hundreds of billions of gallons of untreated sewage are discharged

into the nation's waters from municipal wastewater treatment systems that are overwhelmed by weather conditions that they are not adequate to handle. This year, the Division reached settlements with several cities – including two of the largest sewer treatment settlements ever, encompassing Indianapolis and the Pittsburgh region – that will collectively provide for more than \$4 billion in expenditures to bring these systems into compliance with the Clean Water Act. These settlements will ultimately reduce the volume of untreated sewage discharged into our streams and rivers by tens of billions of gallons. The Division also protected the nation's waters and wetlands from illegal fill through Clean Water Act enforcement actions.

The Division this year also successfully concluded the first court action ever brought under the Pipeline Safety Act. The settlement of this case – which arose out of a tragic explosion of an El Paso Natural Gas Company pipeline which killed twelve people – will require the defendant to pay a \$15.5 million civil penalty and to spend at least \$86 million on comprehensive upgrades of its pipeline system.

The Division's critical enforcement successes in the civil arena were paralleled in the criminal arena. As part of the Division's ongoing initiative to prosecute those who dump waste oil and other chemicals from ships into the oceans and coastal waterways and who keep false records to hide those activities, the Overseas Shipholding Group was sentenced to pay \$37 million in penalties – the largest ever penalty for concealing vessel pollution. The Division also obtained plea agreements, convictions, substantial terms of imprisonment, and criminal fines against violators who intentionally violated the Clean Air Act, Clean Water Act, laws safeguarding the public from exposure to hazardous waste, and laws protecting wildlife. For example, the Division recently reached plea agreements with two British Petroleum subsidiaries for environmental crimes relating to a fatal explosion at a Texas refinery and to leaks of crude oil from pipelines. In agreements announced in October 2007, British Petroleum agreed to pay \$50 million in criminal fines for Clean Air Act violations relating to a catastrophic explosion that killed 15 employees and injured at least 170 others, and, in a second case, agreed to \$12 million in criminal fines, \$4 million in community service payments, and \$4 million in restitution to the state for Clean Water Act violations relating to pipeline leaks onto the tundra and into a frozen lake in Alaska. In another case, the Division secured convictions against Citgo Refining and Chemical Company for having operated open oil tanks that lacked proper emission controls and in which birds protected by the Migratory Bird Treaty Act were trapped and killed, due to the company's failure to install inexpensive protective equipment.

Record-breaking sentences and enforcement cases are impressive but they are only a part of the Division's work. An equally important aspect of the Division's work is its defense of vital federal programs, including military and national security programs. For example, the Division successfully defended the Army against challenges to its chemical weapons demilitarization program. We assisted the military in its training, preparations and deployment in the war on terrorism with a court victory that allowed the Army to resume activities critical to converting the 2nd Brigade, 25th Infantry Division into a Stryker Brigade as part of the Army's modernization plan. The Division also acquired property essential to military and homeland security needs.

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 secures critical water rights for the United States. This year, the Division reached important settlements and secured favorable judgments ensuring access to the water necessary to maintain the vitality of natural resources and uses of the public lands, national forests, national parks, wildlife refuges, wild and scenic rivers, military bases, and federal reclamation projects throughout the West. Another primary responsibility of the Division is the implementation of the United States' trust responsibility to Indian tribes and the resolution of the issues pertaining to American Indians. We work to protect tribal fishing and water rights, this year, for example, reaching a comprehensive settlement that resolves litigation ongoing since the 1970s and vindicating the hunting and fishing rights of five tribes under the 1836 Treaty of Washington.

The Division currently has a docket of over 6,800 active cases and matters. The cases the Division handles arise under more than 150 different statutes, including the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, the National Forest Management Act, the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Endangered Species Act. The Division litigates in every judicial district in the Nation.

As someone who has served more than a decade in the Department of Justice but is relatively new to the Division, I have been impressed with, but unsurprised by, the dedication and hard work of the Division's attorneys and support staff. The service and commitment of our people is in perfect keeping with the Department's highest traditions. The Division's exemplary record in protecting the environment, American Indian rights, and the Nation's natural resources, wildlife, and public lands is due to the hard work of these people, as well as our client agencies, the United States Attorney's Offices, and state and local officials around the country. The Division's work is a powerful demonstration that our national government can – and does – make a positive difference in the lives of Americans.

Ronald J. Tenpas
Assistant Attorney General
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March 2008

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 tens of millions of tons of excess air pollution that has degraded forests, damaged waterways, contaminated reservoirs, and adversely affected the health of the elderly, the young, and asthma sufferers.

This year, the Division achieved a notable Supreme Court victory upholding the Environmental Protection Agency (EPA) interpretation of the CAA that underlies many of these enforcement efforts. In *Environmental Defense v. Duke Energy Corp.*, the Supreme Court, in a 9-0 decision, agreed with the United States that the lower courts had impermissibly reviewed the validity of EPA’s Prevention of Significant Deterioration (PSD) regulations, which they lacked authority to do under the CAA. The Supreme Court also reasoned that EPA was not required to give the same meaning in its regulations to different statutory uses of the term “modification” and that, for the program at issue, it was reasonable for EPA to measure emission increases based on hourly rates even though another program measured emission rates on an annual basis. The two programs had distinctly different purposes, and EPA was free to choose different ways to measure pollution outputs.

In *United States v. East Kentucky Power Cooperative*, the Division obtained a

consent decree that resolved claims under the CAA’s New Source Review (NSR)/PSD provisions, under which EKPC agreed to system-wide tonnage limits on its emissions of sulfur dioxide (SO₂) and nitrogen oxide (NO_x), reducing annual emissions by approximately 50,000 tons per year. The reductions will be achieved by the installation of controls estimated to cost \$650 million. The decree also requires EKPC to pay a civil penalty of \$750,000, and to conduct an environmental mitigation project at a cost of at least \$5 million. In a separate landmark settlement, EKPC also agreed to settle claims under the CAA’s acid rain program and pay the largest civil penalty to date under that program – \$11.4 million – as well as take steps to reduce approximately 400 tons of harmful emissions annually and offset another approximately 20,000 tons of emissions released from its facility located in Clark County, Ky.

In *United States v. Wisconsin Electric Power Company*, the district court entered an amended consent decree, nearly four years after its lodging. This system-wide power plants settlement requires WEPCO to install pollution control equipment at an estimated cost of \$620 million and pay a \$3.1 million civil penalty.

The Division also obtained the first consent decree with an electric utility, Nevada Power Co., for violations at a gas-fired plant. Pursuant to the consent decree, Nevada Power will install approximately \$60 million in pollution controls to secure significant reductions of NO_x from four of its operating units.

In addition, the Division secured an amendment of a 2002 consent decree stemming from the failures of certain coal-fired power plants owned by Public Service Electric Gas in New Jersey to meet emissions reduction requirements in the 2002 consent decree. The newly achieved air pollution reductions are equal or in certain respects superior to those that would have been achieved under the 2002 consent decree. PSEG will also pay a civil penalty of \$6 million and perform environmental mitigation measures valued at \$3.25 million to reduce particulate matter from diesel engines in New Jersey.

The settlements achieved thus far will, when fully implemented, remove almost two million tons of pollutants from the air each year.

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 consent decrees with three more refiners, Total Petrochemical USA Inc., Valero Energy Corporation, and Hunt Refining Co.

Total agreed to pay a \$2.9 million penalty and upgrade pollution controls to resolve claims under the CAA. The changes to its facility, estimated to cost \$37 million, will significantly reduce the facility's emissions of air pollutants, ultimately reducing annual emissions of NO_x, SO₂, and carbon monoxide by more than 180, 800, and 120 tons, respectively.

Valero agreed to pay a \$4.25 million penalty and install \$232 million worth of new and upgraded pollution controls at refineries in three states. The controls will

eventually reduce annual emissions of NO_x and SO₂ by more than 1,870 and 1,810 tons per year, respectively, and will result in additional reductions of carbon monoxide, volatile organic compounds, and particulate matter from each of the refineries. Valero will also spend \$1.6 million on mitigation projects.

Hunt agreed to pay a \$400,000 civil penalty and spend more than \$48.5 million for new and upgraded pollution controls at three refineries to resolve claims under the CAA. The work is expected to reduce more than 1,250 tons of harmful emissions annually from the company's refineries. The States of Alabama and Mississippi joined in the settlements.

With these settlements, the Division's petroleum refinery enforcement initiative will have addressed more than 92 individual refineries – comprising approximately 85% of the Nation's refining capacity – and will reduce air pollutants by more than 325,000 tons a year.

Reducing Air Pollution from Mobile Sources. The Division obtained a consent decree in *United States v. Mercedes-Benz USA and DaimlerChrysler, AG*, resolving claims that the defendants failed to promptly notify EPA of eight separate emission-related defects in a number of different Mercedes vehicles. The CAA requires such prompt notification by auto manufacturers so that the government can consider whether a recall is necessary. In response to the investigation, Mercedes began voluntary recalls for two of the defects at issue and notified owners that it would extend the warranty coverage to address a third defect, at an estimated cost of about \$59 million. Under the consent

decree, Mercedes agreed to pay a penalty of \$1.2 million and to improve its investigation and reporting system to ensure future compliance, at an estimated cost of about \$5.4 million.

Reducing Air Pollution at Other Diverse Industrial Facilities. The Division improved the Nation's air quality by concluding enforcement actions against a variety of other facilities in diverse industries including secondary aluminum production, sulfuric acid manufacturing, natural gas production, metal forming, and oil seed processing.

Those efforts, addressing similarly diverse CAA violations, secured commitments by defendants to perform more than \$236 million in facility improvements, to undertake supplemental environmental projects valued at \$1.375 million to provide local environmental improvements, and to pay more than \$10.1 million in civil penalties. The states of Alabama, California, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Mississippi and Virginia intervened as plaintiffs and signed many of these consent decrees.

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. Storm water can harm the environment because it contains pollutants such as suspended solids, lead, and copper.

The Division achieved a settlement with several St. Louis-area developers responsible for polluting streams and lakes with runoff from three construction sites in *United States v. J.H. Berra Construction Co.*

The defendants have agreed to adhere to a strict compliance program at future construction projects, clean up past pollution, and pay one of the largest environmental penalties of its kind in the state's history, \$590,000. The United States was joined in the decree by the city of Wildwood and the state of Missouri.

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. The settlements the Division reached this year will ultimately reduce the volume of untreated sewage discharged into our waterways by tens of billions of gallons.

The Division lodged a consent decree with the city of Indianapolis, resolving claims relating to discharges from the city's sanitary sewers and overflows from the portions of its sewer system where storm water and sanitary sewage are combined (combined sewer overflows or CSOs). The city will implement a long-term control plan at an estimated cost of \$1.86 billion, perform a pollution reduction supplemental environmental project valued at \$2 million, and pay a civil penalty of \$1.17 million. The injunctive relief provided under the settlement will ultimately reduce the volume of Indianapolis' CSO discharges by over 90 percent, or 7.2 billion gallons per average year out of its current average of 7.9 billion gallons/year.

In a landmark settlement with federal, state, and county authorities, the defendant in *United States v. Allegheny*

County Sanitary Authority agreed to a comprehensive plan to greatly reduce the annual discharge of billions of gallons of untreated sewage into local waterways. ALCOSAN has agreed to a multi-year strategy to upgrade the sewage systems serving Pittsburgh and 82 surrounding municipalities at a cost in excess of \$1 billion. The settlement also requires ALCOSAN to pay a \$1.2 million penalty for past CWA violations, and to undertake \$3 million in environmental projects.

The Division also lodged an interim consent decree with the City and County of Honolulu (CCH) that will correct the most significant problems in Honolulu's wastewater collection system. Because the interim settlement addresses only the most urgent problems in CCH's collection system, the United States and the State of Hawaii are continuing to work actively with CCH to reach a comprehensive resolution to CCH's remaining wastewater collection and treatment challenges.

The Division lodged its final, comprehensive consent decree in *United States v. City of San Diego*, resolving our CWA action against the City relating to the unlawful discharges of sewage from the City's sewer system. Two previous decrees with the City had required it to take 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 raw sewage from its system.

Assuring Environmental Compliance in the Petrochemical Industry. The Division lodged a consent decree in *United States v.*

Equistar Chemicals LP under which the defendant has agreed to spend more than \$125 million on pollution controls and cleanup to address myriad air, water and hazardous waste violations at seven petrochemical plants in Texas, Illinois, Iowa and Louisiana. Equistar will also pay a civil penalty of \$2.5 million (to be divided among the United States and state co-plaintiffs, Iowa, Illinois and Louisiana) and spend \$6.56 million on supplemental environmental projects. Under the consent decree, Equistar will be the first in the petrochemical industry to adopt certain environmental measures, many of which go beyond what the regulations would require.

Defending a Novel Enforcement Approach to Address Pollution from Factory Farms. In *Association of Irrigated Residents v. EPA*, the District of Columbia Circuit rejected challenges to a series of administrative consent agreements that EPA entered to settle potential violations of the CAA and the Emergency Planning and Community Right to Know Act caused by air emissions from large animal feeding operations. Previously, there was no existing methodology to reliably measure factory farms' air emissions, which has hampered EPA's ability to enforce the CAA and other environmental statutes. Under the consent agreements, which are designed to bring the facilities into compliance with the permitting and reporting requirements of the statutes, participating farms will pay a penalty and agree to cooperate in the development of pertinent emissions data and monitoring protocols. Those data and protocols will then provide the basis for an emissions estimating methodology to be used to ensure future compliance.

Ensuring the Supply of Safe Drinking Water to Residents of Trailer Parks and Other Multi-Unit Properties.

In *Manufactured Housing Institute v. EPA*, the Fourth Circuit upheld EPA's determination to apply Safe Drinking Water Act regulations to owners of multi-unit properties other than apartment buildings who separately meter and bill for water delivered to their tenants. The court found that EPA reasonably determined that the water systems of trailer parks and similar multi-unit properties require regulation to ensure a safe drinking water supply.

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.

United States v. Pala Band of Mission Indians involved violations of the CWA in connection with a sand and gravel mining operation and a levee built in the bed of the San Luis Rey River in California. Pursuant to a consent decree, the Pala Band of Mission Indians will pay a \$370,000 civil penalty and fund a \$545,000 mitigation project. A separate consent decree requires three additional defendants to pay a civil penalty of \$65,000. In *United States v. Toy Arnett, et al.*, the Division obtained a consent decree settling a CWA enforcement action concerning property in Santa Rosa Beach, Florida. The five defendants there were the present or former owners of two properties, one where wetlands were converted into pasture, and the other where an Army Corps of Engineers permit was violated. The defendants at the first site will pay a civil penalty of \$65,000, restore the site, and place a conservation easement to be held by the State of Florida over the restored

site. For the violations at the second site, the defendants must convey title to a nearby 20-acre mitigation parcel to an entity designated by the United States. In *United States & State of Maryland v. Costello*, the Division obtained a consent decree under which the defendants will restore 8,000 square feet of the Chesapeake Bay damaged by their construction of an unpermitted erosion control structure. They will also pay \$20,000 in civil penalties to the United States and \$30,000 to a state tidal wetlands fund established to pay for state-sponsored restoration projects.

Enhancing Pipeline Safety. The Division lodged a consent decree in *United States v. El Paso Natural Gas Co.*, the first court action brought to enforce the Pipeline Safety Act. The action resulted from a tragic explosion of an EPNG pipeline which killed twelve people in New Mexico in 2000. As a result of the settlement, EPNG will spend at least \$86 million to implement widespread and comprehensive modifications of its 10,000-mile natural gas pipeline system and pay a \$15.5 million civil penalty to resolve claims that it did not adequately monitor and minimize internal corrosion in two of its pipelines transporting corrosive gas.

ENSURING CLEANUP OF OIL AND HAZARDOUS WASTE

Cleaning Up Contaminated River Systems. The Division continued its aggressive efforts to secure cleanup of our Nation's most contaminated rivers under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Division achieved a settlement of unprecedented size and scope

with the General Electric Company (GE) to provide for cleanup of contamination from polychlorinated biphenyls (PCBs) that two GE plants discharged directly into the upper Hudson River for years. The settlement was lodged in Fiscal Year 2006 but entered in Fiscal Year 2007 after a comment period that drew extensive and wide-ranging public responses. Since entry of the consent decree, the Division has resisted various legal challenges to the settlement.

In *United States v. NCR Corp. and Sunoco-U.S. Mills*, the Division obtained a consent decree that requires these two defendants to perform the first phase of remedial action for one section of the Lower Fox River and Green Bay site in northeastern Wisconsin. The site is contaminated with PCBs discharged into the Fox River from several paper manufacturing and recycling facilities and will cost more than \$500 million to address overall. The remedial action required by this consent decree – which is with only two of eight potentially responsible parties (PRPs) at the site – is expected to cost about \$30 million and features dredging, dewatering, and landfill disposal of PCB-contaminated sediments from a hot-spot of contamination. The Division also lodged a supplement to a consent decree in *United States et al v. P.H. Glatfelter Co. and WTM I Co.* to document the commitment of these two defendant PRPs to provide an additional \$12 million for performance of CERCLA response activities in another section of the site, in addition to the approximately \$60 million provided by these parties pursuant to a 2004 consent decree addressing remedial actions in that section of the site.

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 \$270 million, and recovered approximately \$200 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. Kennecott Utah Copper Corporation* (defendant to spend approximately \$15 million to remedy groundwater contamination caused by past mining operations at the Bingham Canyon mine in Utah); *United States v. MidAmerican Energy Company* (defendants to pay \$4.6 million in past costs and assist EPA's response actions at the LeMars Coal Gas Superfund site in Iowa); *United States v. Frazer Exton Development Corp.* (defendant to perform \$22 million remedial action and pay 50% of EPA's unreimbursed costs at the Foote Mineral Superfund site in Chester, PA); *United States v. Exxon Mobil Corporation* (101 defendants to ensure a site-wide \$48 million cleanup of the Beede Waste Oil site in Plaistow, NH, pay more than \$9 million for future federal and state oversight costs, and \$17 million in past federal and state response costs); *United States v. EPEC Polymers, Inc.* (defendant to remediate two of the three remaining known contaminated areas of the Turtle Bayou site in Liberty County, TX, at an estimated cost of \$13.4 million; reimburse the United States for \$6.9 million of past costs and interim costs estimated at \$1 million; and pay the United States's future response costs, estimated at \$2.1 million).

Enforcing Cleanup Obligations In Bankruptcy Cases. The Division's bankruptcy practice has continued to grow and this year achieved notable success in

several proceedings. In the *Eagle Picher* bankruptcy, the Division secured the agreement of the debtor to deposit \$13.6 million into a custodial trust to fund environmental cleanup work at sites in several states and obtained a judgment for an allowed claim of over \$8.7 million for a site in New Mexico. In the *Gurley* bankruptcy, the Division recovered over \$20 million for two sites in Arkansas through the avoidance of fraudulent transfers.

The Division has lodged additional proposed settlements in various bankruptcy courts, including in the *Asarco*, *Fruit of the Loom*, *Gulf States Steel*, *W.R. Grace*, *Armstrong* and *Saltire Industrial* bankruptcies. In these proceedings, the Division expects to receive millions of dollars of recoveries towards past and future cleanup costs. In one of the most challenging proceedings, *In re: Asarco LLC*, the United States asserted two kinds of claims for over 50 Superfund sites: (1) recovery of funds used for cleanup by other agencies, and/or (2) natural resource damages on behalf of federal natural resources trustee agencies.

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 cleanup actions by EPA and other federal agencies. For example, in *United States v. Capital Tax Corp.*, a Superfund cost recovery and penalty action involving the National Lacquer and Paint site in Chicago, the defendant brought counterclaims alleging an EPA pattern and practice of unconstitutional implementation of its administrative order authority under section 106 of CERCLA. The Division

prevailed on a motion to dismiss. The court found that the company lacked standing and, in the alternative, that there is no due process violation because the unilateral administrative order recipient gets a pre-deprivation hearing, thus upholding the constitutionality of key enforcement provisions of an important environmental statute.

Similarly, in *Raytheon Aircraft Co. v. United States*, the Division prevailed against a claim that the administrative enforcement provisions of section 106 of CERCLA violate due process. The court held that section 106 provides an adequate opportunity for judicial review before any deprivation of property occurs and does not affect any protected liberty interests. The court also rejected the argument that the penalties authorized by section 106 are so coercive as to deprive the administrative order recipient of a meaningful opportunity to challenge the order in court.

Defending the Government's Cleanup Actions. In *Steven Pollack v. Department of Defense*, a citizen sued the Army and Navy, alleging they had failed to perform certain nondiscretionary duties in connection with the remediation of a landfill at Fort Sheridan, Illinois. The Division prevailed on a motion to dismiss. The court held that “the relief [plaintiff] seeks in his lengthy complaint is directed at halting the current work at the site and changing the direction of any additional work there. Accordingly, it is premature” under the Superfund law. This win is important because it allows the cleanup at the site to go forward without being delayed by litigation.

Addressing Oil Spills. The Division lodged a consent decree in *United States v. Meridian Resource & Exploration, LLC* resolving claims under the CWA in connection with five unauthorized discharges of crude oil into waters of the United States from two pipelines and one oil production well at Meridian's facility during 2005-2006. Meridian will expand and improve its pipeline monitoring, inspection, and maintenance program and pay a \$504,000 civil penalty.

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 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 FY 07, we had notable success defending such determinations.

In *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, the Eleventh Circuit rejected an industry trade group's challenges to the FWS's listing of the Alabama sturgeon under the ESA as an endangered species. The court found that there was substantial evidence in the record that the Alabama sturgeon was not the same fish as the shovelnose sturgeon, a much more plentiful species. It also held that the Service's failure to designate critical habitat for the Alabama sturgeon at the same time that it listed the fish as endangered did not

require the court to order the delisting of the species, which was nearly extinct. The court also rejected the argument that the listing was unconstitutional under the commerce clause as there was no evidence that the Alabama sturgeon had any interstate nexus. The court held that the proper focus of analysis should be on the purposes of the ESA itself, not just on the particular species being listed, and concluded that the ESA had a substantial relation to commerce.

In *American Wildlands et al. v. Norton et al.*, the court upheld a FWS listing determination for the westslope cutthroat trout on the basis that the Service's use of morphological data, as well as genetic data, to identify the species was reasonable. In *National Association of Homebuilders v. Kempthorne*, the court agreed with the Division's argument that the FWS's decision not to list the pygmy owl was reasonable, where the population in the United States was peripheral to a large pygmy-owl population in northern Mexico. In *Home Builders of N. Cal. v. FWS*, the court upheld FWS's designation of critical habitat for 15 vernal pool species, where certain California lands had been excluded because they already had adequate management plans. In *Alsea Valley Alliance v. Lautenbacher*, the Division prevailed against a challenge to the NMFS's decision to list 16 "Evolutionarily Significant Units" of salmon. The decision hinged on the Service's policy regarding consideration of hatchery-origin fish in making listing determinations. In *Tucson Herpetological Society v. Kempthorne*, the Division successfully defended a FWS decision to withdraw the proposed listing rule for the flat-tailed horned lizard, establishing the

legitimacy of the Service's evaluation of lost historical habitat in consideration of the species' current persistence.

Defending National Marine Fisheries Service's Ocean Harvest Management.

NMFS is charged, under the Magnuson-Stevens Fishery Conservation and Management Act, with the difficult task of managing ocean commercial fishing to not only 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 *Legacy Fishing Co. et al. v. Gutierrez*, plaintiffs challenged Bering Sea fishery measures which reduce bycatch and waste of fishery resources. The court accepted the Division's arguments that the Service had adequately considered costs to industry to the maximum extent practicable consistent with Magnuson Act conservation standards. In *Coastal Conservation Ass'n v. Gutierrez*, the Division prevailed against allegations by the fishing industry that Magnuson Act standards for rebuilding the red snapper fishery and for reducing bycatch were violated. The court there also held that the Service complied with its obligations under the National Environmental Policy Act (NEPA) to analyze alternatives to the rebuilding plan. In *Sherley v. NOAA*, the Division successfully defended NMFS's denial of a recreational fishing permit against multiple challenges. The court held that the expectation of participating in a federal fishery was not a protected liberty interest and that denial of the permit thus did not violate the right to procedural due process, that 42 U.S.C. § 1983 was inapplicable, that the court lacked jurisdiction over a takings claim, and, in any

event, that the administrative record supported the denial.

Ensuring the Limitations of Federal Jurisdiction Are Enforced.

The Administrative Procedure Act and other special review provisions circumscribe federal jurisdiction, as do the requirements of standing and other jurisdictional prerequisites. The Division prevailed in several wildlife cases on these defenses. In *Washington State Farm Bureau v. NMFS*, the court dismissed a complaint where plaintiffs failed to establish standing and did not demonstrate that they were injured by the Service's listing of a population of killer whales. In *Oregon Natural Resources Council v. Hallock*, the Division prevailed on summary judgment. The court held that EPA's oversight of the Oregon state National Pollutant Discharge Elimination System (NPDES) program and its provision of funds to the Oregon Department of Environmental Quality did not "federalize" the state program so as to require ESA consultation on state-issued NPDES permits regarding the effects on endangered sucker fish of the discharge of an herbicide. In *Defenders of Wildlife v. Gutierrez*, plaintiffs filed ESA claims against the Coast Guard for failure to consult with NMFS regarding the impact of its recommended traffic separation schemes on whales. The court dismissed the claims on the ground that the recommendations, which went to an international body that set the schemes, were not final agency actions subject to judicial review. Similarly, in *Save Our Springs v. Norton*, a court held that a letter from FWS interpreting a Texas Commission on Environmental Quality voluntary guidance document was not final agency action subject to judicial review; FWS had stated that compliance with the

letter, which discussed mitigation of the effects of storm water runoff, would avoid “take” of the Barton Springs Salamander under the ESA. In *Conservation Northwest v. Kempthorne*, the Division prevailed against a claim that FWS should be compelled to implement specific provisions of the Grizzly Bear Recovery Plan; the court held that FWS’s implementation of recovery plans is committed to agency discretion and thus not reviewable under the APA. In *Gulf Fishermen Ass’n v Gutierrez*, the Division defended a challenge to Vessel Monitoring System for Gulf Reef Fish, and the court dismissed plaintiff’s claims on the ground that a jurisdictional 30-day limitations period of Magnuson Act barred suit on all related claims. In *Sea Hawk Seafoods v. Carlos M. Gutierrez*, the Division successfully argued that a challenge brought by certain seafood industry plaintiffs to limits on the Bering Sea fishery were barred by the Magnuson Act’s 30-day statute of limitations because the restrictions were implemented by rule under the Act.

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. In *United States v. South Florida Water Management District*, court entered a consent decree in 1992 requiring the State of Florida to restore water quality in the Everglades through regulation of agricultural runoff and construction of vast wetland treatment systems. The consent decree’s “ambitious strategy to restore and preserve the Everglades ecosystem” – and the federal-state collaboration that produced it – have heralded a new era of intergovernmental cooperation on

Everglades restoration that culminated in 2000 when Congress and the Florida legislature approved an historic, 30-year, \$7.8 billion restoration effort, fulfilling a top priority of the past three federal administrations. This year, the Division participated in the proceedings of the South Florida Ecosystem Restoration Task Force, the intergovernmental body codified by Congress in 1996 to coordinate the restoration of the Everglades. The Division also continued negotiating over additional water quality restoration measures to complement those specified in the consent decree.

In addition, the Division continues to contribute to protection of the endangered Everglades ecosystem 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.

Restoring the San Joaquin River and Securing Bureau of Reclamation Project Water Supplies. The Bureau of Reclamation’s California Central Valley Project is one of the Nation’s major water conservation developments. Seventy years ago, Congress authorized construction of the Friant Division of the Project. Friant Dam diverts all but a fraction of the waters of California’s second-longest river, the San Joaquin – de-watering a lengthy reach of the River for most of the year – for storage in Miller Lake and eventual distribution, primarily for agricultural use in the Central Valley. Earlier, in *Natural Resources Defense Council v. Rodgers*, the Division negotiated a historic settlement of longstanding litigation over Reclamation water supply contracts affecting the San

Joaquin. When implementing legislation is enacted, the historic goals of this settlement will be realized through funding and implementation of one of the largest river restoration projects in United States history.

Defense of Federal Property Interests in Environmentally Sensitive Areas. In *Kingman Reef Atoll Investments, LLC v. United States*, plaintiff sought a ruling that it has fee simple title to Kingman Reef, a reef located nine hundred miles off the coast of Hawaii on which FWS has established a wildlife refuge of magnificent scope. The court dismissed the case on limitations grounds, rejecting plaintiff's argument that the government had abandoned Kingman Reef and should be equitably estopped from asserting the limitations defense.

Balancing Appropriate Management of the Missouri River System. The Army Corps of Engineers has the difficult task of managing the Missouri River System, which consists 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 resources decisions best serve these varied needs, the Corps issued a Master Manual that describes its water control plan. In 2006, the Corps made changes to the Master Manual to comply with FWS suggestions in its biological opinion as to how to protect the endangered pallid sturgeon. The State of Missouri sued the Corps, alleging that it had violated NEPA. The Division successfully defended the Corps on all claims.

Upholding Grazing Management Decisions on Federal Land. In *Western Watersheds Project v. Abbey*, environmental organizations challenged a Bureau of Land Management grazing management decision

for the 325,000-acre Soldier Meadows Allotment in Nevada, which includes wilderness areas. The Division prevailed on summary judgment, with the court holding that the environmental assessment on the management decision satisfied NEPA and that the decision did not permit new grazing or increased grazing in violation of the Wilderness Act or the legislation creating the wilderness areas.

In *Stevens County, Washington v. Department of the Interior*, a county and ranchers challenged a Habitat Management Plan that eliminated grazing in the Little Pend Oreille National Wildlife Refuge, claiming violations of the National Wildlife Refuge System Administration Act (Refuge Act), NEPA, and their Fifth Amendment due process rights. The Division prevailed on all claims. The district court held that the agency had exercised the required "sound professional judgment" under the Refuge Act; that the FWS complied with NEPA since plaintiffs had failed to show that the Plan caused impacts that were not already examined in a programmatic environmental impact statement; and that there was no due process violation because plaintiffs had no protected interest in renewal of a grazing permit under the Refuge Act.

Protecting the Sierra Nevada Range from the Risks of Wildland Fire. In 2004, the Forest Service amended the Sierra Nevada Forest Plan Amendment ("Framework") governing 11.5 million acres in eleven national forests in the Sierra Nevada region of California in an attempt to increase desperately needed fuel treatments to reduce the threats of catastrophic wildfire while meeting the habitat needs of species dependent on old

growth forests. This amendment is the subject of four related lawsuits which threaten to paralyze forest management efforts on 11 million acres of federal land. Recent success in our continued defense of the Framework includes the denial of a preliminary injunction sought against three projects designed to reduce fire risks near communities in the Sierra Nevada.

Litigating Federal Forest Land Management Programs and Policies. The Division continued to have success in defending against a variety of challenges to land management plans and projects. In *Lands Council v. Martin*, the Division prevailed against challenges to the School Fire Salvage Recovery Project in the Umatilla National Forest. The court found the environmental impact statement adequate under NEPA, and upheld the Forest Service's use of a model to estimate soil erosion. Under the National Forest Management Act, the court found reliance on the widely used Scott Guidelines to determine the probability of tree survival was reasonable, as was use of the Decayed Wood Advisor (DecAID) tool. The court also upheld the Forest Service's emergency situation determination and its use of a site-specific plan amendment to modify the Forest Plan. The decision as to the Scott Guidelines, DecAID, and emergency situation determinations was particularly important for the agency's national timber management program.

The Division reached a beneficial settlement in *Idaho Wildlife Federation v. Tower*, involving management of the sage grouse under the Management Plan for the Curlew National Grassland in Idaho. The Management Plan will continue to stay in effect and the Forest Service will be able to

achieve its land management objectives for the Grassland. The Division also successfully defended the decision to allow snowmobiles in the proposed West Hoover Wilderness Addition of the Humboldt-Toiyabe National Forest. In addition, the Division obtained a decision allowing the Bureau of Land Management to proceed with two timber sales in *Klamath Siskiyou v. BLM*. There, the court upheld BLM's determination that FWS's 2004 identification of the Pacific fisher as a "warranted but precluded" species was not a significant new circumstance that required supplementation under NEPA. The court deferred to the BLM's decision to use northern spotted owl habitat as a surrogate for Pacific fisher habitat in its impact analysis and distinguished an earlier case where the court had held that the Forest Service violated NEPA by failing to take a hard look at the impact of logging on the Southern Sierra fisher.

The Division also quickly and decisively prevailed in a challenge to an administrative decision staying a Bureau of Land Management order closing a livestock grazing pasture for the 2007 grazing season for resource protection purposes. In *Oregon Natural Desert Assn. v. United States Department of the Interior*, the court granted our request to convert the preliminary injunction papers into summary judgment papers, ruling in our favor from the bench and entering final judgment. The court held that the administrative decision to stay closure was supported by substantial record evidence.

CRIMINAL ENFORCEMENT OF OUR NATION'S POLLUTION AND WILDLIFE LAWS

Vessel Pollution Prosecutions. 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 who lie about such activities. The Division continues to have great success prosecuting deliberate violations.

In *United States v. Overseas Shipholding Group*, the defendant pled guilty to and was sentenced on charges that it engaged in conspiracy, obstructed justice, made false statements, and violated the Act to Prevent Pollution from Ships (APPS) and the Clean Water Act, as amended by the Oil Pollution Act of 1990. The crimes – involving twelve OSG oil tankers – occurred between June 2001 and March 2006. The offenses involved intentional falsification of oil record books to conceal the discharge of sludge and oil contaminated waste, as well as bypassing required pollution prevention equipment. OSG was sentenced to pay a total of \$37 million in penalties, the largest-ever penalty involving deliberate vessel pollution, to serve a three-year term of probation, and to implement a stringent environmental compliance plan. Of the \$37 million, \$9.2 will fund environmental projects coast-to-coast as part of the corporation's required community service.

In *United States v. Pacific Gulf Marine, Inc.*, the defendant, an American shipping company, pled guilty to four APPS violations involving the illegal discharge of hundreds of thousands of gallons of oil-contaminated bilge waste from four of its

ships. PGM was sentenced to pay a \$1 million fine, to pay \$500,000 to fund environmental projects on the Chesapeake Bay and provide environmental education, to complete a three-year term of probation, and to implement an environmental compliance plan. As part of the ongoing investigation, four PGM Chief Engineers have been convicted of offenses including APPS violations for falsifying oil record books, conspiracy, and making false statements. Three pled guilty and one was convicted after trial.

In *United States v. Ionia Management S.A., et al.*, the defendant company, a Greek operator, was convicted by a jury on 18 counts, including falsifying records and presenting false oil record books to the Coast Guard, for overboard dumping of waste oil into international waters. The second engineer pled guilty and was sentenced to serve a one-year term of probation and to pay a \$1,000 fine.

In *United States v. Petraia Maritime Ltd., et al.*, the defendant, a Swedish owner and operator of the *M/V Kent Navigator*, was convicted on three APPS violations for failure to maintain an accurate oil record book. Coast Guard investigators discovered evidence of illegal bilge waste discharges and concealment of the discharges. Two chief engineers pled guilty to making false entries in the oil record book. Each was sentenced to serve one month's home confinement as part of a two-year term of probation and ordered to pay a \$3,000 fine.

In *United States v. Chian Spirit Maritime Enterprises, Inc., et al.*, the named defendant and its Greek owner/operator each pled guilty to one

APPS violation, and each was sentenced to pay \$1.25 million for misleading Coast Guard investigators during an inspection of the *M/V Irene E.M.* The ship's master pled guilty to presenting false information to the Coast Guard, and was sentenced to serve a one-year term of unsupervised probation. The Chief Engineer pled guilty to one APPS violation and was sentenced to serve a one-year term of unsupervised probation.

In *United States v. Kassian Maritime Navigation Agency Ltd., et al.*, the corporate defendant pled guilty to one APPS violation for maintaining a false oil record book and was sentenced to pay a \$1 million fine, to serve 30 months probation, and to pay \$300,000 to fund community service projects. The chief engineer pled guilty to making a false statement to the Coast Guard and was sentenced to pay a \$1000 fine.

In *United States v. Sun-Ace Shipping Company, et al.*, the corporate defendant pled guilty to one APPS violation for failing to maintain an accurate oil record book. The company was sentenced to pay a \$400,000 fine and an additional \$100,000 in community service to protect and restore the natural resources of the Delaware Estuary. The Chief Engineer pled guilty to obstruction of justice and was sentenced to serve five months in prison followed by two months of supervised probation. The second engineer pled guilty to one APPS violation and was sentenced to serve a three-year term of probation.

In *United States v. Nicanor Jumalon et al.*, the defendant, captain of the *M/V Sportsqueen*, pled guilty to obstruction of justice and was sentenced to serve eight months in prison for illegally dumping oil-contaminated ballast water from the ship.

The India-based shipping company, Accord Ship Management Inc., pled guilty and was sentenced to pay a \$1.75 million fine and serve a three-year term of probation for conspiracy, an APPS violation, and two counts of obstruction for dumping sludge, bilge wastes, and oil contaminated ballast water from the ship. The Chief Engineer also pled guilty to two obstruction violations and was sentenced to serve five months incarceration.

Prosecuting Hazardous Waste and Clean Air Act Violations. In *United States v. Dennis Rodriguez*, the defendant, president and chief operator of North American Waste Assistance, pled guilty to three Resource Conservation and Recovery Act (RCRA) violations, and was sentenced to five months incarceration, followed by five months of house arrest, and a two-year term of probation. Rodriguez generated a manifest that stated 84 drums contained "Non RCRA, Non-regulated hazardous waste" when the drums actually contained an expired petroleum-based compound which was an ignitable hazardous waste. Using the false manifest, he delivered the waste to non-RCRA landfills.

In *United States v. Dylan Starnes, et al.*, the defendant, who had been convicted in 2005 on 15 counts, including Clean Air Act (CAA) and false statement violations, was sentenced to serve 33 months' incarceration, followed by a three-year term of probation. Starnes 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. Citgo Petroleum Corporation, et al.*, Citgo Petroleum and

Citgo Refining and Chemical Company were convicted on two CAA violations. Between 1994 and 2003, the defendants operated tanks that contained oil without installing the proper emission controls. Citgo Refining and Chemical Company was also convicted on three misdemeanor violations of the Migratory Bird Treaty Act. The tanks attracted migratory birds, several of which (including cormorants, pelicans, and several species of ducks) were killed after they landed in the open tanks and became trapped in the oil.

Prosecuting Clean Water Act Violations.

In *United States v. Moses*, the defendant, an Idaho real estate developer, used a bulldozer and other heavy equipment to channelize and reroute Teton Creek in an attempt to prevent periodic flooding of an adjacent subdivision that he had developed. When he continued these actions despite repeated orders to stop from state and federal officials, he was indicted for multiple violations of the Clean Water Act (CWA). He was convicted and sentenced to 18 months in prison and fined \$9,000. On appeal, he argued that he was not required to obtain a CWA dredge and fill permit because he only worked in the riverbed when water had been diverted out of the river for irrigation purposes. He asserted that under the Supreme Court's 2006 decision in *Rapanos v. United States*, which was decided after his conviction, the Army Corps of Engineers lacked regulatory authority over his actions. The Ninth Circuit disagreed, holding that the intermittent flow of the creek resulting from the upstream diversion of water for irrigation purposes did not divest the creek of its status as a "water of the United States" subject to the Corps' regulatory authority under the CWA.

In *United States v. Sinclair Tulsa Refining Company, et al.*, the defendant, a subsidiary of Sinclair Oil, pled guilty to two felony CWA violations. Two company managers each pled guilty to one felony CWA count for manipulating the sampling and discharges of wastewater into the Arkansas River in violation of Sinclair's NPDES permit. Sinclair was sentenced to pay a \$5 million fine, pay \$500,000 to fund a community service project on the Arkansas River, and serve a two-year term of probation. The managers were each sentenced to complete a three-year term of probation, including six months home confinement. One was ordered to pay a \$160,000 fine and perform 100 hours of community service, the other an \$80,000 fine and 50 hours of community service.

In *United States v. Acquity Speciality Products, et al.*, the defendant pled guilty to one CWA violation and was sentenced to pay a \$3.8 million fine and complete a three-year term of probation. Acquity admitted that from September 1998 until November 2002, while inspectors conducted sampling, employees altered the wastewater flow in order to distort the sampling results. The Director of Environmental Compliance pled guilty to conspiracy to violate the CWA and was sentenced to pay a \$5,000 fine and serve a five-year term of probation.

Enforcing the Laws Protecting Wildlife.

In *United States v. James Miller, et al.*, the defendant was sentenced for his role in running an illegal, unlicensed big-game hunting guide operation in Alaska between 1999 and 2001. Miller had previously pled guilty to one felony Lacey Act charge and one felony false statement charge and was sentenced to serve 18 months' incarceration

followed by a three-year term of probation and to pay \$10,650 in restitution. He also will forfeit his Super Cub aircraft, a hunting rifle, and several hunting trophies from illegally-killed big game.

In *United States v. Antonio Vidal Pego, et al.*, Pego and Vadilur S.A., a Uruguayan corporation, each pled guilty to and was sentenced on charges involving the illegal importation of Patagonian and Antarctic toothfish (also known as Chilean Sea Bass). The government seized more than 53,000 pounds of toothfish, valued at \$314,397. Pego pled guilty to obstruction of justice and was sentenced to serve a four-year term of probation and pay a \$400,000 fine. Vadilur pled guilty to false labeling, importation of illegally possessed fish, and attempted sale of those fish. The company was sentenced to a four-year term of probation and ordered to pay a \$100,000 fine, cease all corporate activities, and dissolve as a business.

In *United States v. Jan Swart, d/b/a Trophy Hunting Safaris, et. al.*, Swart, a South African big-game outfitter, pled guilty to one felony smuggling violation, and was sentenced to serve 18 months' incarceration followed by a three-year term of probation. The charge stems from his involvement in a scheme to import five hides and three skulls of leopards illegally killed in South Africa and smuggled to Zimbabwe, before being imported through Denver. His co-defendant pled guilty to one felony Lacey Act false labeling violation and was sentenced to pay a \$5,000 fine and serve 19 days incarceration, followed by a three-year term of probation in South Africa.

In *United States v. Jeffrey Diaz*, the defendant pled guilty on November 28,

2006, to two felony smuggling counts and two felony false statement counts for smuggling 12 Australian Eagle Owl eggs, and lying about it on customs forms. He was sentenced to serve 21 months' incarceration, followed by a three-year term of probation, and pay a \$5,000 fine. The smuggling of the fertile eggs into the United States from Australia without the required quarantine period posed a tangible threat of disease transmission to humans, including bird flu, as well as a threat to the commercial poultry industry in the form of Newcastle Disease.

In *United States v. Michael Sofoulis, et al.*, Sofoulis pled guilty to a misdemeanor violation of the Marine Mammal Protection Act (MMPA) and was sentenced to six months' incarceration, followed by a one-year term of probation, ordered to pay a \$15,000 fine, plus \$5,000 in restitution to the State of Alaska. His co-defendant pled guilty to conspiracy to violate the Lacey Act and the MMPA, and to making false statements, and was sentenced to serve eight months' incarceration, followed by a one-year term of probation. The convictions stemmed from a scheme to sell walrus headmounts made from tusks and skulls and falsification of registration documents.

In *United States v. Princess Cruise Lines Inc.*, Princess pled guilty to one violation of the Endangered Species Act and was sentenced to pay a \$200,000 fine, pay an additional \$550,000 to fund research in Glacier Bay, Alaska, and serve a five-year term of probation. Princess failed to operate its vessel in a slow, safe speed near humpback whales in waters near Glacier Bay National Park. After the event, Princess imposed a permanent 10-knot

speed restriction on all its vessels in nearby waters.

In *United States v. Panhandle Trading Inc., et al.*, one individual and two corporate defendants pled guilty to conspiracy to violate the Lacey Act and conspiracy to commit money laundering, for their roles in an illegal catfish importation scheme. The individual was sentenced to serve 51 months' incarceration followed by a three-year term of supervised release. Both companies will complete five-year terms of probation, and all three defendants will be held jointly and severally liable for \$1,139,275 in restitution to the Department of Homeland Security.

DEFENDING VITAL FEDERAL PROGRAMS AND INTERESTS

Protecting the Federal Fisc – Royalties Due to the United States. In *BP America Production Co. v. Burton*, oil and gas companies that hold federal oil and gas leases on which they owe production royalties to the federal government argued that the Interior Department's Minerals Management Service (MMS) could not enforce orders to the companies to reaudit past payments for inadequacies for more than the six-year period in the general statute of limitations in 28 U.S.C. 2415(a). The Supreme Court disagreed, holding that the limitations period pertained only to damage actions founded on contract brought by the United States, not to an agency's issuance of administrative orders. This holding will require the oil companies involved in the law suit to reaudit their accounts for the years 1989-1996 and could potentially result in tens of millions of

dollars of royalty payments owed to the federal government.

Balancing Statutory Mandates -- The Clean Water Act and the Endangered Species Act. In *National Association of Home Builders v. Defenders of Wildlife, et.al*; *EPA v. Defenders of Wildlife, et.al*, environmental groups argued that the EPA must comply with the procedural and substantive requirements of Section 7 of the Endangered Species Act (ESA) when deciding whether to delegate to a state its authority under Section 402 of the Clean Water Act (CWA) to issue pollution discharge permits. The ESA requires federal agencies to consult and assess the impact of their proposed decisions on listed species. The CWA requires EPA to delegate the Section 402 program if a state satisfies nine criteria, none relating to endangered species protection. The Supreme Court, in a 5-4 decision, held that the ESA did not apply. The majority held that the court of appeals had erred in holding that EPA had acted arbitrarily and capriciously by taking allegedly contradictory positions on the application of Section 7 of the ESA. On the merits, the majority held that the ESA obligations did not apply because a regulation jointly promulgated by the agencies charged with administering the ESA provided that Section 7 did not apply to agency actions that were mandatory in nature. Because the pertinent CWA provisions required EPA to delegate the permitting program if a state met the CWA's requirements, EPA was not required to comply with ESA Section 7.

Defending Against Encroachment on Federal Agencies' Regulatory Authority. In *Missouri v. Westinghouse*, the state and the corporate defendant sought entry of a

proposed consent decree to govern the cleanup of a former nuclear fuels manufacturing site. However, federal law gives the Nuclear Regulatory Commission exclusive authority to regulate cleanup of nuclear materials at decommissioned nuclear facilities. The Division successfully intervened on behalf of NRC and the Department of Energy to oppose the proposed consent decree. The court accepted the Division's argument that the proposed decree would impinge upon the federal government's exclusive authority to regulate nuclear materials. The court explained that the Atomic Energy Act preempts state regulation of nuclear facilities that are being decommissioned and preempts state regulation of the radiological portion of mixed wastes.

Ensuring Consistency of United States Aircraft Engine Emission Standards with International Standards. In *National Association of Clean Air Agencies v. EPA*, the court affirmed EPA's decision under the CAA to conform United States aircraft engine emission standards to international consensus standards, against challenges contending that domestic standards should be the most stringent possible. The court held that, in declining to adopt more stringent standards, EPA reasonably balanced the costs and additional time involved in developing and implementing such standards against the benefits of conforming domestic aircraft engine emission standards with existing international standards and reasonably opted in favor of the latter.

Defending EPA's Authority to Interpret State Law and Regulations in Clean Air Act Title V Permitting Proceedings. In two Eleventh Circuit cases, *Sierra Club v.*

Johnson and Glynn Environmental Coalition v. EPA, the court affirmed EPA's decisions not to object to title V operating permits issued to sources by the State of Georgia. In both cases, the court confirmed that EPA's interpretations of state laws and regulations that were part of a federally-approved State Implementation Plan were entitled to deference.

Defending EPA's Interpretation of the Clean Water Act. In June 2006, the Supreme Court issued a splintered opinion in *Rapanos v. United States* on the extent of federal jurisdiction under the CWA to regulate wetlands and upstream tributaries of navigable waters. In numerous cases in district and appellate courts during FY 2007, the Division has litigated the meaning of the *Rapanos* decision and the extent of federal regulatory jurisdiction. After *Rapanos*, the Sixth Circuit Court of Appeals remanded *United States v. Cundiff*, a civil enforcement action for the illegal filling of wetlands, to the district court, which ruled that the United States had established jurisdiction over the defendants' wetlands based on both the test enunciated by the plurality and the test put forth in Justice Kennedy's concurring opinion in *Rapanos*. The court ordered defendants to perform the government's proposed restoration plan.

United States v. Fabian is a CWA civil enforcement action in connection with the unauthorized filling of wetlands located along the Little Calumet River in Indiana. The Division obtained a favorable decision on summary judgment. The court found that the United States had demonstrated that defendant's property contained wetlands that were within federal jurisdiction under the CWA and that

defendant had added pollutants to the wetlands. Regarding regulatory jurisdiction, the court followed Justice Kennedy's concurring opinion in *Rapanos* and held that the wetlands were adjacent to a navigable-in-fact water (notwithstanding being separated hydrologically by a 130-foot wide levee) and, thus, did not require a specific showing of a significant nexus between the wetlands and the navigable river.

In *United States v. Bailey*, the Division worked with the U.S. Attorney's Office to obtain a favorable ruling in a civil enforcement action for violations of the CWA in wetlands adjacent to Lake of the Woods in Minnesota. The defendant constructed a one-quarter mile long road in wetlands abutting the lake. In granting summary judgment for the government, the court held that the United States can establish regulatory jurisdiction under either Justice Scalia's plurality opinion, or Justice Kennedy's concurring opinion in *Rapanos*. The court found the filled areas to be adjacent wetlands under Justice Kennedy's "significant nexus" test and issued a restoration order requiring removal of fill, filling drainage ditches, seeding, and monitoring.

In *P&V Enterprises v. Army Corps of Engineers*, plaintiff sought to challenge, under the Commerce Clause, the Corps' regulation defining jurisdiction under section 404 of the CWA over certain intrastate waters that "could affect interstate or foreign commerce." The Division prevailed on its motion to dismiss. The court found that plaintiff had not identified any basis for equitable tolling of the limitations period for its facial challenge, which had long since expired.

Defending the Army Corps of Engineers' Clean Water Act Permits. The Division successfully defended permitting decisions by the Corps under Section 404 of the CWA in a number of cases.

In *Natural Resources Defense Council v. Army Corps of Engineers*, plaintiffs challenged a regional general permit issued by the Corps regulating discharges of dredged and fill material into waters of the United States in a 48,000-acre area in the Florida Panhandle. The Division prevailed on summary judgment. *Bering Strait Citizens v. Army Corps of Engineers* was a challenge to a CWA permit issued in connection with the construction and operation of the Rock Creek Mine/Mill Complex and the Big Hurrah Mine, near Nome, Alaska. The Division successfully defended the permit.

In *Friends of Magurrewock v. Army Corps of Engineers*, the Division defeated a motion for preliminary injunction seeking to enjoin a Corps permit issued to the Maine Department of Transportation to fill 6.8 acres of wetlands and riverbed in connection with the construction of an international border crossing between Calais, Maine, and St. Stephen, New Brunswick. The district court found that the Corps had reasonably assessed practicable locations for the international border crossing and reasonably concluded that impacts of the bridge on a nearby wildlife refuge were speculative. The Division also defeated a preliminary injunction motion in *Northwest Bypass Group v. Army Corps of Engineers*, an action seeking judicial review of a permit issued by the Corps authorizing the filling of wetlands adjacent to the Turkey River in Concord, New Hampshire, for construction

of the Langley Parkway South. The court rejected numerous challenges, including allegations that the Corps acted improperly in balancing competing traffic studies, analyzing alternatives, and considering cumulative and secondary impacts. This victory allows a long-planned, important road construction project to proceed.

Defense of Offshore and Onshore Oil and Gas Leasing and Operations. Domestic energy exploration and production continues to play a critical role in the Nation's energy policy as our energy needs grow and access to foreign energy becomes more uncertain. The Division has been instrumental in implementation of the Nation's energy policy. For instance, in *North Slope Borough v. MMS*, an Alaska native corporation and another native interest group sought to stop an offshore oil and gas lease sale in the Beaufort Sea for alleged violations of NEPA. The Division defeated a motion for preliminary injunction to halt the lease sale.

The search for new energy resources is critical to energy independence. In *Northern Plains Resource Council v. BLM* and *Northern Cheyenne Tribe v. Norton*, environmental groups challenged the Bureau of Land Management's decision authorizing coal bed methane development in Montana. They alleged that the decision violated NEPA, the Federal Land Policy Management Act, and the National Historic Preservation Act. Although the district court held that further environmental analysis was needed, it agreed with the Bureau that some continued development should be allowed consistent with the option to elect phased development after the supplemental analysis was performed. On appeal, the Ninth Circuit rejected plaintiffs'

argument that NEPA required a prohibition on any development pending the supplemental analysis and upheld the narrowly tailored injunction, which allowed development consistent with the phased development approach to be studied.

In *Chihuahuan Grasslands Alliance v. Norton*, environmental groups challenged an oil and gas lease sale in the Nutt Grasslands in Luna County, New Mexico, alleging that the Bureau's sale decision violated the Federal Land Policy Management Act for failure to properly solicit public comment and NEPA for, among other things, relying on a programmatic environmental impact statement rather than a sale-specific environmental analysis. The Division prevailed on summary judgment on all counts, obtaining an important holding that a lease sale does not necessarily mark the point of irretrievable commitment of resources because an agency's subsequent review of applications for permits to drill on a leasehold are also subject to further environmental analysis.

In *Te-Moak Tribe of Western Shoshone v. Department of the Interior*, a tribe and two environmental groups challenged the Bureau of Land Management's approval of a three-phase oil and gas exploratory drilling operation on approximately 30,000 acres in Nevada under NEPA, the National Historic Preservation Act, and the Federal Land Policy Management Act. The Division secured summary judgment in the Bureau's favor on all counts.

Defeating Efforts to Avoid Royalty Obligations in Mineral Leases. Sound administration of the Nation's energy

policy also includes assuring that the government is appropriately paid by those who benefit from development of our mineral resources. The Division's work has been important in meeting this goal. In *Devon Energy Corp. v. Norton*, an oil company challenged an Interior Department decision ordering a restructured accounting and payment of additional royalties on coal bed methane produced from federal leases in Wyoming because the company had improperly deducted certain costs in calculating royalties. The district court granted the Division's motion for summary judgment, allowing the recovery of proper royalties to the benefit of the American public.

Resolving Challenges to the Modernization of the Nation's Airways and Seaways. Keeping pace with increasing demands and technological advancements is a national priority. The Division aided this effort in a number of ways. We negotiated a settlement in *NRDC v. Army Corps of Engineers*, which will permit the Corps to proceed with a critically important project designed to deepen the navigational channels of the New York/New Jersey Harbor. On two occasions, the court found the Corps' NEPA analysis regarding this project to be inadequate and remanded for additional work. The Division thus worked to reach a settlement that will allow the Corps to complete its harbor-deepening project without the threat of future requests for injunctive relief. The settlement was based, in part, on pre-existing Corps obligations and practices and was tailored to preserve the Corps' discretion in future decisions.

Modernization of the "world's busiest airport" is the subject of a \$6 billion

project designed to make Chicago's O'Hare Airport no longer the "nation's most delayed airport." In *National Mitigation Banking Ass'n v. Army Corps of Engineers*, several wetlands mitigation banking groups brought an action challenging the Corps' compliance with NEPA and the CWA. The plaintiffs specifically attacked the Corps' decision to allow the permittee, the City of Chicago, to pay a provider \$26.4 million to purchase wetlands mitigation in lieu of selecting the plaintiffs to provide the required mitigation. The Division prevailed on summary judgment against NEPA and CWA challenges, successfully defending the controversial in-lieu-fee mitigation arrangement approved by the Corps.

Maintaining and Enhancing the Nation's Energy Infrastructure. The Division is often called upon to litigate challenges to the Nation's energy infrastructure. For example, in *Border Power Plant Working Group v. Dep't of Energy*, we successfully defended a CAA and NEPA challenge to decisions by the Department of Energy and Bureau of Land Management to issue Presidential Permits and rights-of-way over federal land for transmission lines which cross the international border in southern California and connect to power plants in Mexico. The Division prevailed on all claims.

Management of the wastes resulting from the Nation's needed energy production is an important component of federal energy responsibilities. The Division defends waste management decisions from challenges that could hamper federal efforts to appropriately direct waste practices. For example, *Coalition on West Valley Nuclear Waste*

and Joanne E. Hameister v. Bodman concerned a challenge to the Department of Energy's decision about waste management at the West Valley Demonstration Project site. The Division prevailed on summary judgment, with the court finding that the Department acted appropriately by completing the interim waste management process under the circumstances.

Finally, in perhaps the most ambitious nuclear waste project ever, for seven years the Division has been prosecuting litigation in *United States v. State of Nevada*, challenging the Nevada State Engineer's ruling summarily denying the Department of Energy's applications for permits to use water at Yucca Mountain to carry out the Department's mandate under the Nuclear Waste Policy Act to develop the Nation's first high-level nuclear waste and spent fuel repository. This year, the Division successfully limited the reach of a state order seeking to prohibit the Department's continuing use of water to collect data in support of the license application it intends to submit next year to the Nuclear Regulatory Commission.

Supporting the Federal Highway Administration's Traffic Control Projects. As our Nation's population and cities grow, enhancing the ability of our highways to safely and efficiently transport passengers and cargo in an environmentally sensitive manner has become a more important and delicate federal task. The Division plays a significant role in the Federal Highway Administration's (FHWA) efforts to address traffic control and safety issues. In *Davis v. Mineta*, plaintiffs challenged two much needed highway projects in a rapidly growing urban area near Salt Lake City, Utah. In addition to project-

specific claims under NEPA, plaintiffs broadly challenged the manner in which FHWA fulfills its environmental analysis obligations. Plaintiffs asserted that the Agency should be required to conduct broad programmatic analyses on the entire State Transportation Improvement Program, not just on individual projects. Such an obligation would have broad ramifications agency-wide. With close coordination with our co-defendant, the State of Utah, we ultimately prevailed on all issues.

In *Conservation Law Foundation v. FHWA*, the court issued a largely favorable decision on summary judgment regarding NEPA and Federal-Aid Highway Act (FAHA) challenges to a FHWA decision to fund the widening of a 19.8-mile stretch of Interstate 93 between Salem and Manchester, New Hampshire. This matter was litigated jointly with the State of New Hampshire. The court found in favor of defendants on NEPA claims regarding consideration of alternatives and the analysis of direct and cumulative impacts and on the FAHA claims. The court ordered a limited remand for preparation of a supplemental environmental impact statement on certain issues, but allowed the project to proceed.

Securing Needed Water Rights for the United States. This year the Division entered into numerous settlements, or secured favorable judgments, that will protect the water supplies and flows necessary to maintain the vitality of natural resources and uses of the public lands, national forests, national parks, wildlife refuges, wild and scenic rivers, military bases, and federal reclamation projects throughout the West. For example, in the

Klamath Basin Adjudication, the major general stream adjudication in the State of Oregon, the Division secured rulings granting FWS's claims in their entirety for the Lower Klamath and Tule Lake National Wildlife Refuges. These rulings recognize the United States' right to divert and use hundreds of thousands of acre-feet of water per year to meet Refuge purposes. In *State of Washington Department of Ecology v. Acquavella*, a general stream adjudication of water rights in the Yakima River Basin, the Division secured a favorable decision confirming the Bureau of Reclamation's state-based water rights, both for its federally owned facilities and for its water delivery obligations to other parties, on terms that provide the Bureau with extensive discretion in managing the Yakima Project.

The Division's successes do not always take the form of water rights determinations. Sometimes, collateral issues are critical too, as illustrated by *In Re Snake River Basin Adjudication*, the general stream adjudication covering 87% of the State of Idaho. There, the Idaho Supreme Court upheld a decision denying an award of attorney's fees against the United States. In this case of first impression, the court ruled that Congress has not authorized state courts to impose liability on the United States for other parties' attorney's fees. This decision will protect the public fisc from substantial potential liabilities in Idaho, where the United States is litigating in support of federal water interests in adjudications involving thousands of potential claimants.

Upholding Government to Government Relations with Tribes. The Division successfully defended Bureau of Indian Affairs (BIA) decisions affecting its government to government relations with

tribes. In *St. Pierre v Kempthorne*, the Division prevailed in a case involving a longstanding dispute over the government's action in approving a constitutional amendment that altered the membership standards of the tribe. The court found the tribe an indispensable party to the adjudication of the validity of challenges to the tribal constitution and, alternatively, gave res judicata effect to tribal court adjudications that sought to resolve the same issues. This ruling is strong precedent to prevent dissident tribal members from interfering with the government's dealings with tribal governments and provides substantial support for the finality of tribal court resolutions for intra-tribal disputes.

In *Vann v. Kempthorne*, we successfully resisted two preliminary injunctions that would have limited our ability to engage in government to government relations with the Cherokee Nation, prevented the BIA from recognizing a tribal election, and prohibited distributing money to the tribe. Plaintiffs claimed the Cherokee Nation's leadership took actions to eliminate Cherokee Freedmen (descendants of former slaves of the tribe) from tribal membership and deprive them of voting rights contrary to a treaty with the United States. The court, while concerned about the treatment of the Cherokee Freedmen by the Cherokee Nation, chose to allow the BIA to provide funding to the tribe and deal with the Nation's leadership. This allowed the BIA to take actions it believes to be both in the interest of the Cherokee Nation as a whole and in the interests of the Freedmen, while respecting tribal sovereignty.

Protecting Taxpayers Against Unwarranted or Excessive Claims. An important part of the Division’s work is defending against unwarranted claims that federal actions impinge upon private property interests and, in cases where private property has been taken in furtherance of public purposes, determining the proper compensation due to property owners. The Division has an exemplary record in these cases in ensuring that the United States does not pay unwarranted claims or excessive amounts.

In *Stockton East Water District v. United States*, plaintiffs sought \$500 million based on the alleged failure of the Bureau of Reclamation to deliver water to several California water districts under their water service contracts. The United States prevailed after a multi-week trial. The court held that the water districts did not show that the Bureau made unreasonable decisions in operating the reservoir and allocating water under a contract that required the Bureau to “use all reasonable means to guard against” water shortages. Similarly, *Klamath Irrigation District v. United States* involved claims for compensation in the amount of \$100 million based on the alleged failure of the Bureau of Reclamation to deliver water from the Klamath Project, based on the Bureau’s compliance with the ESA. Following previous decisions holding for the United States as to specific claims, the United States obtained a decision this year holding that the Sovereign Acts Doctrine provided a complete defense, since the ESA was passed for the benefit of the public and did not involve the government acting as a contractor.

In *Testwuide v. United States*, approximately 3400 plaintiffs owning property in Virginia near two naval bases alleged Fifth Amendment takings claims based on an increase in military aircraft overflight activity as a result of mandated base closures and consolidations. The United States settled these claims under favorable terms, thus avoiding the risk of a far greater monetary cost.

On occasion, the Fifth Amendment takings claims faced by the Division rise to staggering levels. In *Nicholson v. United States*, which arose out of the flooding caused by Hurricane Katrina, plaintiffs alleged that the faulty design and construction of the New Orleans levee system caused a taking of their properties. Plaintiffs sought class certification and asserted claims of \$100 billion. The United States prevailed on summary judgment, with the court finding that the flooding was not the natural and probable consequence of governmental action.

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, including property needed for new or expanded courthouses, for flood control projects, for federal office buildings, and for access to federal facilities.

In the course of this work, the Division is mindful of its goal to achieve results just to individual landowners and to the taxpayers of the United States. Through settlements and trials, the Division achieved results that amounted to savings of some \$18.6 million dollars. It also achieved beneficial results by working with

agencies to avoid the expense of litigation where possible. For example, in a situation requiring installation of security measures around the federal district courthouse in Manhattan, the Division worked with GSA to devise a right of use that avoided litigation altogether.

Enforcing Environmental Laws Through International Capacity Building.

The Division frequently provides training on civil and criminal environmental enforcement to judges, prosecutors and other government attorneys, and other legal practitioners in foreign countries. Division attorneys engaged in such capacity building traveled to numerous countries, including Panama, China, Taiwan, Indonesia, Thailand, Hungary, Denmark, the Netherlands, the United Arab Emirates, the Kingdom of Bahrain, Egypt, Tanzania, and Mexico. The Division worked with government attorneys from Mexico and Canada to develop and present a conference in February 2007 on environmental enforcement issues for Mexican judges and magistrates in Mexico City. The symposium was sponsored by the Enforcement Working Group of the Commission on Environmental Cooperation, an international organization created under the North American Agreement on Environmental Cooperation. Division attorneys also served as instructors in workshops for judges and prosecutors in the Philippines and Indonesia on prosecuting cases to combat illegal trade in wildlife and wildlife parts. These workshops were organized in conjunction with the Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN). Division attorneys also participated in several capacity building efforts to strengthen enforcement responses to oil

pollution from vessels; attorneys planned and staffed a multi-agency training mission to Taiwan which provided in-depth training to several Taiwanese agencies concerning identification of and investigation of vessel pollution violations. The Division also helped organize meetings with visiting foreign enforcement and other government officials from countries such as China, Japan, Indonesia, Vietnam, and Chile.

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

The Division at times participates 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. In *Northwest Environmental Defense Center v. Brown*, we filed a brief in federal district court on the issue of whether a CWA NPDES permit is required for forestry roads. The court agreed with our view that such permits are not required. Another example is *BGA/Western Mohegan Tribe v. Ulster County*. In that case, a group of Native Americans sought a ruling from a federal district court that could have suggested that they had some of the attributes of a federal Indian tribe. The Division filed an amicus brief explaining that recognition as a federal Indian tribe could be granted only by the Department of the Interior and that the suit was improper. The court agreed.

PROMOTING NATIONAL SECURITY AND MILITARY PREPAREDNESS

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*, plaintiffs challenged the Army’s destruction of a chemical nerve agent under the Resource Conservation and Recovery Act. The destruction process involves neutralizing the deadly liquid agent at one location, then shipping the resulting product to a commercial hazardous waste incinerator. Plaintiffs alleged that the chemical agent is not fully neutralized in the treatment process and that trucking the resulting product thus presents risks. The Division defeated plaintiffs’ motion for a preliminary injunction. The court held that the Army properly considered all the available evidence when it concluded that the post-neutralization product could be classified as a caustic hazardous waste after treatment and that the Army took the necessary hard look at the environmental impact of its plan to ship that product. This decision allows this important program, vital to national security, to proceed 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 to the state permitting agency on two relatively minor issues, but held that the facility may continue incinerating chemical weapons during the remand because petitioners had not shown

that the operations were having an adverse effect on public health or the environment.

Aiding the Military’s Training, Preparations and Deployment in the War on Terrorism. After nearly three years of litigation in *Ilioulaokalani Coalition v. Gates*, the Division this year achieved an important victory in its defense of a key component of the Army’s 30-year modernization plan, “Stryker conversion” activity at an Army training facility in Hawaii. The Division secured partial relief from an injunction that had prohibited all conversion and training activity while the Army worked to complete additional documentation under NEPA. With this relief, the Army was able to immediately resume every conversion project and training activity it had identified as critical for ensuring that the 2nd Brigade, 25th Infantry Division is provided with training and weapons systems needed to successfully fight the global war on terrorism.

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.

Property Acquisitions to Improve Military Readiness and National Security. As requested by federal agencies acting under authority of Congress, the

Division exercised the federal government's power of eminent domain to initiate litigation enabling land acquisitions for military readiness and national security.

The Division filed new cases for such diverse military installations as the Navy's Air Facility, El Centro; the Harvey Point Defense Testing Facility; the Naval Computer and Telecommunications Area Master Station; the Army's Gowen Field Training Area in Idaho; and the Air Force's Seymour Johnson Air Force Base and Travis Air Force Base. In addition, it continued its litigation efforts in existing cases such as that involving property at Eielson Air Force Base in Alaska, a case which concerns complex lease issues arising from the military's "section 801 housing" project, pursuant to which the military leased land on installations to private developers who constructed military housing that was leased back to the military.

In addition, the Division has filed nine new cases to provide national security along the country's northern and southern borders. For example, at the northwestern and northeastern borders, it filed actions to acquire property for two new or expanded ports of entry. One suit, which seeks land for the expanded border station at Blaine, Washington, involved the condemnation of the State's interest in portions of Interstate-5 just south of the boundary between the United States and Canada; the plan is to construct the border station and then reconstruct the affected portions of Interstate-5 as a bridge over the border station, all on an expedited basis in anticipation of 2010 Winter Olympics in Vancouver. At the southwestern border, the Division has filed suit to acquire part of the

property needed for the Multi-Tiered Fence Project.

PROTECTING INDIAN RESOURCES AND RESOLVING INDIAN ISSUES

Protecting Tribal Hunting, Fishing, and Gathering Rights. The Division litigates to defend treaty-protected tribal hunting and fishing rights. In *United States v. Michigan*, the United States, five tribes, the State of Michigan, and Michigan hunting and conservation groups successfully negotiated a comprehensive settlement that affirms the existence and extent of the inland hunting and fishing rights of the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Little River Band of Ottawa Indians. The agreement resolves a long-standing dispute over whether the Tribes retained hunting and fishing rights pursuant to the 1836 Treaty of Washington. The agreement resolves litigation ongoing since the 1970s.

In *United States v. Washington*, a long-running case involving tribal treaty fishing rights in Western Washington, the court issued a decision in favor of the United States and numerous Indian tribes, holding that the Tribes' treaty-secured rights of taking fish impose a duty on the State of Washington to improve culverts that hinder fish passage and diminish fish populations.

Defending Tribal and Federal Interests in Water Adjudications. During the past year, the Division successfully represented the interests of Indian tribes in complex water rights adjudications. The Division,

working with the Interior Department, the State of Washington, private water users, and the Lummi Indian Nation, negotiated a comprehensive settlement of a significant water rights lawsuit involving groundwater underlying the Lummi Reservation in *United States v. Washington Department of Ecology*. In another major water rights case, the Division successfully argued in both federal and state court for entry of a consent decree effectuating the Gila River Indian Community Water Rights Settlement. The settlement brings critical water resources to the Gila River Indian Community's Reservation and resolves long-standing issues regarding water use.

The Division also prevailed in two trials that focused on amending two 1991 consent decrees settling decades-old litigation involving water rights on the Animas and La Plata Rivers in Colorado. In four consolidated cases brought on behalf of the Southern Ute and Ute Mountain Tribes, the court agreed, over objections, to amend consent decrees in order to make them consistent with legislation concerning the Animas-La Plata water project.

State of Maine v. EPA involved a petition for review of EPA's decision authorizing the State of Maine to administer the CWA permitting program in the territories of the Penobscot Nation and Passamaquoddy Tribe, but retaining federal authority to issue permits for certain tribally-owned facilities with operations that EPA concluded are internal tribal matters. The First Circuit affirmed EPA's decision granting authority to the State to administer the program within the Tribes' territory, but vacated EPA's decision to retain permitting authority as to certain tribally-owned facilities. The decision, which turned on

construction of the Maine Indian Claims Settlement Act, clarifies the respective roles of the State and the Tribes in administering the CWA in Maine.

Upholding Agencies' Authority to Implement Indian Policies. The Division has achieved considerable success in defending the Secretary of the Interior's trust land acquisition authority against numerous constitutional and administrative law challenges. These decisions have strengthened the authority of the Secretary to provide for tribes' physical, economic, and political well-being.

Defending Tribal Trust Claims. The Division represents the United States in numerous cases that tribes have brought demanding accountings 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 that the United States holds in trust for tribes. There are more than 100 cases ongoing in several courts and these cases are in various stages of discovery, active pretrial preparation, and formal or informal settlement discussions.

SUPPORTING THE DIVISION'S LITIGATORS

Award Winning Quality of Life. The Division was voted the second best place to work in the federal government (out of the 222 agency component offices) in the "Best Places to Work in the Federal Government 2007" survey.

The Division also was honored to receive the "Constance L. Belfiore Quality of Life" Award from the Bar Association of

the District of Columbia – the first government law office to be so honored in the 10-year history of the award. This award recognized the Division for its quality of work, collegiality, attorney development and mentor programs, and service to the community.

The Human Resources staff also completed the second year of its innovative “Honors Paralegal Program,” which makes use of the hiring authority in the Federal Career Intern Program. Each new Honor Paralegal was provided a three-day orientation program and paired with an attorney mentor, which has proven enormously helpful in getting the new staff integrated into the work of the Division.

The Office of Human Resources has implemented an on-line orientation program that allows new employees to complete time-consuming forms in advance of their first day, saving valuable time and resources.

In 2007, the Division had an outstanding performance fulfilling the President’s Management Agenda, with the highest “green” performance scores in every rating category for which the Division is monitored.

New Technology Resources and Upgrades. The Division upgraded all printers and servers, increased bandwidth, updated our backup equipment, and made additional improvements to our system architecture and network structure. The upgrades will pave the way for a new desktop system in the near future. The Division also upgraded and replaced its BlackBerry PDAs, enabling staff to remain

highly efficient with the use of current mobile technology.

The Division also rolled out a new Intranet module with resources for environmental enforcement litigators. The new *EESNet* contains a wealth of information and resources relevant to work under various environmental statutes. Substantive legal resources include EPA and DOJ guidance to litigators, judicial and administrative models, policies, outlines, overviews, and case updates. Management resources provide trial schedules, staffing lists, and consent decree and complaint libraries sorted by year and statute. This site will serve as a prototype for other practice area intranet pages.

The Division expanded its unique mail scanning program this year to provide greater technical capability. Mail now is scanned directly into the Division’s document management software, ensuring that electronic copies are made available immediately to multiple recipients in their offices or in remote locations while teleworking, on travel, or during emergencies requiring employees to work from offsite locations.

The Division’s Office of Litigation Support provided outstanding automation support services for our largest and most complex cases. Our Litigation Support program combines cutting edge legal technology, experienced contract staff, and extensive in-house expertise. OLS expanded the Division’s Extranet, allowing trial teams to more effectively collaborate on case materials with agency counsel, investigators, and expert witnesses by routinely making new cases available through our secure Internet portal.