



# Department of Justice

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**STATEMENT**

**OF**

**IGNACIA S. MORENO  
ASSISTANT ATTORNEY GENERAL  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
DEPARTMENT OF JUSTICE**

**BEFORE THE**

**SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW  
COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**CONCERNING**

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

**PRESENTED ON**

**MAY 31, 2012**

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SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW  
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**CONCERNING  
OVERSIGHT OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION**

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**I. INTRODUCTION**

Chairman Coble, Representative Cohen and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the work of the Environment and Natural Resources Division of the U.S. Department of Justice (ENRD or the Division). I have had the honor of serving as the Assistant Attorney General for ENRD since November 16, 2009. This is my second tenure with the Division, and I am grateful for the opportunity to once again represent the interests of the United States.

**II. OVERVIEW OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION**

The Environment and Natural Resources Division is a core litigating component of the U.S. Department of Justice (the Department). Founded more than a century ago, it has built a distinguished record of legal excellence. The Division is currently organized into nine litigating sections (Appellate; Environmental Crimes; Environmental Defense; Environmental Enforcement; Indian Resources; Land Acquisition; Law and Policy; Natural Resources; and Wildlife and Marine Resources), and an Executive Office that provides administrative support. ENRD has a staff of almost 700, more than 400 of whom are attorneys.

The Division functions as the Nation's environmental lawyer, representing virtually every federal agency in courts across the United States and its territories and possessions in civil and criminal cases that arise under more than 150 federal statutes. Key client agencies are the U.S. Environmental Protection Agency (EPA), the U.S. Department of the Interior, the U.S. Army Corps of Engineers (the Army Corps), the U.S. Department of Commerce, the U.S. Department of Agriculture, the U.S. Department of Homeland Security, the U.S. Department of Energy and the U.S. Department of Defense, among others. The Division's litigation docket contains almost 7,000 active cases and matters.

Our work furthers the Department's strategic goals to prevent crime and enforce federal laws, defend the interests of the United States, promote national security, and ensure the fair administration of justice at the federal, state, local and tribal levels. Most importantly, the Division's efforts result in significant public health and other direct benefits to the American people through the reduction of pollution across the Nation and the protection of important natural resources.

Every day, the Division works with client agencies, U.S. Attorneys' Offices, and state, local and tribal governments, to enforce federal environmental, natural resources, and wildlife laws. It also defends federal agency actions and rules when they are challenged in the courts, working to keep the Nation's air, water and land free of pollution, promoting military preparedness and national security, and supporting other important missions of our agency clients. The Division acquires land for purposes ranging from national parks to national security, protects tribal lands and natural resources, and works to fulfill the United States' trust obligations to Indian tribes and their members. I could not be more committed to fulfilling the work of the Division.

Finally, I would be remiss if I did not mention that ENRD was named, for the third time in a row, the best place to work in the federal government. The rankings are calculated by the Partnership for Public Service and are based on data from the Office of Personnel Management's annual Federal Employee Viewpoint Survey. This accolade is due in no small part to the varied, challenging and important work that we do in the Division, but also to the collegiality, expertise, dedication and professionalism of the Division's employees, whom I applaud and commend to you.

### **III. THE CORE MISSION OF THE DIVISION**

A full discussion of the broad range of ENRD's recent work is contained in the publication entitled *ENRD Accomplishments Report Fiscal Year 2011*, for example, which is posted on the Division's website. [http://www.justice.gov/enrd/ENRD\\_Assets/Accmplshmt Stmt 2011 WEB 5 16 12b.pdf](http://www.justice.gov/enrd/ENRD_Assets/Accmplshmt Stmt 2011 WEB 5 16 12b.pdf). To highlight the work of the Division for purposes of today's hearing, I will describe the core mission of the Division, with illustrative case results, and also provide a brief look at our work before the U.S. Supreme Court.

In managing its complex caseload, the Division is guided by its core mission, which has five key elements: (1) strong enforcement of civil and criminal environmental laws to ensure clean air, clean water, and clean land for all Americans; (2) vigorous defense of environmental, wildlife and natural resources laws and agency actions; (3) effective representation of the United States in matters concerning the stewardship of our public lands and natural resources; (4) vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights; and (5) protecting the public fisc.

## **A. Strong Enforcement of Civil and Criminal Environmental Laws**

Before discussing ENRD's overall enforcement accomplishments, I would like to discuss one of the Division's top enforcement priorities: the Deepwater Horizon oil spill.

### **1. Deepwater Horizon Oil Spill**

The Division has played an instrumental role in supporting the federal response to, and investigation of, the catastrophic oil spill in the Gulf of Mexico. On April 20, 2010, explosion and fire destroyed the Deepwater Horizon offshore drilling rig located in the Gulf of Mexico, approximately 40 miles from the Mississippi River delta. The explosion and fire tragically claimed the lives of 11 rig workers. It also resulted in a massive oil spill—the largest in U.S. history—that would take months to contain and that is expected to have long-lasting and devastating impacts on natural resources in the Gulf of Mexico. From the outset, Attorney General Eric Holder, then Assistant Attorney General Tony West, who headed the Civil Division, and I traveled numerous times to the Gulf. We saw the devastation caused by the oil spill, and heard the despair of local citizens whose way of life was threatened and possibly impacted forever.

From the first days following the Deepwater Horizon explosion and oil spill, ENRD provided extensive legal assistance to numerous federal agencies responding to the disaster. Division lawyers established a rapid response team to address urgent and ongoing inquiries from leadership throughout the government, helping to answer questions that enabled the United States to respond quickly and forcefully to the events on the ground. From the outset, ENRD also helped coordinate activities with the Gulf Coast States and the local U.S. Attorneys.

While response efforts were underway, the Department initiated civil and criminal investigations of the oil spill, as announced by the Attorney General. In December 2010, the Department filed a civil action against nine defendants, including BP, Transocean and others, in the Gulf oil spill multidistrict litigation proceeding, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La.). The United States' civil complaint asks the court to impose civil penalties under the Clean Water Act against eight defendants. It also asks the court to declare eight of the defendants liable without limitation under the Oil Pollution Act of 1990 for government-incurred removal costs, economic damages and damages to natural resources.

Since filing the civil action, ENRD and the Civil Division have taken or defended over 300 depositions, produced some 70 million pages in discovery and continued preparation for trial. The court has re-set the first phase of trial for January 2013.

On February 17, 2012, the Department announced a proposed agreement with MOEX Offshore 2007 L.L.C. (MOEX) to settle its liability in the Deepwater Horizon oil spill. According to the terms of the settlement, MOEX will pay \$70 million in civil penalties to resolve alleged violations of the Clean Water Act—the largest to date under the Clean Water Act—and will facilitate land acquisition projects in several Gulf States that will preserve and protect in perpetuity habitat and resources important to water quality. Those projects will cost MOEX at

least another \$20 million. Of the \$70 million in civil penalties, \$25 million would go to the States of Alabama, Florida, Louisiana, Mississippi and Texas. After considering comments submitted by the public on the settlement proposal, on May 3, 2012, the United States requested the court to enter that settlement as a judicial order.

The Division's work in response to the oil spill is not limited to the Department's civil enforcement action. The Division also has defended a number of lawsuits filed against federal agencies related to the explosion and oil spill. These cases challenged various federal regulatory requirements and plans, aspects of the federal government's response to contain the oil spill in the first months following the explosion, and the Administration's initial regulatory actions to prevent future oil spills. In addition to numerous district court cases, ENRD also is defending 16 petitions for review in the Fifth Circuit, which have been consolidated into two separate actions. These petitions seek review of the Department of the Interior's approval of drilling exploration and development plans in the Gulf of Mexico.

The Division continues to work closely with the Federal Natural Resource Trustees to fully assess and document damages resulting from the oil spill to natural resources within the Gulf of Mexico, to ensure that the responsible parties ultimately pay for all costs to restore these resources. On April 21, 2011, two Federal Natural Resource Trustees for the Deepwater Horizon oil spill—the Department of the Interior and the National Oceanic and Atmospheric Administration—and our State Trustee partners announced that BP had agreed to provide up to \$1 billion toward early restoration projects to address injuries to natural resources caused by the oil spill in the Gulf of Mexico. The Department of Justice assisted in reaching this important agreement that will fund early restoration work.

Finally, the Division represents the Department on the Gulf Coast Ecosystem Restoration Task Force (Task Force). The Task Force was established on October 5, 2010, by Executive Order 13554 ("Establishing the Gulf Coast Ecosystem Restoration Task Force") and is responsible for coordinating intergovernmental efforts to implement restoration programs in the Gulf Coast region.

## **2. Additional ENRD Enforcement Priorities**

A core mission of the Division is enforcement of civil and criminal environmental laws to protect our Nation's air, land, water, and natural resources. These laws include the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act (commonly known as the Superfund law), the Safe Drinking Water Act and the Residential Lead-Based Paint Hazard Reduction Act. Most modern-era federal environmental laws provide for civil and criminal enforcement to secure injunctive relief, civil penalties, jail time, fines, enforcement of administrative orders, and other relief. Several laws also provide for recovery of government response costs and natural resource damages. Because of the severity of the punishment, criminal prosecutions of environmental violations primarily address conduct that presents an endangerment, shows disregard for public safety or environmental integrity, or demonstrates a pattern of fraudulent or recalcitrant conduct. As the government's environmental lawyer, we receive referrals from our federal client agencies and we exercise discretion in determining whether and when to bring suit.

Low-income, minority and Native American communities are often disproportionately burdened with pollution, resulting in more significant health problems. Environmental justice, first identified as an important public policy goal for the federal government in the Clinton Administration, when Executive Order 12898 was issued, is a top priority for this Administration. As U.S. Attorney General Holder has stated: “At every level of the Department and across all 94 United States Attorneys’ Offices [environmental justice] work is a top priority.” ENRD strives across all of its work to ensure that all Americans enjoy the benefit of a fair and even-handed application of environmental law. We are conducting outreach to allow ENRD to consider input from affected communities in the evaluation and formulation of appropriate remedies for violations of the law. The Division is working closely with the U.S. Attorneys’ Offices throughout the country to further these goals. Several of the cases discussed below illustrate how we have successfully incorporated environmental justice into the diverse ENRD case docket.

### **3. Overall Civil and Criminal Results**

In collaboration with other federal agencies, U.S. Attorneys’ Offices, and state, local and tribal governments, the Division’s civil and criminal environmental enforcement efforts have immeasurably protected human health and the environment through significant reductions in emissions and discharges of harmful pollutants. We also have achieved impressive monetary results through civil and criminal enforcement:

—From January 2009 through December 2011, for example, ENRD secured \$2.2 billion in civil and stipulated penalties, cost recoveries, natural resource damages, and other civil monetary relief, including almost \$1.3 billion recovered for the Superfund. We also secured over \$21.3 billion in corrective measures through court orders and settlements—measures that will go a long way toward protecting our air, water and other natural resources.

—On the criminal side, from January 2009 through December 2011, the Division concluded 140 criminal cases against 266 defendants, obtaining over 125 years in confinement (reflecting years of incarceration, in halfway houses, and of home detention) and over \$233 million in criminal fines, restitution, community service funds and special assessments.

Importantly, these results also serve to deter future violations, increasing exponentially the value of this work.

### **4. Civil Enforcement**

The ENRD docket of civil enforcement cases varies at any given time based on the course of investigations, the priorities of client agencies, the readiness of parties to settle, and disposition by courts. It also reflects changes in the law as regulations are promulgated, modified or remanded, and priorities set by the Division to address the most egregious violations. Generally, however, the ENRD docket contains a mix of clean air, clean water, hazardous waste and other types of civil enforcement actions. For more than a decade, we also have emphasized the value of bringing cases addressing violations by an entire company across various

environmental media such as air, water and waste (“multimedia”) and enforcement actions to address industrial sectors. Such cases reflect the priorities of our client agencies and the increased benefits to public health and the environment that these actions can achieve. Enforcing cleanup obligations in bankruptcy cases also has become an important part of the ENRD civil docket.

#### **a. Protecting Clean Air through Civil Enforcement**

The Environment and Natural Resources Division has litigated a number of cases under the Clean Air Act’s New Source Review provisions against operators of coal-fired electric power generating plants. Violations arise when operators construct major life-extension projects on aging facilities without installing required state-of-the-art pollution controls, resulting in excess air pollution that has degraded forests, damaged waterways, contaminated reservoirs and adversely affected the health of the elderly, the young, and asthma sufferers. Through fiscal year 2011, we settled 21 of these matters and will obtain reductions of over two million tons of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) each year, once the more than \$12 billion in required pollution controls are fully functioning.

The Division recently obtained three more settlements under this initiative in *United States v. Northern Indiana Public Service Co.* (NIPSCO); *United States v. Hoosier Energy Rural Electric Cooperative* (Hoosier); and *United States v. American Municipal Power, Inc.* (AMP). Under the NIPSCO consent decree, the company will install air pollution controls at three of its coal-fired power plants located in Chesterton, Michigan City and Wheatfield, Indiana (at a cost of approximately \$600 million), and permanently retire a fourth facility in Gary, Indiana. Under the Hoosier consent decree, the cooperative will install pollution controls at its Meron and Ratts Stations, located in southwest Indiana (at a cost of \$250-300 million). The AMP consent decree requires the Ohio utility to permanently retire its Richard H. Gorsuch Station near Marietta. When fully implemented, air pollution controls and other measures will collectively reduce air pollution by more than 123,000 tons every year compared with pre-settlement emissions. NIPSCO, Hoosier and AMP, respectively, also paid civil penalties of \$3.5 million, \$950,000 and \$850,000, and will respectively spend \$9.5 million, \$5 million and \$15 million on projects to mitigate the adverse effects of past excess emissions (including such projects as retrofitting diesel school buses to reduce emissions, changing out old wood-burning stoves and outdoor boilers, rehabilitating damaged forests, and establishing programs to increase the use of energy-efficient appliances).

We also have concluded almost 30 actions under an EPA initiative to improve Clean Air Act compliance among petroleum refiners and to reduce significant amounts of air pollution from refineries nationwide through comprehensive, company-wide enforcement settlements. The first settlement was reached in 2000, and as of the end of fiscal year 2011, 106 refineries operating in 32 states and territories—more than 90% of the total refining capacity in the United States—are under judicially enforceable agreements to significantly reduce emissions of pollutants. As a result of the settlement agreements, refiners have agreed to invest over \$6 billion in new pollution controls designed to reduce emissions of SO<sub>2</sub>, NO<sub>x</sub> and other pollutants by over 360,000 tons per year.

One such action is a September 2010 settlement with Murphy Oil USA covering two large petroleum refineries in Wisconsin and Louisiana. Murphy agreed to install equipment at the facilities (at a cost of approximately \$142 million) to resolve Clean Air Act New Source Review violations, which will reduce emissions of SO<sub>2</sub> and NO<sub>x</sub> by nearly 1,400 tons each year as well as reduce emissions of volatile organic compounds, particulate matter and carbon monoxide. The company also agreed to pay a \$1.25 million civil penalty and to spend \$1.5 million on an environmental project that will control noxious odors emanating from its Louisiana facility. Importantly, the settlement also included community-focused components developed through community outreach. First, Murphy Oil will have to meet stringent pollution control requirements if it expands certain operations. Second, the settlement requires Murphy Oil to construct and maintain an air monitor between its refinery and the local neighborhood and to continuously monitor levels of SO<sub>2</sub>, particulate matter, and volatile organic compounds. Third, Murphy Oil must post the air monitoring data on a public Internet website. This is the first refinery settlement to require this kind of monitoring and the disclosure of data on a publicly available website.

#### **b. Safeguarding America's Waters through Civil Enforcement**

The Division has made it a priority to bring cases nationwide to improve municipal wastewater and stormwater collection and treatment. Courts across the country have entered more than 30 settlements in these cases from January 2009 through December 2011, requiring long-term control measures and other relief estimated to cost more than \$14 billion. These cases often involve one of the most pressing infrastructure issues in the Nation's cities—discharges of untreated sewage from aging collection systems found in older urban areas, where low-income and minority communities often are. Raw sewage that sometimes backs up into home basements contains pathogens that threaten public health. Discharges of raw sewage may lead to beach closures and advisories against fish consumption.

The Division recognizes that current economic conditions often make it difficult for municipalities to commit to the large expenditures needed to address sewer system overflows. We have the flexibility under the law and applicable federal policies to consider unique circumstances, including ability to pay, as well as the site-specific nature of relevant receiving waters and locally relevant construction requirements in shaping protective, fair and just resolution of these cases.

An example of such actions is the comprehensive Clean Water Act settlement ENRD and the State of Ohio reached with the Northeast Ohio Regional Sewer District (NEORS) in December 2010. NEORS discharges nearly five billion gallons of untreated, raw sewage approximately 3,000 to 4,000 times per year into Lake Erie and nearby rivers. The settlement requires NEORS to install pollution controls (at a cost of about \$3 billion), including the construction of seven tunnels to reduce the discharge of untreated, raw sewage. The district paid a penalty of \$1.2 million, divided evenly between the United States and Ohio. NEORS will spend \$1 million to operate a hazardous waste collection center for Cuyahoga County and spend approximately \$800,000 to improve other water resources. The settlement also will advance the use of large-scale green infrastructure projects to control wet weather discharges.



Another significant case is a Clean Water Act settlement with the City of Kansas City, Missouri in which Kansas City agreed to make \$2.5 billion worth of improvements over 25 years to its outdated and dilapidated sewer system. The settlement will improve public health and the environment throughout the city. It includes relief tailored to address the impacts of the violations on disproportionately burdened communities by prioritizing sewer rehabilitation projects and requiring early action to reduce overflows of untreated sewage in the urban core. The city and EPA met with community groups to better understand local problems and needs.

### **c. Improving All Environmental Media through Civil Enforcement**

In July 2010, the Division obtained a significant company-wide settlement in *United States v. McWane, Inc.* McWane operates iron and brass foundries, and various valves and tank manufacturing facilities across the Nation. The settlement resolves more than 400 civil violations of the Clean Air Act, Clean Water Act, Emergency Planning and Community Right-to-Know Act, Superfund, Resource Conservation and Recovery Act, Safe Drinking Water Act and Toxic Substances Control Act, as well as state environmental laws. McWane has now developed and implemented new company-wide environmental management and worker health systems, and identified, documented and corrected all environmental violations at all facilities at a cost of more than \$7 million. The company also will pay a civil penalty of \$4 million and will undertake supplemental environmental projects to benefit the communities surrounding McWane's facilities (spending more than \$9 million).

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

The Division's bankruptcy practice has grown in recent years. In bankruptcy cases, ENRD files proofs of claim to protect environmental obligations owed to the United States by responsible entities filing for bankruptcy. These matters are typically handled in close coordination with affected states and tribal and local governments. From January 2009 through December 2011, ENRD obtained agreements in 25 bankruptcy proceedings, under which debtors committed to spend an estimated \$1.4 billion to clean up hazardous waste sites, reimburse the Superfund almost \$665 million and pay more than \$77 million in natural resource damages.

The *Asarco* case is illustrative of this work.<sup>1</sup> In the largest cost recovery for hazardous waste cleanup ever, debtor American Smelting and Refining Company, L.L.C. (Asarco) paid \$1.79 billion pursuant to its confirmed bankruptcy reorganization in *In re ASARCO, L.L.C.* Under the reorganization plan, the United States received \$776 million, which will be used to fund cleanups at more than 35 sites; the Coeur d'Alene Work Trust was paid \$436 million to fund cleanup and restoration work in Idaho's Coeur d'Alene Basin; three custodial trusts were paid approximately \$261 million to fund cleanup, restoration work and associated administrative costs at 24 sites in 13 states; and 14 states received payments in excess of \$321 million to fund environmental settlement obligations at over 36 sites.

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<sup>1</sup> Due to my previous employment, I have recused myself from the Division's work on the *Asarco* case. The above case discussion reflects publicly available information.

## **5. Criminal Enforcement**

Environmental prosecutors investigate and, as appropriate, bring charges against individuals and organizations for a broad range of criminal activities, which include polluting our Nation's waterways, dumping illegal wastes into sewer systems, emitting hazardous air pollutants, engaging in illegal commercial fishing and logging, and killing endangered species. ENRD's Environmental Crimes Section, working with U.S. Attorneys' Offices nationwide, uses a variety of criminal laws to bring environmental criminals to justice. The Division's efforts have resulted in significant criminal sanctions, thereby protecting and enhancing public health and the environment and deterring others from violating federal laws.

### **a. Protecting Clean Air through Criminal Enforcement**

To meet Clean Air Act requirements, the State of Nevada requires vehicle emissions testing in areas that exceed national standards for carbon monoxide and ozone. In Las Vegas, Nevada, certain unscrupulous testers were paid to falsify the emissions testing to enable failing vehicles to obtain passing results. Although the effect of an individual testing violation was small, the widespread fraud threatened the integrity of the entire system and allowed many polluting cars to remain on the road. Ten separate defendants pled guilty to Clean Air Act felonies.

### **b. Safeguarding America's Waters through Criminal Enforcement**

The Clean Water Act prohibits filling jurisdictional wetlands without a permit. From July to October 2006, Lieze Associates, d/b/a Eagle Recycling, a waste management company, dumped at least 8,100 tons of construction and demolition debris into wetlands in Frankfort, New York adjacent to the Mohawk River. The defendants concealed the illegal dumping by fabricating a New York State Department of Environmental Conservation permit. In pleading guilty, the company admitted to engaging in a systematic pattern of document concealment and destruction. The company was sentenced to a \$500,000 fine, \$70,000 in restitution and cleanup costs, and three years of probation, and required to implement an environmental compliance plan.

### **c. Cleaning Up Contaminated Lands through Criminal Enforcement**

At its Metropolis, Illinois facility, Honeywell produced uranium hexafluoride. Air emissions from this process were scrubbed with potassium hydroxide, which created a highly corrosive and radioactive mud that was stored in 55-gallon drums. For a time, the company reclaimed uranium from the mud and reprocessed any remaining material. However, it stopped using the reclamation process in 2002 and began to knowingly and illegally accumulate thousands of drums of radioactive and corrosive mud.

In 2011, Honeywell pleaded guilty to a Resource Conservation and Recovery Act felony violation and was sentenced to five years of probation and a fine of \$11.8 million. As a condition of probation, the company must legally process the uranium and potassium hydroxide

mud, and develop, fund and implement a household hazardous waste collection program for the surrounding community at a cost of approximately \$200,000.

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

Environmental crimes and criminal violations of worker health and safety regulations are often found together, such as at the pipe foundries owned by McWane, Inc. McWane manufactured cast iron pipes at its Atlantic States facility. This operation involved melting scrap metal at temperatures that approached 3,000 degrees Fahrenheit. Trial evidence proved a corporate philosophy and management practices that resulted in an extraordinary history of environmental violations, workplace injuries and fatalities, and obstruction of justice. The evidence showed that the defendants (1) routinely violated Clean Water Act permits by discharging petroleum-contaminated water and paint into storm drains that led to the Delaware River; (2) repeatedly violated Clean Air Act permits through illegal use of the foundry's furnace for waste disposal; (3) systematically altered accident scenes and air monitoring conditions; and (4) routinely lied to officials who were investigating environmental and worker safety violations.

Over several years, the Division brought five criminal cases against McWane, which resulted in nearly \$25 million in criminal fines and approximately \$3.5 million in environmental projects. In April 2009, four Atlantic States managers were sentenced to serve 70, 41, 30 and six months of incarceration, respectively. The company was sentenced to pay an \$8 million fine and complete a four-year term of probation, and was put under the oversight of a court-appointed monitor. The defendants' appeal of their conviction is pending before the Third Circuit.

The Environmental Protection Agency has strict Clean Air Act rules regarding the removal of asbestos from buildings during demolition or remodeling projects in order to protect worker and public health. When asbestos-containing materials are damaged or disturbed, microscopic fibers become airborne and can be inhaled into the lungs, where they can cause significant health problems. The Division successfully prosecuted a number of asbestos-related cases last year. The following case is an example.

Despite knowing of the presence of asbestos, three co-conspirators hired an unlicensed company to scrape asbestos-containing ceilings during the renovation of a 200-plus-unit apartment building. Defendants hired Hispanic day laborers and failed to tell them about the asbestos or provide them with adequate protective gear. Defendants were sentenced, respectively, to 48 months of incarceration, followed by two years of supervised release, and payment of \$5,400 in restitution; six months of home confinement, three years of probation, and 150 hours of community service; and two years of probation and joint and several liability for the \$5,400 in restitution. The asbestos was cleaned up properly at a cost of \$1.2 million. The restitution was used to pay for medical monitoring for the three workers involved in the illegal asbestos removal. One of the defendants has appealed his conviction and sentence to the Ninth Circuit.

#### **e. Reducing Pollution from Ocean-Going Vessels**

The vessel pollution program reflects the Division's ongoing, concentrated effort to detect, deter and prosecute those who illegally discharge pollutants from ships into oceans, coastal waters, and inland waterways. Enforcement is chiefly under the International Convention for the Prevention of Pollution from Ships, known as "MARPOL," and its federal implementing legislation, the Act to Prevent Pollution from Ships (APPS). These laws require vessels to maintain logbooks recording all transfers and discharges of oily wastes. In addition, these cases frequently involve obstruction of U.S. Coast Guard inspections. From January 2009 through December 2011, the penalties imposed in vessel pollution cases prosecuted by ENRD have totaled more than \$42 million, and responsible maritime officials have been sentenced to more than 43 months in confinement.

The case of *United States v. Polembros Shipping, Ltd.*, is illustrative. In 2009, the defendant, a Greek shipping operator, pleaded guilty to and was sentenced for numerous violations of federal laws. The company was sentenced to pay a \$2.7 million fine and \$100,000 to fund research related to marine invasive species and to three years of probation, during which time all 20 ships it owned or managed were barred from entering U.S. ports and territorial waters. Additionally, the ship's master was sentenced to serve ten months of incarceration, and two other crew members were ordered to serve probation for crimes including APPS and other statutory violations.

#### **f. Stopping Illegal Logging, Wildlife Trafficking, and Commercial Fishing**

##### **i. Illegal Logging**

The Lacey Act, initially enacted in 1900, is the United States' oldest wildlife protection statute. Until it was amended by the U.S. Congress in May 2008, the Lacey Act served as an anti-trafficking statute that protected a broad range of fish and wildlife, but only a limited range of plants. The Food, Conservation and Energy Act of 2008 amended the Lacey Act by expanding its protection to a broader range of plants and plant products and by adding a prohibition on the importation of plants and plant products in violation of the law of the country of harvest. Conservative estimates place the value of illegally harvested timber traded annually worldwide at \$10 billion to \$15 billion. Since the 2008 amendments, ENRD has worked with other federal agencies and counterparts abroad to educate governments, industry participants, non-governmental organizations and the public on the Lacey Act's provisions to combat the international trade in illegally harvested plants and plant products, including timber.

##### **ii. Illegal Wildlife Trafficking**

Illegal wildlife trafficking globally, estimated to be worth between \$5 billion to \$20 billion annually, puts many species at risk of extinction, such as tigers, rhinoceros and some primate species. Federal criminal enforcement of wildlife statutes plays a key deterrent role and augments state, tribal and foreign wildlife management efforts. A wildlife case can include prosecution of both individual and organizational perpetrators; disgorgement of proceeds from illegal conduct such as smuggling; punishment that includes community service to help mitigate

harm caused by the offense; and forfeiture of wildlife and instrumentalities used to commit the offense.

The two key statutes are the Lacey Act and the Endangered Species Act. The Lacey Act reaches two broad categories of wildlife offenses: poaching and illegal trafficking in wildlife and false labeling. The Endangered Species Act establishes a U.S. program for the conservation of endangered and threatened species. The Endangered Species Act makes it illegal to traffic in listed endangered or threatened species without a permit. The Endangered Species Act also implements our international treaty obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)—a treaty establishing limits on trade in certain species of wildlife.

Trafficking prosecutions run the gamut from local poaching to international smuggling rings to the taking of protected species during a U.S. hunt. One example is the recent prosecution of two defendants for bringing internationally protected black coral into the United States. The defendants admitted that from 2007 to 2009 they sent more than \$194,000 worth of black coral to “Company X.” They pleaded guilty to conspiracy, false statements and false labeling under both the Endangered Species Act and the Lacey Act for illegally shipping black coral from China to the Virgin Islands. The defendants were sentenced to 30 months and 20 months of incarceration, respectively. Each also must pay a \$12,500 fine and is prohibited from shipping any coral or other wildlife products to the United States for a three-year period following release from prison.

### **iii. Illegal Commercial Fishing**

Illegal commercial fishing encompasses such crimes as illegal fish harvesting, purchase of illegally harvested fish, and false labeling of fish under the Lacey Act as well as related general criminal violations. The Division has made it a priority to investigate and prosecute these crimes. For example, in early May 2011, two defendants were sentenced in Mobile, Alabama to 33 months and 24 months in prison, respectively, fined \$5,000 each, and barred for three years from working in the seafood industry or owning any seafood-related business. Both were convicted of 13 felony offenses, including conspiracy, receiving smuggled goods and misbranding.

## **B. Vigorous Defense of Environmental, Wildlife and Natural Resources Laws and Agency Actions**

The Division’s mission also includes defense of a broad range of environmental, natural resources, and wildlife laws, regulations and agency actions. More than half of ENRD attorney time is spent on this important work that must be done to defend lawsuits against the government. Success in defensive litigation on behalf of our client agencies preserves vital federal programs and interests, allowing the implementation of environmental and natural resources laws and regulations and protection of the public fisc. The following cases illustrate this type of work.

## **1. Defending Agency Actions**

The Division earned a favorable decision in *National Petrochemical & Refiners Association v. EPA*, a case seeking review of EPA regulations governing the Clean Air Act Renewable Fuel Standards Program. The regulation set requirements for minimum volumes of bio-mass diesel fuel to be produced and used in 2010, as required by the Energy Independence and Security Act. The U.S. Court of Appeals for the D.C. Circuit held that the rule was not impermissibly retroactive because it combined the 2009 and 2010 minimum volumes of bio-mass fuel as set out in the statute.

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

Over the past three years, EPA has developed a program under the Clean Air Act to regulate certain greenhouse gas emissions that contribute to global climate change. The agency has set limits for emissions of greenhouse gases from new passenger cars, light-duty trucks, and medium-duty passenger vehicles covering model years 2012 through 2016 and has promulgated regulations specifying a phased approach for addressing greenhouse gases from large stationary sources through stationary source permitting programs. These efforts have generated a significant amount of litigation, which ENRD will continue to defend.

In 2011, the Division successfully defended the operation of floodways on the Mississippi River necessitated by spring flooding. Missouri sought a temporary restraining order to enjoin the Army Corps from operating the Birds Point-New Madrid Floodway in response to record high flooding. The floodway was necessary to protect thousands of people and millions of dollars of property from the potential of catastrophic flooding that could result from the failure of a levee near Cairo, Illinois. Missouri was unsuccessful in seeking emergency relief from the Eighth Circuit and the U.S. Supreme Court.

## **2. Promoting National Security and Military Preparedness**

The Environment and Natural Resources Division makes a unique and important contribution to national security, a key Administration priority, while ensuring robust compliance with the country's environmental and natural resources laws. Increasingly, the Division is responsible for defending agency actions that support the security of the United

States. We defend safe disposal of nuclear waste and obsolete chemical weapons. We defend against challenges to critical training programs that ensure military preparedness. We exercise the federal government's power of eminent domain to acquire lands or review title to lands needed to fulfill critical military and homeland security functions.

One example is ENRD's support of the Strategic Border Initiative to secure the Nation's borders. In 2007, the U.S. Congress mandated construction of fencing and related infrastructure at multiple points along the U.S.-Mexico border in order to enhance domestic security by curtailing smuggling, drug trafficking, and illegal immigration. Over the last three years, the Obama Administration has dedicated unprecedented resources to securing the borders. The Division is working closely with the U.S. Department of Homeland Security and the Army Corps to facilitate land acquisitions necessary for the construction of 225 miles of congressionally mandated fencing along the U.S.-Mexico border. This effort has required acquisition by eminent domain of nearly 400 land parcels in Texas, New Mexico, California and Arizona and extensive work to obtain timely possession for construction purposes and to address widespread title and survey issues. The Division has helped resolve almost 200 cases (most in the past three years), and has trials scheduled next year on three of the largest, most precedent-setting cases with valuation disputes totaling more than \$65 million.

The case of *Phippsburg Shellfish Conservation v. Army Corps of Eng'rs* illustrates how, with ENRD's support, the Army Corps' dredging projects necessary for national defense and economic vitality have been accomplished without delay. The Army Corps' dredging project was critical to the delivery of the *U.S.S. Spruance*, a billion-dollar guided missile destroyer, from the Bath Iron Works in Maine to the possession of the U.S. Navy. We successfully defended the Army Corps' plan to dredge the Kennebec River to enable safe passage of the new destroyer to the open ocean. Delayed delivery would have affected training and assignments for multiple ships implicating military training readiness.

### **C. Promoting Responsible Stewardship of Public Lands and Fish and Wildlife**

A substantial portion of the Division's work includes litigation related to the management of public lands and associated natural and cultural resources. These cases involve federal land, resource, and ecosystem management decisions challenged under a wide variety of federal environmental statutes that affect more than a half-billion acres of land and hundreds of millions of acres of subsurface mineral interests. ENRD's land and natural resources litigation includes original actions before the U.S. Supreme Court to address interstate boundary and water allocation issues; suits over management decisions affecting economic, recreational and religious uses of the national parks and national forests; and actions to recover royalties and revenues from extraction or development of natural resources. In addition to the criminal actions discussed above, we also handle civil cases arising under the fish and wildlife conservation laws, including suits defending agency actions under the Endangered Species Act, the Magnuson-Stevens Fishery Conservation and Management Act and the Marine Mammal Protection Act.

One important example is ENRD's work in the Klamath River Basin. The Basin, which is located in Oregon and California, is home to four Indian tribes, an important federal irrigation project, and National Wildlife Refuges crucial to migratory waterfowl, and is a historically large

producer of salmon. For three decades, it has been the subject of intense litigation over water rights, the Endangered Species Act and the operation of the Bureau of Reclamation's Klamath Project. The Division worked closely with the Department of the Interior and other federal agencies to negotiate two far-reaching agreements signed on February 18, 2010. The agreements seek to reduce irrigation demands and provide a framework for stakeholders to collaborate on environmental and economic studies assessing the potential for dam removal in the Basin. They illustrate what can be accomplished when individuals and groups with varied interests work in good faith to solve seemingly intractable problems. We will continue to explore creative ways to settle conflicts that have defied resolution, despite decades of costly litigation.

#### **D. Protecting Tribal Resources and Resolving Tribal Issues**

President Obama and U.S. Attorney General Holder have made clear their commitment to Indian Country. As Attorney General Holder said in December 2010 when he addressed the 12th National Indian Nations Conference, this Department is committed "to building and sustaining healthy and safe native communities; to renewing our Nation's enduring promise to American Indians and Alaska Natives; and to respecting the sovereignty and self-determination of tribal governments." I fully share this commitment as does the Division.

The United States holds almost 60 million acres of land in trust for tribes and individual members. The U.S. Department of the Interior and ENRD, working with tribes, seek to protect those lands and associated resources from trespass, impairment or encumbrance. The Division litigates on behalf of federal agencies to protect the rights and resources of federally recognized Indian tribes and their members. This includes defending against challenges to statutes and agency action designed to protect tribal interests, and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. We have increased outreach to tribal leaders and communities to better understand their concerns and work more closely with them in carrying out these important responsibilities with careful consideration of the government-to-government relationship between the United States and federally recognized tribes.

For example, the Division represents the interests of the United States as trustee for Indian tribes and their members in complex water rights adjudications in nearly every western state. We currently have about 30 active water rights adjudications. In 2010, ENRD contributed to five landmark Indian water rights settlements that will resolve complex and contentious Indian water rights issues in three western states: the Taos Pueblo Indian Water Rights Settlement, the Aamodt Litigation Settlement Act and the Navajo-San Juan River Basin Settlement in New Mexico; the Crow Tribe Water Rights Settlement in Montana; and the White Mountain Apache Tribal Settlement in Arizona. These settlements provide certainty as to the nature and extent of tribal water rights, and thereby promote economic development both on reservation and in the adjacent, often rural, communities.

As another illustration of our tribal work, the Division resolved a longstanding dispute over the boundaries and existence of a reservation. In *Saginaw Chippewa Indian Tribe v. Granholm*, the tribe, the United States, the State of Michigan and local governments negotiated a historic settlement recognizing that the Isabella Reservation in south central Michigan is Indian



Country. The settlement provides a model for how states, tribes and local governments can solve common problems.

The Division also is charged with representing the United States in civil litigation brought by tribes and their members against the United States, including claims that the United States has breached its trust responsibility. The United States is committed to resolving the pending tribal trust accounting and trust management cases in a fair and just manner.

We recently settled the Osage Tribe's claims that the United States breached its trust duties and responsibilities to the tribe by allegedly failing to provide a trust accounting and mismanaging the tribe's trust funds and non-monetary resources (primarily oil and gas resources) from 1896 to 2000. In October 2011, the tribe and the United States agreed to a historic settlement of those claims for \$380 million. The settlement was the outcome of months of dedicated effort by both parties to resolve more than a decade of costly litigation.

Under other settlements reached this spring, the United States also has resolved alleged liabilities to 42 tribes in compensation of the tribes' claims regarding the government's management of trust funds and non-monetary trust resources. The settlements set forth a framework for promoting tribal sovereignty and improving or facilitating aspects of the tribes' relationship with the United States, while reducing or minimizing the possibility of future disputes and avoiding unnecessary litigation. We will continue to press forward to right historical wrongs in a fair and just manner and fulfill the promise of the government-to-government and trust relationship between the United States and the tribes.

#### **E. Protecting the Public Fisc—Fiscal Year 2013 Budget Request**

The President's fiscal year 2013 request seeks 537 positions (370 attorneys), 582 FTEs and \$110,360,000. Included in this request are adjustments to base required to maintain the legal representation services that have yielded the impressive legal successes and quantitative outcomes described in this statement and to annualize supplemental funding provided in fiscal year 2010 for the Department's response to the Deepwater Horizon oil spill. Funding the fifth-largest litigating Division in the Department at this level is a good investment. The Division is committed to ensuring that American taxpayers receive a substantial return on their investment by securing significant monetary recoveries and corrective measures through litigation.

#### **F. Appellate and Supreme Court Litigation**

The Environment and Natural Resources Division handles appeals arising under numerous statutes before the Circuit Courts of Appeals across the country, and frequently has cases come before the U.S. Supreme Court. The U.S. Supreme Court also regularly solicits the Department's views on filed petitions for writs of certiorari. We support the Solicitor General's Office as it formulates positions on behalf of the United States in cases handled by the Division in lower courts and in cases that are of interest to the Division. In 2010 and 2011, the Supreme Court decided four Division cases: *United States v. Tohono O'odham Nation*, which concluded that the Court of Federal Claims lacked jurisdiction to adjudicate a tribal breach of trust claim where the tribe had a related suit pending in federal district court; *Montana v. Wyoming*, which

resolved a dispute between Montana and Wyoming over claims to water in the Yellowstone River Basin; *American Electric Power Co., Inc. v. Connecticut*, which found that the Clean Air Act and the EPA actions it authorizes had displaced any public nuisance cause of action that may have existed under federal common law to address greenhouse gas emissions from power plants; and *United States v. Jicarilla Apache Tribe*, which recognized the right of the United States to assert the attorney-client privilege to protect documents demanded by an Indian tribe in a breach of trust claim by the tribe against the United States.

In the current Supreme Court term, the Court has decided two important Division cases: *PPL Montana, L.L.C. v. Montana*, which addressed the standard for whether certain rivers and river segments in the West are “navigable” for purposes of determining state versus federal title to the riverbeds; and *Sackett v. Environmental Protection Agency*, which concluded that a landowner, alleged by EPA to have filled wetlands without a Clean Water Act permit, may seek immediate judicial review of an administrative compliance order before the agency seeks to judicially enforce the order. Our recent cases before the Supreme Court truly illustrate the remarkable breadth and importance of the Division’s work.

#### **IV. CONCLUSION**

In closing, I would like to assure the Subcommittee that ENRD remains fully committed to representing the interests of the United States before the courts in order to protect human health, the environment and the public fisc.

Mr. Chairman, I would be pleased to answer your questions and those of Members of the Subcommittee.