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DEPARTMENT OF JUSTICE—CIVIL, ENVIRONMENT AND NATURAL RESOURCES, AND TAX DIVISIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

MAY 31, 2012

Serial No. 112–124

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

74–416 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
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DEPARTMENT OF JUSTICE—CIVIL, ENVIRONMENT AND NATURAL RESOURCES, AND TAX DIVISIONS

THURSDAY, MAY 31, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 12:08 p.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Ross, Quayle, and Cohen.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Johnny Mautz, Counsel; Omar Raschid, Professional Staff Member; Rachel Dresen, Professional Staff Member; Ashley Lewis, Clerk; Will Green, Intern; (Minority) James Park, Subcommittee Chief Counsel; Susan Jensen-Lachmann, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. COBLE. The Subcommittee will come to order.

One of our Committee's most important duties is to perform oversight of the United States Department of Justice. Today, the Subcommittee seeks to fulfill this duty through oversight of several Department components within the Subcommittee's jurisdiction.

The Civil, Environment and Natural Resources, and Tax Division dollars and potential recoveries and liabilities are at stake. Together, these three divisions manage a vast amount of civil litigation brought by or against the Federal Government. They handle many thousands of cases each year, though no fewer than 28 litigating sessions, and they employ well over 2,000 people.

Substantively, the responsibilities of these divisions carry out a remarkable variety of cases of constitutional litigation over Federal programs to Medicare and Medicaid fraud, defense of our Nation's air, water, and land from pollution, complex tax litigation, and the emerging issue of identity theft tax fraud. It is vital that these divisions carry out these duties effectively, efficiently, fairly, and impartially. Billions of dollars in potential recoveries and liabilities are at stake. In many cases, so are precious natural resources.

But, even more important, public confidence in our legal system and our Federal legal officials depends to no small degree on how well these divisions discharge their respective duties.

This is the first opportunity the Subcommittee has had to conduct oversight of the divisions since June of 2010 when we last held oversight on the Civil Division. A number of new issues have arisen to prominence since the divisions were last before us, and we look forward to the opportunity to discuss them with the divisions at this time and perhaps subsequently.

Other issues, of course, are of perennial importance, and we look forward to examining those issues as well.

Let me introduce the witnesses and then perhaps Mr. Cohen will be here. I think he is on his way, is he not?

We have a distinguished panel before us today. And good to have the gentleman from Arizona, Mr. Quayle. Good to have you with us as well.

Mr. Stuart Delery—am I pronouncing it correctly, Mr. Delery?

Mr. DELERY. Yes.

Mr. COBLE [continuing]. Was appointed Acting Assistant Attorney General for the Civil Division in March of 2012. Before this appointment, Mr. Delery served in the Department of Justice in a variety of roles, including senior counselor to the Attorney General.

Prior to joining the Justice Department in 2009, Mr. Delery was a partner in the Washington, D.C., office of WilmerHale, where he was a member of the Litigation Department and the Appellate and Supreme Court Litigation Practice Group and served as vice chair of the firm's Securities Department. Mr. Delery graduated from the Yale School of Law and the University of Virginia. He clerked for Justice Sandra Day O'Connor and Byron White on the U.S. Supreme Court and for Chief Judge Gerald B.—how do you pronounce his surname?

Mr. DELERY. Tjoflat.

Mr. COBLE. Thank you, sir—of the U.S. Court of Appeals.

Our second witness is Ignacia Moreno, Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice.

Ms. Moreno has enjoyed a distinguished career in both public and private sectors. Ms. Moreno started her legal career in 1990 at Hogan & Hartson, LLP in Washington and worked there until 1994 when President Clinton appointed her to the Department of Justice. She served there for 7 years, including time as a private counsel to the Assistant Attorney General for Environment and Natural Resources Division.

From 2001 to 2006, Ms. Moreno was of counsel and later a partner at Spriggs & Hollingsworth in Washington, D.C. From 2006 until her confirmation, Ms. Moreno was counsel, Corporate Environmental Programs, at the General Electric Company. Ms. Moreno is a graduate of the New York University School of Law and earned her BA from New York University. She was born in Colombia and raised in New York City.

Ms. Kathryn Keneally is the Assistant Attorney General for the Tax Division, Department of Justice. Ms. Keneally was sworn in as Assistant Attorney General for the Tax Division on 6 April 2012. She oversees more than 350 attorneys as they enforce the Nation's tax laws.

Prior to joining the Justice Department, Ms. Keneally was a partner in the New York office of the law firm of Fulbright & Ja-

worski, LLP. For 25 years, Ms. Keneally represented individuals and businesses before the Internal Revenue Service and the Department of Justice in criminal and civil tax cases, trial cases in the Federal district and appellate courts and the United States Tax Court.

Ms. Keneally earned an LLE in taxation from the New York University School of Law, graduated magna cum laude from Fordham Law School, and received her BS from Cornell University. Ms. Keneally clerked with the Honorable Edward R. Neaher, U.S. District Judge of the Eastern District of New York.

We are pleased to have each of you with us today.

The bad news is I am told we must vacate this building on or about 1:15. We should be through by then. At that time, I am told that the Immigration Subcommittee will be invading our territory.

We have been joined by the distinguished gentleman from Florida, Mr. Ross. Good to have you with us.

Mr. Cohen is on his way.

Let me go ahead and start the hearing with you, Mr. Delery. Then we will recognize Mr. Cohen when he comes in. And, if you can, confine your comments if you can to within the 5-minute rule. There is a panel on your desk. You will see the green light. And when the green light turns to amber that is your notice that you have a minute to go. We won't keelhaul you if you offend that purpose.

Mr. Delery, good to have you with us.

TESTIMONY OF STUART F. DELERY, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. DELERY. Thank you, Mr. Chairman; and thank you also to Congressman Cohen and the other Members of the Subcommittee for the privilege to appear before you today at this oversight hearing to discuss the work of the Justice Department's Civil Division.

As you know, the Civil Division represents the United States in court in a wide variety of matters. The Division's cases involve virtually every executive branch agency as well as the President, Cabinet officers, and Members of Congress. With over 1,000 attorneys and over 400 support staff, the Civil Division is the Justice Department's largest litigating component, and the cases we handle include both defensive and affirmative litigation.

As part of our mission the Civil Division defends the legality of Federal statutes and programs when they are challenged; we seek to recover money that is lost to the government through fraud, waste, and abuse; we defend the government when it is sued for damages, whether for breach of contract or for personal injury; and we help to administer sensitive national compensation programs.

The three main priorities for the Civil Division are protecting the national security, protecting taxpayer dollars, and protecting the Nation's consumers.

Protecting the American people remains the Department's highest priority. The Civil Division plays a key role in this effort through its active docket of national security litigation. In these cases, we vigorously defend our national security consistent with the rule of law. For example, the Civil Division is currently defend-

ing around 140 habeas corpus petitions brought by detainees held at Guantanamo Bay, Cuba, and we have had significant success resolving many of the most important legal questions in these cases in the government's favor.

In other matters, earlier this month our attorneys prevailed in a case seeking to force the National Security Agency to disclose whether it had records involving contacts with Google regarding cyber security. And the Division defends in the Federal courts every immigration removal order involving terrorists and other aliens who present national security risks.

We are particularly proud of the Division's work in these and other cases as it underscores the Attorney General's tireless efforts to address terrorism and other threats to national security with integrity and devotion to our most fundamental values.

In terms of protecting taxpayer dollars, we have enjoyed unprecedented success. Since January, 2009, the Department has recovered over $11 billion in civil fraud cases under the False Claims Act, more than in any comparable period. When coupled with criminal recoveries from our Consumer Protection Branch, the Civil Division has, standing side by side with U.S. Attorneys offices and State attorneys general across the country, obtained nearly $15 billion in civil and criminal fraud settlements, judgments, penalties, and fines. Health care fraud comprises the largest category of these fraud recoveries, more than $11 billion, with the largest share coming from pharmaceutical and medical device industries.

Just earlier this month, the Department announced that Abbott Laboratories would pay $1.5 billion to resolve criminal and civil allegations arising from its illegal marketing of the prescription drug Depakote. This was the latest in a series of so-called off-label marketing cases in which the Civil Division, working with U.S. Attorneys offices around the country, has prosecuted pharmaceutical and device manufacturers who violate the Food, Drug, and Cosmetic Act by marketing their products for uses not approved as safe and effective by the FDA.

But our efforts to tackle fraud do not end with health care fraud. We are actively pursuing economic fraud and seeking to recover ill-gotten gains for the benefit of fraud victims.

We have also been vigilant in our efforts to root out fraud in connection with the procurement of goods and services used by our military and civilian agencies, including fraud affecting our men and women fighting in Iraq and Afghanistan. Since January, 2009, procurement fraud cases have accounted for approximately $1.6 billion in recoveries, which exceeds the amount in any comparable period.

Our final area of focus in the Civil Division is to protect consumers. We continue to be at the forefront of the Department's civil and criminal enforcement of Federal consumer protection laws. And since January, 2009, our Consumer Protection Branch obtained the convictions of 123 defendants and courts imposed criminal penalties exceeding $3.9 billion.

Now, while the Civil Division has had a particularly active enforcement practice over the last 3 years, most of our work is defensive. Our work defending the Federal Government in commercial, tort, and other claims has saved billions of dollars, and our defense

of numerous statutory and constitutional challenges has upheld critical executive and congressional authority.

Mr. Chairman, my written testimony describes in more detail these and other areas of the Civil Division's work, and I would be happy to respond to the Committee's questions. I thank you again for the opportunity to be here today.

[The prepared statement of Mr. Delery follows:]

Department of Justice

STATEMENT

OF

STUART F. DELERY
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

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

CONCERNING

CIVIL DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

PRESENTED ON

MAY 31, 2012

STATEMENT OF
STUART F. DELERY
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

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

CONCERNING
CIVIL DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

MAY 31, 2012

Chairman Coble, Congressman Cohen, and Members of the Subcommittee:

Thank you so much for inviting me here to testify on the work of the Civil Division of the Department of Justice. I appreciate the opportunity to discuss our work and our budget and resource needs for Fiscal Year 2013.

The Civil Division represents the United States, its agencies, Members of Congress, Cabinet officers and other Federal employees. Its litigation reflects the diversity of government activities, involving, for example, the defense of challenges to Presidential actions; national security issues; benefit programs; energy policies; commercial issues such as contract disputes, banking, insurance, patents, fraud, and debt collection; all manner of accident and liability claims; enforcement of immigration laws; and civil and criminal violations of consumer protection laws. The Division is made up of approximately 1,400 permanent employees, over 1,000 of whom are attorneys. Each year, Division attorneys handle thousands of cases that collectively involve billions of dollars in claims and recoveries. The Division confronts

significant policy issues, which often rise to constitutional dimensions, in defending and enforcing various Federal programs and actions. The priorities of the Division include protecting the nation, protecting taxpayers, and protecting consumers.

NATIONAL SECURITY

Defending the nation remains the Department's highest priority. The Civil Division currently is defending approximately 140 habeas corpus petitions brought by detainees held at the detention facility at Guantanamo Bay, Cuba. In these cases, we vigorously defend our national security interests in a manner consistent with the rule of law, and we have had significant success in obtaining resolution of many of the most important legal questions governing these cases in the government's favor. The Civil Division also has successfully defended against extending habeas corpus rights to detainees held in Afghanistan, a theatre of war where detainees are provided robust Department of Defense review.

The Division has scored a number of victories in cases involving national security:

- In 2010, the Civil Division secured the dismissal of a lawsuit contending that the United States had violated the Constitution and Alien Tort Statute by allegedly targeting a dual U.S./Yemini citizen – whom the Department of Treasury had designated a global terrorist – for the application of lethal force;
- In 2011, the Civil Division organized, instructed, and supervised a team of Pakistani lawyers in defending a member of the diplomatic staff of the U.S. Embassy in Pakistan who had been arrested and charged with murder following the killing of two individuals who attempted to rob him at gunpoint;

- The Division has handled important cases involving federal employees' obligations under agreements with the United States that prohibit them from making unauthorized disclosures of classified information; and
- The Division's attorneys have litigated *Bivens* suits against high-level government officials.

The Division defends in the federal courts every removal order involving terrorist and other national-security-risk aliens and litigates detention, benefits denial, and naturalization and denaturalization cases involving these individuals. Since 1997, the Division has successfully defended the State Department's and Treasury Department's designations of terrorist organizations and criminal prohibitions on providing "material support" to designated foreign terrorist organizations. For instance, on June 21, 2010, the Supreme Court, in *Holder* v. *Humanitarian Law Project*, voted 6-3 to reject a free-speech challenge from humanitarian aid groups to the law that bars "material support" – everything from money to technical know-how – to foreign terrorist organizations.

We also obtained dismissal of over 40 nationwide class action suits against numerous telecommunications companies that allegedly assisted the National Security Agency (NSA) in post-September 11th surveillance activities. That dismissal was affirmed on appeal in December 2011. The Division's national security successes continued in the federal appellate courts around the country. In recent years, the Division prevailed in cases involving records regarding the NSA's "Terrorist Surveillance Program" and a challenge to the Foreign Intelligence Surveillance Act, and individuals held as part of the investigation into the terrorist attacks of September 11th.

And, on May 11, 2012, the Division prevailed in a case involving an attempt to force the NSA to disclose whether it had records involving contacts with Google regarding cybersecurity.

Since September 2009, the Department has used new policies and procedures regarding the invocation of the state secrets privilege that provide greater accountability and reliability. The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department attempts to allow cases or claims to proceed whenever possible, and will never defend an assertion of the privilege to cover up official wrongdoing or to prevent embarrassment to government officials or departments. Under the new procedures there is a State Secrets Review Committee, consisting of senior Department officials, which evaluates the recommendation to invoke the privilege.

COMBATTING WASTE, FRAUD, AND ABUSE

The Attorney General and the Civil Division have made fighting waste, fraud, and abuse a top priority, and this focus has paid off. Since January 2009, the Civil Division's efforts to combat fraud in its many forms (such as health care fraud, financial fraud, and procurement fraud) have yielded record civil and criminal recoveries of over $14.9 billion. Since January 2009, the Civil Division has used the False Claims Act to recover more taxpayer dollars lost to fraud – more than $11 billion – than in any other comparable period. During this time, the Civil Division's Consumer Protection Branch, which pursues criminal and civil violations of the Food, Drug, and Cosmetic Act, recovered nearly $3.9 billion in fines, forfeitures, and penalties.

1. Health Care Fraud

Fighting health care fraud is a priority for the Division. On May 20, 2009, the Attorney General and the Secretary of the Department of Health and Human Services (HHS) announced the creation of a new interagency task force, the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement. Through enforcement actions under the False Claims Act, and aided by the efforts of HEAT, the Department has recovered over $7.4 billion in health care funds lost to fraud since January 2009.

A significant component of the Department's health care fraud caseload consists of cases alleging misconduct by manufacturers of pharmaceuticals and medical devices. For example, during fiscal year 2011, we recovered $900 million in settlements with eight pharmaceutical manufacturers that allegedly reported inflated drug prices, knowing that federal health care programs relied on those prices to set payment rates. Additionally, during the last fiscal year, the Division pursued allegations that a subsidiary of GlaxoSmithKline was manufacturing and distributing certain adulterated drugs from its now closed Cidra, Puerto Rico plant. The subsidiary ultimately pled guilty to criminal charges and paid $150 million in criminal fines and forfeitures, and GlaxoSmithKline agreed to pay an additional $600 million to the federal government and the states to resolve related civil claims.

Recently, on May 7, 2012, the Department announced the second largest settlement with a drug company in a case involving Abbott Laboratories Inc., which paid $1.5 billion to resolve criminal and civil liability arising from the company's unlawful promotion of the prescription drug Depakote for uses not approved as safe and effective by the Food and Drug Administration.

The settlement includes a criminal fine and forfeiture totaling $700 million, and civil settlements with the federal government and the states totaling $800 million. Abbott also will be subject to court-supervised probation and reporting obligations for Abbott's CEO and Board of Directors.

2. Responding To The Financial Crisis

The Civil Division has taken a prominent role in the President's Financial Fraud Enforcement Task Force. I serve as a co-chair of three of the Task Force's working groups, all of which bring together the government's civil and criminal capabilities to enhance our enforcement, prevention, and outreach efforts.

The Mortgage Fraud Working Group's work has led to unprecedented levels of cooperation between the federal government and state and local partners to address the housing crisis that has affected so many American families. Since FY2009, the Department has seen a 92 percent increase in mortgage fraud cases, and, in FY2010 and FY2011, there were 2,100 defendants charged with mortgage-fraud related crimes.

In March 2012, a $25 billion settlement was jointly concluded by the federal government and the States with the five leading mortgage servicers. The historic settlement provides nearly $1 billion to the federal Treasury and $20 billion in consumer relief. The settlement also requires new servicing standards that will protect consumers from future abuses.

Just recently, for example, the Department announced a settlement with Deutsche Bank and its subsidiary, MortgageIT, that will return $202.3 million to the FHA's Mortgage Insurance

Fund. The settlement resolved allegations that these entities failed to maintain a quality control program to prevent and correct underwriting deficiencies in connection with FHA loans, including failing to review early payment defaults. The Department has also filed a complaint against Allied Home Mortgage and two of its executives, which alleges misconduct that caused substantial losses to the FHA.

On January 27, 2012, the Attorney General also announced the formation of the Financial Fraud Enforcement Task Force's new Residential Mortgage-Backed Securities Working Group. This Working Group brings together the Department of Justice, several state Attorneys General, and other federal agencies to investigate those responsible for misconduct contributing to the financial crisis through the pooling and sale of residential mortgage-backed securities, with the goal of holding those who violated the law accountable and providing relief to homeowners.

The Civil Division is also a leader of the new Consumer Protection Working Group, which is charged with working with federal law enforcement and regulatory agencies and state and local partners to strengthen and expand existing efforts to combat consumer-related fraud schemes. In March 2012, the Consumer Protection Working Group held a summit where federal and state law enforcement officers and regulatory agencies were first joined privately by the Attorney General and local consumer protection groups to discuss issues of importance to American consumers and where later they held panel presentations that were open to the public in an effort to educate consumers about how to protect themselves from scams.

The Department's Commercial Litigation Branch is defending against claims relating to the Government's 2008-2009 rescue of our nation's financial system and economy from the most severe crisis since the Great Depression. These cases allege that, when the Federal Reserve and the Treasury made emergency loans and financial investments, they did so on terms that violated the Constitution by purportedly taking the plaintiffs' property without just compensation or by unlawfully exacting financial consideration. For example, the Department is defending against a class action brought by Starr International Co. upon behalf of shareholders of American International Group (AIG), and derivatively upon behalf of AIG. Starr complains that it was an uncompensated taking or an unlawful exaction for the Government to acquire equity in AIG as consideration for the Federal Reserve's $85 billion loan rescuing AIG from a liquidity crisis that presented systemic risk. In *Colonial Chevrolet Co., Inc., et al., v. United States*, and *Alley's of Kingsport, Inc., et al., v. United States*, former General Motors (GM) and Chrysler dealers whose dealership agreements were terminated during GM and Chrysler's restructurings and bankruptcies allege that the Government's assistance to the automakers resulted in a taking of their dealerships, rights under their dealership agreements, and rights under state dealer laws.

3. Procurement Fraud

Using the False Claims Act, the Department is aggressively pursuing fraud in connection with the wars in Southwest Asia. On September 13, 2011, the Department of Justice announced that Saudi-based Tamimi Global Company Ltd. agreed to pay the United States a combined $13 million to resolve criminal and civil allegations that the company paid kickbacks to a Kellogg Brown & Root Inc. (KBR) employee and illegal gratuities to a former U.S. Army sergeant in

connection with KBR's prime contract with the U.S. Army to provide logistical support to the military in conflicts abroad, including Iraq and Afghanistan. Earlier this year, the Department of Justice announced that Maersk Line Limited agreed to pay $31.9 million to resolve qui tam allegations that it had inflated invoices for transporting thousands of shipping containers to the U.S. military operating in Iraq and Afghanistan. Since January 2009, we have reached settlements in cases involving goods and services provided in connection with the war effort amounting to $222 million.

The Civil Division's focus on Southwest Asia is only part of our broader commitment to protecting the Government's military and procurement systems against fraud. Since January 2009, procurement fraud cases have accounted for approximately $1.6 billion in recoveries – which exceeds the amount recovered in any comparable period. The Government's recent efforts to combat procurement fraud include the filing of a False Claims Act complaint against Bollinger Shipyards for making material false statements to the Coast Guard about the longitudinal strength of its design to extend the length of Coast Guard cutters. The first converted cutter suffered hull failure when put into service, and efforts to repair it and other converted cutters were unsuccessful. The unseaworthy vessels have since been decommissioned.

The Government is also continuing to litigate various matters alleging that companies, as well as individual executives, manufactured and sold defective bulletproof vests containing Zylon fabric as the key ballistic material to the United States for use by federal, state, local, and tribal law enforcement agencies. The United States has alleged that these defendants were aware

that the Zylon fabric degraded quickly, but took no action to inform the government. Thus far, the Department has obtained more than $61 million in this effort.

4. Consumer Protection

The Civil Division is at the forefront of efforts to protect consumers through vigorous civil and criminal enforcement of federal consumer protection laws. In 2010, the Attorney General and Congress approved a reorganization of the Civil Division to create the Consumer Protection Branch, which would report to its own Deputy Assistant Attorney General. In 2011, the Division implemented that reorganization, empowering the Branch to more effectively and comprehensively protect consumers from myriad forms of fraud and abuse. It sharpened its focus in areas such as health care fraud, business opportunity fraud, and food and drug safety, and it expanded its footprint to include areas like mortgage fraud, counterfeit pharmaceuticals, and immigration service fraud. These renewed efforts have led to great success — in 2011 alone, the Branch recovered almost $1 billion in fines, penalties, and restitution. Between January 2009 and May 1, 2012, the Consumer Protection Branch, working together with our partners in the U.S. Attorneys' Offices, has obtained convictions of 123 defendants and courts have imposed fines, restitution, forfeitures, and penalties, exceeding $ 3.9 billion for illegal activities in connection with defrauding consumers. During this same time period, 84 defendants were sentenced to some form of confinement, receiving a total of more than 312 years.

The Department also promotes critical consumer protection initiatives. The Civil Division is litigating several cases that challenge efforts to place critical, public-health-based limitations on the sale and marketing of tobacco. The Division also regularly defends the Food

and Drug Administration (FDA) in cases meant to ensure that the public has access to safe and effective generic drugs. Currently, the Division is defending the legality of an important, Congressionally-mandated database, maintained by the Consumer Product Safety Commission (CSPC), which provides consumers with vital information about the safety of products they buy. The Division is actively litigating against any number of companies around the country that persist in robo-calling consumers, flouting the Do-Not-Call statutes and regulations.

OTHER SIGNIFICANT LITIGATION MATTERS

The Civil Division has led the Department's response to a number of events of national significance and, in the process, has been engaged in significant litigation. The Civil Division has defended against more than 20 lawsuits challenging the constitutionality of the Affordable Care Act in district courts and courts of appeal. The Civil Division and the Environment and Natural Resources Division are co-leading the government's civil efforts to hold accountable those responsible for the explosion and fire on the Deepwater Horizon and the resulting oil spill in the Gulf of Mexico by filing a civil suit against BP and others under the Oil Pollution Act and Clean Water Act.

The Department is challenging, on federal preemption grounds, a series of state statutes designed to implement state-specific immigration policies. To date, we have filed suit against laws passed by Alabama, Arizona, South Carolina, and Utah. In each of these cases, the district court enjoined part of the relevant law. The Ninth Circuit upheld the entirety of the injunction against Arizona's law, and while the Eleventh Circuit has not yet issued a decision in Alabama's appeal, it has enjoined additional portions of the law pending appeal that were not enjoined by

the district court. The Supreme Court recently heard oral arguments in the Arizona case, and a decision in that matter is expected before the end of the Court's current term.

KATRINA LITIGATION

The Civil Division's Torts Branch is defending against approximately 400 tort suits for flood damage in New Orleans as a result of Hurricane Katrina. The suits are consolidated in the Eastern District of Louisiana under the caption *In re Katrina Canal Breaches Consolidated Litigation*. The suits, which include putative class actions, allege that the Army Corps of Engineers negligently designed, constructed, and maintained the levees and floodwalls that failed along the Outfall Canals, the Mississippi River Gulf Outlet (MRGO), and the Inner Harbor Navigation Canal (IHNC) during the hurricane.

The district court dismissed a lawsuit arising from the flooding caused by the failure of the floodwalls along the Outfall Canals holding that the United States was immune from liability based on the Flood Control Act and the Federal Tort Claim Act's discretionary function exception. The district court imposed liability in a lawsuit filed in connection with flooding arising from levees that failed along the MRGO, after rejecting the immunity defenses in that case. The Fifth Circuit Court of Appeals affirmed both rulings of the district court. The United States has requested rehearing *en banc* in the Fifth Circuit Court of Appeals regarding the affirmance of the judgment related to the MRGO. A third suit regarding the flooding from floodwall failures along the IHNC affecting the Lower Ninth Ward is set for trial on September 10, 2012.

NATIVE AMERICAN ISSUES

During the past few years, the Department has continued to make some significant strides in improving the relationship between the United States government and tribal nations. The Division continued working to finalize the $3.4 billion settlement in *Cobell v. Salazar*, one of the largest class action cases ever filed against the government. The settlement provides $1.5 billion as compensation to over 495,000 individual Indians for alleged accounting and asset mismanagement claims, and $1.9 billion to fund a land buy-back program to address the continuing "fractionation" problem caused by land interests being repeatedly divided over the years. Following the passage of legislation that ratified the settlement, which the President signed into law in 2010, the Division, along with class counsel, argued for and obtained district court final approval of the settlement in July 2011. On May 22, 2012, the D. C. Circuit affirmed the district court's judgment approving the settlement. The appellants have 45 days within which to seek rehearing and 90 days within which to file a petition for certiorari with the Supreme Court.

The Department administers the Radiation Exposure Compensation Act Program, which provides payments to those who contracted certain cancers and other serious diseases after being exposed to radiation through nuclear weapons tests or in the uranium mining industry during the 1940s, 1950s, and 1960s. During 2010, the Civil Division implemented a new outreach internship program in order to address the special concerns and difficulties faced by Native American populations in the claims process. Through the new internship program, 27 Native American college and graduate students from the Four Corners region attended a two-week training session in Washington, D.C., on the Program's claim adjudication process. Upon

returning to their communities, the students were provided with employment opportunities to conduct intensive outreach efforts. During the period of their fieldwork from July 2010 through March 2012, the students reviewed over 150 potential new claims of which 30 have been filed with the Program, published eight articles in local papers, spoke at 58 community engagements, and hosted over 40 outreach meetings. In May 2012, the Program is participating in a health fair with the Spokane Tribe in Wellpinit, Washington, to educate the community on the availability of compensation under the Act.

FARMERS' ALLEGED DISCRIMINATION LITIGATION

For more than a decade, the Civil Division has been defending the Department of Agriculture (USDA) in lawsuits brought by African American farmers (*Pigford v. Vilsack*), Native American farmers (*Keepseagle v. Vilsack*), Hispanic farmers (*Garcia v. Vilsack*), and female farmers (*Love v. Vilsack*), respectively, alleging that USDA discriminated against these groups in its farm loan programs. The Civil Division has made it a priority to put these cases on a path to resolution, so that USDA can turn the page on this chapter in its history and renew its efforts to be a model service provider.

In February 2010, the Department and USDA announced the settlement of the *Pigford II* case, which was brought by African American farmers who tried unsuccessfully to have their claims against USDA for credit and non-credit discrimination resolved under the *Pigford I* Consent Decree. Congress appropriated a total of $1.25 billion to fund the settlement, and the court approved the settlement in October 2011. The settlement certified a non-opt out class and established two mutually exclusive alternative dispute resolution processes under which class

members' claims will be decided. Successful class members will be eligible for a liquidated damages award, debt forgiveness, and tax payments.

The Division is also handling *Keepseagle v. Vilsack*, a class action settlement brought on behalf of Native American farmers who claim that they suffered discrimination in connection with their attempts to obtain farm loans. The court approved the parties' settlement agreement on April 28, 2011. That agreement provided a settlement class with a claims process and payments of up to $680 million in compensation, up to $80 million in debt relief from USDA, and various forms of programmatic relief.

Finally, the Division is defending lawsuits brought by Hispanic farmers, *Guadalupe L. Garcia Jr. v. Vilsack*, and by female farmers, *Rosemary Love v. Thomas Vilsack*, who allege that USDA discriminated against them in the awarding of government loans and other assistance. In February 2011, in the *Garcia* and *Love* cases, the Department and USDA announced a voluntary administrative claims process, which USDA is developing, to provide up to a total of $1.33 billion to participating Hispanic and female farmers in lieu of further court proceedings.

IMMIGRATION MATTERS

The Civil Division defends and prosecutes the Nation's most complex civil immigration matters in federal court. In 2011, the Civil Division's Office of Immigration Litigation (OIL) prevailed in more than 90 percent of its cases in the trial and appellate courts. One example of the Civil Division's immigration litigation is a case in which a computer error led to flawed results in the diversity visa lottery for Fiscal Year 2012. When the State Department realized the

lottery had not been conducted according to law, it cancelled the results. A putative class action was brought on behalf of the approximately 22,000 applicants who received notification of their winning status in the flawed process. The district court dismissed the complaint, and the matter is now pending on appeal. OIL's litigation success is due in part to OIL's committed support of the Department of Homeland Security's (DHS) enforcement objectives calling on DHS to focus immigration resources on matters of the highest priority, which include national security, criminal, and border integrity cases. OIL also continued its collaborative efforts across Department components and other government agencies to maximize litigation and enforcement results. A specialized unit within OIL has engaged in continued training of Justice Department, FBI, and other agencies' national security components on enforcement alternatives in investigations when national security information cannot be used publicly or where declassification and use comes at too great a cost, toward the ultimate objective of removing security risk aliens from the country. Further, OIL helped secure two victories this year in the Supreme Court: in one case, the Court reversed the Ninth Circuit and upheld the determination that an alien child cannot impute his or her parent's years of continuous residence in order to obtain cancellation of removal; in the other, in which OIL worked closely with the Tax Division, the Court found that tax evasion constitutes an aggravated felony, potentially subjecting an alien to removal.

INTERNATIONAL TRADE

The Division has been actively supporting the Administration's policies regarding trade with our largest trading partners. For example, the Department's Commercial Litigation Branch has now brought three arbitration proceedings to enforce the 2006 Softwood Lumber

Agreement between the United States and Canada, and received two Awards requiring Canadian lumber producers and exporters to abide by the Agreement's export charge requirements. A third award is pending. The Department has also vigorously defended the Administration's efforts to ensure that Chinese imports into the United States are assessed the proper duties. Finally, the Department continues to work closely with U.S. Customs and Border Protection to bring appropriate cases against importers who have committed fraud and other violations.

OTHER DEFENSIVE LITIGATION

The Division continues to protect taxpayer dollars by vigorously defending the government in civil litigation, and limiting monetary judgments entered against the United States to just pennies for each dollar sought. For example, the Department has virtually finished resolving the massive *Winstar* claims that resulted from the savings and loan crisis of the 1980s, with recoveries averaging only six cents on each dollar claimed. The Division also has defended the Treasury against multi-billion dollar claims advanced by the nuclear power industry over the government's delay in taking possession of spent nuclear fuel, while simultaneously obtaining settlements with 70 percent of the industry.

ALTERNATIVES TO LITIGATION

The Division also currently helps administer the Vaccine Injury Compensation Program (VICP). The VICP was created in 1986 by the National Childhood Vaccine Injury Act to encourage childhood vaccination by providing a streamlined system for compensation in rare instances where an injury results. The most important and controversial litigation concerns whether there is a causal connection between childhood vaccines and the development of

autism. In 2009, the Civil Division successfully proved that there was no causal connection between autism and vaccines in several important test cases in the Omnibus Autism Litigation, a litigation effort that involves nearly 5,000 claims. The opinions in those test cases were widely praised by experts in the public health community as critical to addressing growing misconceptions about vaccines and maintaining public confidence in the safety and efficacy of the nation's vaccine program. The opinions were affirmed by the U.S. Court of Appeals for the Federal Circuit. The Division continues to successfully advance this position in resolving the remaining cases alleging autism as a vaccine injury.

The Civil Division has led the Department's efforts to implement the James Zadroga 9/11 Health and Compensation Act of 2010, which reopens the September 11th Victim Compensation Fund of 2001 (the Fund) and expands the pool of eligible applicants to include rescue workers and others who experienced latent physical injuries as a result of the September 11, 2001 terrorist attacks and subsequent debris removal. Civil Division attorneys have assisted the Fund's Special Master on a wide array of complex legal and policy issues, while Division administrative staff lead a team of contractors managing the Fund's operations, including the development of a web-based claim form designed to save administrative costs and make it easier for claimants and their families to apply for compensation.

PRESIDENT'S BUDGET REQUEST

The President's FY 2013 request seeks 1,476 positions (1,063 attorneys), 1,419 FTE and $298,040,000. Included in this request are the base resources required to maintain the superior legal representation services that have yielded such tremendous success and additional funds to

support additional financial fraud investigations. Unfortunately, the House bill approved on May 11th did not include the requested increase for financial fraud, or the adjustments-to-base to cover increases in rent, contracts, health benefits coverage, and other uncontrollable costs. We hope that the House will reconsider the President's request at Conference.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.

Mr. COBLE. Thank you, Mr. Delery. And I am glad to hear you emphasize health care fraud, because it is plaguing all of us, not the least of which you all get plagued with it as well, I am sure.

We have been joined by the distinguished Ranking Member, the gentleman from Memphis, Tennessee, Mr. Cohen; and I will now recognize him for his opening statement.

Mr. COHEN. Thank you, Chairman Coble, and thank you for all of your courtesies you have extended—the nicest human being in all of Congress, Mr. Coble—and for holding these hearings on these three divisions: Civil, Tax, and Environment. You are. You are the nicest guy. It is amazing how nice you are. People do not understand that we all get along. But if they were all like Howard we would all get along even better.

Mr. COBLE. If the gentleman from Tennessee will yield, I thank you for those generous comments. Thank you, sir.

Mr. COHEN. But we have the Civil Division before us today which we had hearings when I was the Chair of this Subcommittee; and it is nice to have Tax and Environment and Natural Resources here, too.

I want to report to you all that I have seen your boss lately, and he is doing his job. We were at the White House and General Holder was there, and we talked a little bit about California. And he does not yet understand how they are making a mistake there, but they are making a mistake there in going after some of those people they should not necessarily be going after. Because they are really California's problem and not America's. But he is still doing his job.

And I saw Mr. Perez there, who is doing a great job in Memphis working on the juvenile court situation.

So I appreciate what all the attorneys do at Justice. It is a tough job, and you represent the American people on a great variety of issues in the courts, the Federal courts. And you enforce the laws that we make. So it is so important, that it is important that we have this oversight hearing.

We need to provide you with adequate funds to do your job and resources. We are not here just in a vacuum. We pass laws. Somebody has to enforce them. Thank you for enforcing Congress' laws.

In fiscal year 2013, the President requested $298 million for the Civil Division and 110 for ENRD and 106 for the Tax Division. They are modest amounts in light of the overall Federal budget and especially in light of the returns to the taxpayers from work in these divisions. These are all divisions that bring in monies.

Energy and Natural Resources obtained more than $650 million in civil recoveries and criminal fines and saved taxpayers $2.1 billion by successfully defending against meritless claims. The Civil Division's civil fraud recovery since '09 have exceeded $9 billion, and the Division has successfully defended the United States in cases involving billions of dollars. And the Tax Division brings in $13 for every dollar spent.

Without you, we would not exist. You are the sine qua non of all. Beyond the monetary benefits, this Division's work has intangible but in some ways even more valuable benefits like ensuring clean air and clean water, things that we used to take for granted, maintaining public health and securing dignity for all Americans. We have seen some evidence that some of the values that we hold in the past have been questioned, but we appreciate your carrying on.

As Mr. Delery—I hope I pronounced that correct. Is it Delery?

Mr. DELERY. Delery.

Mr. COHEN. Delery—Mr. Delery noted in his testimony, the House recently passed a fiscal year 2013 appropriations bill that did not include requested funding for the Civil Division's financial fraud work or for adjustments to base which are intended simply to keep pace with the cost of things like increases in rent, contracts, health benefit coverage, and other increased costs. Such a funding approach is shortsighted. And while no one likes wasteful spending this money request is not being wasted. So it is an investment in protecting the public fiscal health as well as ensuring our laws are enforced and that justice is served.

So I thank our witnesses for their work and for your update and thank Chairman Coble for allowing me to give this testimony at this time. I look forward to the remainder of your testimonies and yield back the balance of my time.

Mr. COBLE. Thank you, Mr. Cohen.

Ms. Moreno, we will recognize you for 5 minutes.

TESTIMONY OF IGNACIA S. MORENO, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. MORENO. Chairman Coble, Representative Cohen, and Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss the important work of the Environment and Natural Resources Division, also known as ENRD.

The Environment and Natural Resources Division is a core litigating component of the United States Department of Justice. Founded more than a century ago, it has built a distinguished record of legal excellence. The Division functions as the Nation's environmental lawyer, with a staff of about 700 individuals, including close to 400 lawyers who are dedicated to protecting human health and the environment.

We bring civil and criminal cases and defend the vital work of client Federal agencies under more than 150 Federal statutes. ENRD's litigation docket contains almost 7,000 active cases and matters in courts across the United States, about half of which are defensive in nature.

The Division's priorities are guided by our core mission, which includes, first, strong enforcement of civil and criminal environmental laws to ensure clean air, clean land, and clean water for all Americans; second, vigorous defense of environmental wildlife, and natural resources laws in agency actions and protection of the public fisc; third, effective representation of the United States in matters concerning the stewardship of our public lands and natural resources, including the acquisition of land for public purposes from national parks to national security; and, fourth, vigilant protection of tribal sovereignty, tribal lands and resources, and tribal treaty rights.

The work that we do in the Environment Division could not be more important. The Deepwater Horizon fire, explosion and oil spill in the Gulf of Mexico in April of 2010 came into our homes in daily news coverage of the resulting tragic loss of life and environmental devastation. After the disaster, the importance of environmental and natural resources protection could not be clearer. The Environ-

ment Division will continue to vigorously enforce applicable laws and regulations within existing authorities to ensure that we protect human health and the environment and that the American people do not bear the cost of pollution or mismanagement of our natural resources.

The Division has achieved impressive monetary results from civil and criminal enforcement. For example, from January, 2009, through December, 2011, 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. The Superfund finances the clean-up of sites contaminated with hazardous substances.

We also secured about $21.3 billion in corrective measures, court orders, and settlements, measures that will go a long way toward protecting our air, land, water, and other natural resources.

Over the same period, the Division concluded 140 criminal cases against 266 defendants, obtaining more than 125 years in confinement and over $233 million in criminal fines, restitution, community service funds, and special assessments.

Many important benefits flow from these results. They provide tangible health and environmental benefits for the American people through significant reductions in pollution. They serve to deter future violations, increasing exponentially the significance of this work. They also reflect good value, returning many times over the Division's operating budget to the U.S. Treasury.

In all that we do, we ensure that all communities, including those most vulnerable, are protected from environmental harms. All Americans deserve clean air, clean land, and clean water so that they may prosper where they live, work, and play.

Again, I appreciate the opportunity to participate with my colleagues in this hearing and would be happy to address your questions.

[The prepared statement of Ms. Moreno follows:]

Department of Justice

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

STATEMENT OF
IGNACIA S. MORENO
ASSISTANT ATTORNEY GENERAL,
ENVIRONMENT AND NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE

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

CONCERNING
OVERSIGHT OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

May 31, 2012

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. 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 (SO2) and nitrogen oxide (NOx) 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 SO2, NOx 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 SO2 and NOx 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 SO2, 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 (NEORSD) in December 2010. NEORSD 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 NEORSD 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. NEORSD 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.[1] 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.

[1] 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.

Mr. COBLE. Thank you, Ms. Moreno.

Ms. Keneally.

TESTIMONY OF KATHRYN KENEALLY, ASSISTANT ATTORNEY GENERAL, TAX DIVISION, U.S. JUSTICE DEPARTMENT

Ms. KENEALLY. Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me here to testify about the work of the Tax Division.

As Chairman Coble noted, on April 6, 2012, I had the privilege of being sworn in as the Assistant Attorney General for the Division.

Mr. COBLE. Ms. Keneally, maybe it is my hearing impairment, but get a little closer to the mic if you will.

Ms. KENEALLY. I was thanking you for commenting on my appointment.

Mr. COBLE. Oh, you bet.

Ms. KENEALLY. Thank you again for inviting me here today.

While my arrival in the Department is fairly recent, my experience with Federal tax administration and litigation is not. Over the course of my career I have represented many clients before the Tax Division, United States Attorneys Offices, and the Internal Revenue Service on a variety of civil and criminal tax matters.

Over that time, I have learned effective tax administration is guided by two fundamental principles. First, we owe it to all taxpayers who voluntarily comply with our tax laws to enforce the laws against those who do not comply. Second, because tax touches on all citizens, residents, and income earners, there must be a fair and consistent tax enforcement policy throughout the country.

These values are deeply engrained in the culture of the Tax Division. As Assistant Attorney General I am committed to serving the American people by reaffirming these principles and leading the Division in what can only be described as the increasingly more complex and global task of tax enforcement.

The Tax Division plays a critical role in the fair and consistent administration of our tax laws. The IRShas primary responsibility for determining and collecting taxes owed. In most cases, the IRS's administrative powers are sufficient to ensure compliance with the tax laws. However, when taxpayers do not voluntarily comply, the IRS relies on the Tax Division to bring timely enforcement in Federal Court.

For example, the Tax Division enforces and defends summonses to gather information for ongoing tax examinations, collects and defends tax assessments when taxpayers do not pay voluntarily, obtains civil injunctions to shut down tax scam promoters and fraudulent return preparers, authorizes criminal tax prosecutions, and investigates and prosecutes criminal tax violations throughout the country. Each year the Division has approximately 6,000 civil tax cases in process, handles hundreds of civil and criminal tax appeals, and authorizes between 1,300 and 1,800 prosecutions.

To carry out the work of the Division, we currently have 378 attorneys. The President's budget for 2013 fiscal year provides $106.5 million in funding for the Tax Division. This funding level will allow the Division to continue its enforcement efforts through its prosecutions, collections, and injunctions actions, all areas that are

critical to the full and fair enforcement of the tax laws enacted by Congress.

As Member Cohen noted, given that on average every tax dollar invested in a Division attorney results in a savings of at least $13 to the Federal Treasury, the full funding of the Tax Division is a wise investment in the economic stability of the Nation.

While the Division continues to maintain a sizable caseload of traditional tax enforcement matters we are also mindful of the need to identify and respond to ongoing, growing, and new trends in noncompliance. I would like to highlight four areas of noncompliance that are among our highest enforcement priorities: stolen identity refund fraud, as Chairman Coble noted; abusive tax shelters; offshore tax schemes; and tax defiers.

Prosecutions in civil injunctions against individuals who engage in tax fraud have always been top priorities for the Division. Recently, a new and more aggressive scheme has cropped up across the country at an alarming rate, stolen identify refund fraud. The plan is frighteningly simple—steal Social Security numbers, file tax returns showing a false refund claim, and then have the refunds loaded onto a prepaid card or sent to an address where the wrongdoer can get access to the funds. While the Division has been successful in prosecuting these cases and in obtaining lengthy sentences, we are committed to work even harder to shut down these schemes.

We are also continuing to build on the Division's success in fighting abusive tax shelters. These schemes were designed to cost the Treasury many tens of billions of dollars in unpaid taxes. Each victory by the Division recovers not only the taxes due in that case but also sets a precedent to resolve other cases and to deter others who are engaging in these schemes.

The Division is also continuing to investigate and prosecute account holders, banks, bankers, and other facilitators in connection with offshore activities designed to evade taxes.

Finally, tax defiers who engage in conduct to undermine our tax system, often through violence, must and will remain an enforcement priority.

In all cases, the Division's enforcement efforts serve to assure the vast majority of taxpayers that their voluntary compliance is justified and that everyone will be held to pay their fair share in our tax system.

Thank you again, Mr. Chairman, for the opportunity to discuss the important work of the Tax Division. I am happy to answer any questions that you or any other Members of the Committee may have.

[The prepared statement of Ms. Keneally follows:]

Department of Justice

STATEMENT OF

KATHRYN KENEALLY
ASSISTANT ATTORNEY GENERAL
TAX DIVISION

BEFORE THE

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

REGARDING

OVERSIGHT OF THE TAX DIVISION

PRESENTED

MAY 31, 2012

Statement of Kathryn Keneally
Assistant Attorney General
Tax Division
Department of justice

Before the
Subcommittee on Courts, Commercial and Administrative law
Committee on the Judiciary
United States House of Representatives

Concerning the
Tax Division of the
United States Department of Justice

Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me here to testify on the work of the Tax Division. On April 6, 2012, I had the privilege of being sworn in as the Assistant Attorney General for the Division. While my arrival in the Department is fairly recent, my experience with federal tax administration and litigation is not. Over the course of my career I have represented many clients before the Tax Division, the United States Attorneys' Offices and the Internal Revenue Service (IRS) on a wide variety of civil and criminal tax matters. My career in tax law has instilled in me the belief that effective tax administration must be guided by two fundamental tax principles. First, all of us who work in tax administration owe it to all taxpayers who voluntarily comply with our tax laws to enforce the laws against those who do not comply. Second, because tax touches all citizens, residents, and income-earners, there must be a fair and consistent tax enforcement policy throughout the country. Based on my years of interaction with Tax Division prosecutors and attorneys, it came as no surprise to me that these values are deeply ingrained in the culture of the Division. As Assistant Attorney General, I look forward to reaffirming these principles and leading the Division in what can only be described as the increasingly more complex and global task of tax enforcement on behalf of the American taxpayer.

As the legal enforcement arm of the IRS, the Tax Division plays a critical role in the fair and consistent administration of our tax laws. The IRS has primary responsibility for determining and collecting taxes owed and, in most cases, the IRS's administrative powers are sufficient to ensure compliance with the tax laws. However, when taxpayers do not voluntarily comply, the IRS relies on the Tax Division to bring timely enforcement in federal court. Among other matters, the Tax Division enforces and defends IRS summonses to gather information for

ongoing tax examinations; collects and defends tax assessments when taxpayers do not pay voluntarily; obtains civil injunctions to shut down tax-scam promoters; authorizes almost all criminal tax prosecutions; and investigates and prosecutes criminal tax violations throughout the country. Each year the Division has approximately 6,000 civil cases in process, handles hundreds of civil and criminal appeals, and authorizes between 1,300 and 1,800 prosecutions.

The Tax Division's mission is to enforce the nation's tax laws fully, fairly, and consistently throughout the country in order to promote voluntary compliance with the tax laws, maintain public confidence in the integrity of the tax system, and promote the sound development of the law. In each and every case, Tax Division attorneys strive to collect the proper amount of tax due and owing -- no more and no less. Tax Division prosecutors authorize and prosecute cases after determining that there is a reasonable probability of conviction based on the existence of sufficient admissible evidence to prove all of the elements of the offense charged. To carry out its mission, the Tax Division currently has 378 attorneys, who are assigned either to one of sixteen sections and offices located in Washington, D.C., or to the Southwestern Civil Trial Section located in Dallas, Texas. Attorneys are supported by 153 administrative support employees.

The President's Budget for the 2013 fiscal year provides $106.5 million in funding for the Tax Division. This funding level will allow the Division to continue its enforcement efforts through its prosecutions, collections, and injunction actions -- all areas that are critical to the full and fair enforcement of the tax laws enacted by Congress. Given that on average every dollar invested in a Division attorney results in a savings of at least $13 to the Federal Treasury, the full funding of the Tax Division is a wise investment in the economic stability of the nation.

Civil Litigation

Civil Trial The Tax Division is responsible for litigating all matters arising under the internal revenue laws in all state and federal trial courts, except the United States Tax Court. Tax Division civil litigators enforce the Internal Revenue Service's requests for information in ongoing examinations, and collect and defend tax assessments when the examinations are completed. Tax cases filed against the United States comprise nearly 71% of the Division's caseload, both in the number of cases to be litigated and the number of attorney work-hours devoted to them each year. At any given time, Tax Division civil trial attorneys are responsible for nearly 6,000 cases in various stages of resolution. Each year, the Division's civil trial

attorneys save the Treasury hundreds of millions of dollars through their representation of the government in defense of refund claims brought by taxpayers. As of September 30, 2011, the Division was defending tax refund cases worth approximately $10.4 billion to the Federal Treasury.

The Tax Division contributes significantly to closing the tax gap through its affirmative civil litigation to collect tax debts. The goal of this litigation is to enforce the tax laws and collect taxes that would otherwise go unpaid. Collection suits have a direct and positive effect on the Treasury. The Division consistently collects more each year than its entire budget. For example, over the past five fiscal years, the Division has collected in excess of $1.2 billion in unpaid tax debts. Given that the IRS only refers to the Tax Division tax debts that the IRS has been unable to collect administratively, the Division's efforts are a tremendous return on investment in collecting the most difficult debts.

As a result of both its refund and collection litigation, the average return on investment over the last five fiscal years for each dollar invested in a Tax Division attorney is 13:1. While the direct return for each budget dollar invested is impressive, it pales in significance to the precedent our cases set. Many issues run across industry or other lines, affecting many more taxpayers than just those in suit, with an impact that continues year after year. Of equal importance, the Division's litigation assures honest taxpayers that those who choose not to pay their fair share will be pursued and penalized.

The portfolio of the Tax Division attorneys includes a wide array of procedural and substantive tax matters which can affect just an individual taxpayer or business, a large number of similarly-situated individual taxpayers or even an entire industry. Transactions at issue can range from the proper reporting of income and deductions on a Form 1040 to the consequences of an investment in a complex corporate tax shelter. Tax Division attorneys are also responsible for defending the interests of the United States in bankruptcy proceedings. When a matter is referred by the IRS for defense or litigation, the Division independently analyzes the facts and applicable law to ensure that the tax system is being enforced uniformly and fairly across the country. While the Division does not prevail in every case it litigates, Division attorneys are scrupulous about advancing positions they believe to be correct under the applicable statutes and judicial precedents, and settling or conceding cases when appropriate. As a result, the Tax Division civil attorneys are successful in more than 95% of civil cases that they litigate each year.

Voluntary compliance requires that all taxpayers fully and timely pay their fair share. While the overwhelming majority of taxpayers are compliant, unfortunately a small segment of the population is willing to promote schemes that encourage and facilitate noncompliance. In some instances, the government engages in parallel civil and criminal investigations to stop and punish the misconduct. As part of its civil tax enforcement, the Tax Division has a successful injunction program that has shut down many tax-fraud promoters and fraudulent tax-return preparers. The promoters sued range from those who design and market "too good to be true" eliminate-your-taxes schemes, to lawyers and accountants selling sophisticated, complex tax shelters to wealthy business owners. Since 2000, Tax Division attorneys have obtained injunctions against more than 500 tax-fraud promoters and return preparers. This number represents a dramatic increase over the 1990s, when the total number of promoters and preparers enjoined barely reached 25 for the entire decade. The schemes the Division has enjoined during the past several years had cost the Federal Treasury more than $2 billion and placed an enormous administrative burden on the IRS. If permitted to continue unchecked, these schemes would undermine public confidence in the integrity of our tax system, and require both the IRS and the Tax Division to devote tremendous resources to detecting, correcting, and collecting the resulting unpaid taxes. As part of our injunction program, we have developed close working relationships with IRS agents and attorneys to ensure that misconduct is detected early, investigated fully, and referred quickly so that it can be stopped before it spreads further.

Civil Appellate Tax Division civil appellate attorneys are responsible for briefing and arguing civil federal tax cases before the United States courts of appeal. Civil appellate attorneys handle about 700 cases a year, and about half of the cases involve appeals from decisions of the United States Tax Court, with the balance arising from decisions of the United States district courts and the Court of Federal Claims. Civil appellate attorneys also assist the Solicitor General of the United States in drafting pleadings and briefs filed in federal tax cases considered by the United States Supreme Court. These include amicus curiae briefs in suits that present issues affecting the interests of the United States, or in which the Court invites the United States to provide its views on tax-related questions. When the government receives an adverse decision, the Appellate Section closely evaluates the legal and policy implications of the decision and provides a recommendation to the Solicitor General, taking care to ensure that resources are spent wisely only on the most meritorious government appeals.

Criminal Investigation and Prosecution

Criminal Trial In addition to our extensive civil practice, the Tax Division authorizes all prosecutions arising under the federal tax laws except for excise taxes and criminal disclosure violations. In most cases, Division attorneys either conduct or supervise these prosecutions, often in partnership with prosecutors from the United States Attorneys' Offices. The Division's twin criminal goals are to prosecute criminal tax violations and to promote uniform nationwide criminal tax enforcement. In many cases, the Tax Division receives requests from the IRS to prosecute violations after the IRS has completed an administrative investigation. In other cases, the IRS asks the Tax Division to authorize grand jury investigations to determine whether prosecutable tax crimes have occurred. Tax Division prosecutors review, analyze, and evaluate referrals to ensure that uniform standards of prosecution are applied to taxpayers across the country. In the past few years, the Division has authorized between 1,300 and 1,800 criminal tax investigations and prosecutions each year. After tax charges are authorized, cases are handled by a United States Attorney's Office, by a Tax Division prosecutor, or by a team of prosecutors from both. Tax Division prosecutors also conduct training for IRS criminal investigators and Assistant United States Attorneys, and provide advice to other federal law enforcement personnel, such as the DEA and the FBI.

The crimes investigated and prosecuted by the Tax Division include attempts to evade tax, willful failure to file returns, and submission of false returns, as well as other conduct designed to violate federal tax laws. The crimes may be committed by individuals, business entities, or tax preparers and professionals. These cases often encompass tax crimes where the source of the individual or business income is earned through legitimate means – as examples, a restaurateur who skims cash receipts; a self-employed individual who hides taxable income or inflates deductions; or a corporation that maintains two sets of books, one reporting its true gross receipts and the other - used for tax purposes - showing lower amounts. Prosecutions in these cases often receive substantial attention in the local and national media, and convictions remind law-abiding citizens who pay their taxes that those who cheat will be punished.

Tax Division prosecutors also investigate and prosecute tax violations that have been committed along with other criminal conduct, such as securities fraud, bank fraud, identity theft, bankruptcy fraud, heath care fraud, organized crime, public corruption, mortgage fraud, and narcotics trafficking. In addition, Tax Division prosecutors investigate and prosecute domestic tax crimes involving

international conduct, such as the illegal use of offshore trusts and foreign bank accounts used to conceal taxable income and evade taxes. As tax crimes have become more complex and international in scope, so has the workload of Tax Division prosecutors. In addition to the traditional cases involving unreported legal source income, over the last several years a greater proportion of our cases involve high net worth taxpayers and tax professionals who sell and implement dubious tax schemes. During FY 2011, Division prosecutors obtained indictments in 145 cases and convictions in 137 cases. The conviction rate for cases brought by Tax Division prosecutors usually exceeds 95%.

Criminal Appeals The Tax Division Criminal Appeals and Tax Enforcement Policy Section (CATEPS), handles appeals in criminal tax cases prosecuted by Tax Division prosecutors, as well as some appeals from trials handled by United States Attorneys' Offices. The Division also supervises appeals in matters prosecuted by the United States Attorneys' Offices. The appellate-level review provided by CATEPS attorneys plays a vital role in promoting the fair, correct, and uniform enforcement of federal tax law. CATEPS is also charged with developing criminal tax enforcement policy, and the section provides technical guidance on issues including the sentencing guidelines and restitution in tax cases. The section's international team serves as a resource to Division attorneys and IRS agents on international discovery matters arising in civil and criminal cases. CATEPS also plays a role in providing information and technical expertise on matters involving international tax information agreements and treaties.

It is apparent from this brief overview that Tax Division attorneys and prosecutors are involved in every facet of federal tax enforcement. While we continue to maintain a sizeable caseload of what may be considered "traditional" tax enforcement matters, we are also mindful of the need to identify and respond to ongoing, growing, and new trends in civil and criminal noncompliance. I would like to take a moment to highlight four areas of noncompliance that are among our highest enforcement priorities -- stolen identity refund fraud, abusive tax shelters, offshore tax schemes, and tax defiers.

Stolen Identity Refund Fraud

Investigating, stopping and prosecuting individuals who engage in tax refund fraud have always been top priorities for the Tax Division. Using a variety of civil and criminal enforcement tools, the Division, along with our partners at the IRS and in the United States Attorneys' Offices, has successfully shut down hundreds of

unscrupulous preparers and individuals who viewed the Federal Treasury as a personal bank account. Their schemes have included filing returns containing inflated, false deductions or false W-2 income statements, or preparing returns and failing to remit the refund to the taxpayer. Recently a new and even more aggressive scheme has cropped up across the country at an alarming rate -- stolen identity refund fraud.

The plan is frighteningly simple – steal social security numbers, file tax returns showing a false refund claim, and then have the refunds electronically deposited or sent to an address where the wrongdoer then can get access to the refunds. In many cases, the taxpayer whose social security number has been compromised will later face difficulties when he or she files a tax return after the IRS has received a false return using that taxpayer's social security number. In other cases, the false returns are filed using social security numbers of deceased taxpayers or others from whom no federal tax return may be due for filing. These schemes are usually implemented in early January, so that the thieves can file before the proper taxpayer is expected to file, with the goal of taking advantage of the IRS's efforts to pay out refunds quickly. In many cases, the most vulnerable in our society are the victims of this form of identity theft. Names and social security numbers have been stolen at medical firms, prisons, and hospitals by dishonest employees who are often paid for the information. Postal workers have been compromised, robbed, and in one instance, murdered to gain access to the refund.

The low physical risk and high potential for financial gain has made stolen identity refund theft the new crime of choice for drug dealers and gangs. While the crime may seem deceptively simple, the scope and organization of these criminals is vast and growing. In certain cases, the proceeds of the crimes have been used to purchase illegal narcotics for resale, or funneled offshore.

For taxpayers who are direct victims of stolen identity refund fraud, the economic and personal consequences can be severe and often long-term. While the IRS will make good on the refund that is due to the taxpayer, the personal burden and delay can be considerable. Further, when a stolen identity is used to commit tax refund fraud, all taxpayers are victims, and all Americans are impacted by the loss to the Federal Treasury.

In recognition of the severity of the problem, the Department and the IRS have devoted significant resources to the successful prosecution of a number of individuals who have engaged in stolen identity refund fraud. Depending on the facts of a particular case, we can bring a variety of charges, including aggravated identity theft and theft of government property, in addition to tax charges such as false claims for refund, false returns, and tax conspiracy.

In the last several years, the Department has successfully prosecuted many significant cases in which a stolen identity was used to commit tax refund fraud. Recent examples of successful prosecutions include:

- On May 8, 2012, Veronica Dale was sentenced to 27 years and 10 months in prison, and her co-conspirator, Alchico Grant, was sentenced to 25 years and 10 months in prison, for their roles as the leaders of a Montgomery, Alabama stolen identity refund fraud ring. They were also ordered to pay over $2.8 million in restitution to the IRS. Using the stolen identities of Medicare beneficiaries, Dale and Grant filed over 500 fraudulent refund claims, and then recruited others to set up a bank account in the name of a business into which more than $1.5 million in fraudulently obtained refunds were deposited.

- In January 2012, Marsha Elmore, an Alabama tax return preparer, was sentenced to 15 years and 4 months in prison for filing false claims, wire fraud, and aggravated identity theft. Elmore admitted to stealing tax refunds by filing false tax returns using stolen identities. She was ordered to pay over $1 million in restitution to the IRS.

- In December 2011, Shawntrece Sims, a Tampa, Florida resident, was sentenced to 9 years in prison for a tax and mail fraud scheme. Sims admitted to using stolen social security numbers to file false tax returns. In many cases, the individuals were not aware that their identities were being used and in other cases, the individuals were deceased. Sims was ordered to pay $672,887 in restitution to the government.

- In November 2011, Roger Snells, also of Tampa Florida, was sentenced to 4 ½ years in prison for tax fraud and aggravated identity theft. Snells admitted to using identifying information of deceased individuals to electronically file fraudulent tax returns with the IRS. This case was part of Operation Rainmaker, a coordinated effort by the United States Attorney's Office, the U.S. Secret Service, U.S. Postal Inspection Service, IRS Criminal Investigation, the FBI, and the Tampa Police Department.

While these successful prosecutions are an important step in the right direction, they are but a step. We will do more – much more. The Tax Division, in conjunction with the IRS and United States Attorneys nationwide, has prioritized

the investigation and prosecution of individuals who engage in stolen identity refund fraud. The Department is targeting individuals involved in all stages of these schemes, including those who illegally obtain the personal identifying information, those who file the false returns with the IRS, those who knowingly facilitate cashing the checks or otherwise obtaining the refunds, those who receive the fraudulent refunds, and those who mastermind or promote these scams. For example, on January 31, 2012, the Department and the IRS announced the results of a massive national sweep cracking down on suspected perpetrators of stolen identity refund fraud. In the course of one week and across 23 states, the actions against 105 individuals included 80 complaints, informations, and indictments, 58 arrests, 19 search warrants, 10 guilty pleas, and 4 sentencings. The sweep reflected the extensive and well-coordinated investigative and prosecution efforts of the Department and the IRS.

Stolen identity refund theft schemes often cross state and international borders and our investigation and prosecution strategy must be similar in scope. The Tax Division is working closely with many United States Attorneys' Offices and the IRS to ensure effective information sharing and investigative cooperation as permitted by law. This approach is yielding significant results. For example, in Montgomery, Alabama, coordinated prosecutions by Tax Division attorneys and Assistant United States Attorneys have resulted in the indictment of 32 individuals, 12 pleas, 1 conviction following trial, and 9 sentencings in stolen identity refund fraud cases over the past 9 months. We are also working closely with our partners at the IRS to streamline the process for referring matters for grand jury investigation.

Enforcement efforts are important, but the goal must be to stop fraudulent refunds at the door. We would prefer to prosecute attempted stolen identity refund fraud rather than completed refund fraud, and we would prefer even more to deter these crimes from occurring. Civil injunctions have been and continue to be a vital tool in combating return preparers and promoters who engage in fraudulent tax schemes. The Division is equally committed to civil as well as criminal enforcement in the stolen identity refund fraud arena.

The Department's efforts to investigate, stop, and prosecute stolen identity refund fraud are in addition to the IRS's well-publicized efforts to detect and prevent the fraud before it occurs. These IRS efforts include designing new screening filters that will improve the IRS's ability to spot false returns before they are processed and before a refund is issued, as well as expanded efforts to place

identity-theft indicators on taxpayer accounts to track and manage identity-theft incidents.

While prevention and detection are always the first and best lines of defense, we recognize that prosecution is also a critical and effective tool in combating stolen identity refund fraud. It is an unfortunate truth that there will always be a small but persistent segment of society who will seize on any opportunity to "make a quick buck" at the expense of others. The Tax Division is committed to working with its federal, state and local law enforcement partners to shut this problem down. When we prosecute these cases, we send a clear message to those who engage in this conduct that they will be held accountable for their actions.

Abusive Tax Shelters

The Tax Division plays a major role in the government's effort to stop the spread of abusive tax shelters. According to Department of Treasury estimates, over the past few decades the use of abusive tax shelters by large corporations and high-income individuals has cost the government many tens of billions of dollars. Tax shelter litigation is among the most sophisticated and important litigation handled by the Tax Division. Frequently, tax losses created by abusive tax shelters are completely artificial in that the transactions will not have generated any corresponding economic loss to the taxpayer. These transactions routinely use multiple special entities and involve complex financial schemes that often lack a real business purpose or any real economic substance. Many abusive tax shelter transactions involve participants located throughout the world, making discovery difficult and expensive to pursue. Despite the complexity and the cost of litigating these cases, the Tax Division is committed to shutting down abusive tax shelters that serve no other purpose than to avoid tax that is legally due.

A coordinated and effective effort is essential to prevent substantial losses to the Treasury and deter future use of abusive shelters by other taxpayers. Tax shelter cases are staffed by teams led by the Division's most experienced litigators. The Division's Tax Shelter Coordinator works closely with Division and IRS Chief Counsel attorneys to ensure that all legal positions taken are uniform throughout the country, and that all briefs and arguments include the most persuasive legal analysis.

Over the past few years, the Tax Division has been very successful in the abusive tax shelter area. For example:

- In January 2012, the Second Circuit rejected (for the second time) a "lease-stripping" tax shelter scheme engaged in by General Electric when it established a foreign-based partnership known as Castle Harbour that had been created by a General Electric subsidiary and two Dutch banks. This tax shelter scheme involved the U.S. taxpayer's attempt to allocate tens of millions of dollars of U.S. taxable income to the Dutch banks (which did not pay U.S. taxes), even though the cash, in reality, stayed with the U.S. taxpayer. The Second Circuit's opinions in this case are significant and will help the government fight the use of "sham" partnerships that serve no legitimate purpose except to evade taxes. The Second Circuit also found this type of lease-stripping scheme to be so abusive that it imposed significant penalties.

- In the fall of 2011, the Tax Division succeeded in upholding on appeal its victory in litigation involving the "distressed debt" tax shelter. In this type of abusive scheme, tax shelter promoters identify foreign entities that have suffered losses due to bad debts. The Tax Division litigated the first distressed debt tax shelter case against Texas billionaire Andy Beal, who had acquired a partnership known as Southgate that had been formed when a Chinese bank contributed nearly-worthless loans that were in default. The distressed debt tax shelter purports to allow a U.S. taxpayer to recognize, for U.S. tax purposes, the bad debt losses that were in fact suffered by foreign entities. The Division prevailed at trial. On appeal, the Fifth Circuit Court of Appeals rejected the use of the Southgate partnership to create these benefits. Subsequent to the original Southgate decision, the government has prevailed in other distressed debt tax shelter cases, and we continue to handle other distressed debt shelters that are pending in other trial courts.

- The Tax Division has handled many "Sale-in Lease-out" and "Lease-in Lease-out" (SILO / LILO) tax shelters. These abusive leasing schemes are designed to transfer, for a fee, tax benefits from one entity that cannot use them (such as a foreign corporation or a U.S. municipality) to a U.S. taxpayer. For example, through an extremely complicated stack of paperwork, a U.S. corporation in substance may pay a fee to a municipality that owns subway cars for the right to claim tax deductions relating to those cars under circumstances in which the municipality would not have been

allowed such deductions. The U.S. corporation, despite the maze of paperwork generated by clever tax advisors, does not truly own the subway cars on which it is claiming tax deductions. In a 2008 decision, the Tax Division prevailed in the Fourth Circuit in the BB&T litigation. After that victory, the IRS announced a settlement initiative that resolved, on terms that were very favorable to the government, 87% of the IRS's inventory of SILO/LILO transactions. Those taxpayers that did not settle have continued to litigate. In the spring of 2011, this abusive tax shelter scheme was rejected by the Federal Circuit in the Wells Fargo litigation.

Despite these significant victories, we continue to litigate tax shelter cases, and we anticipate that more cases will continue to be filed in the federal trial and appellate courts for the next several years. As examples, the Division is actively litigating cases in which taxpayers attempted to use distressed assets and debt, foreign tax credit generators, foreign currency straddles, and a variety of complex paper transactions that occurred for no other purpose than to avoid the payment of federal tax. We will continue to defend vigorously the IRS's disallowance of the sham benefits claimed by taxpayers who seek to elevate form over substance and undermine the tax system to avoid paying their fair share.

Offshore Tax Schemes

The Tax Division plays a lead role in investigating and prosecuting those who use foreign tax havens to evade taxes and reporting requirements. The increased technical sophistication of financial instruments and the use of the internet have made it all too easy to move money around the world instantly, without regard to national borders. According to a 2008 report issued by the Permanent Subcommittee on Investigations, Committee on Homeland Security and Government Affairs, United States Senate, the use of undeclared offshore accounts to evade U.S. taxes costs the Treasury at least $100 billion annually. Using tax havens facilitates evasion of U.S. taxes and related financial crimes, and fosters the perception that if people have enough money and access to unscrupulous professionals, they can get away with hiding money offshore. Thanks to the considerable and highly publicized efforts of the Tax Division and the IRS, reality has caught up with those who chose to engage in this illegal behavior.

Offshore tax schemes re often difficult to detect and prosecute. Over the last several years, the Tax Division and the IRS have worked closely and devoted considerable civil and criminal resources to target taxpayers and professionals who

engage in and facilitate offshore tax evasion. The Division's initial efforts focused on UBS AG, the biggest bank in Switzerland and the seventh largest in the world. In 2009, UBS entered into a deferred prosecution agreement, paid $780 million in disgorged profits, taxes and penalties, exited the cross-border business and provided account information for a large number of U.S. taxpayers. Separately, UBS agreed to provide the IRS information on thousands more U.S. taxpayer accounts. The Tax Division and the IRS engaged in extended negotiations with the Swiss government to obtain the necessary records under Swiss bank secrecy laws. Both the Department and the IRS continue to investigate offshore tax schemes worldwide. Charges have already been brought against a bank and numerous bankers, independent financial advisers and attorneys. The deterrent effect of these efforts has been substantial. Since 2009, nearly 30,000 taxpayers have voluntarily disclosed their hidden foreign accounts, compared to fewer than 100 voluntary disclosures of all types annually in prior years, and the IRS recently reported it has collected $4.4 billion from those taxpayers. And the individuals who disclosed their foreign activities are now expected to go forward as compliant taxpayers, bringing much more into the Treasury.

There are constraints imposed by prosecutorial needs as well as statutory protections for grand jury secrecy and the confidentiality of tax information that prevent me from commenting on any ongoing investigations in this or any other area. However, I can say this: We have insisted, and will continue to insist, that individuals and companies doing business in this country comply with U.S. laws. And we have investigated and prosecuted, and will continue to investigate and prosecute, U.S. taxpayers who try to evade taxes by hiding money in offshore accounts and those who help them.

National Tax Defier Initiative

Tax defiers, also known as illegal tax protesters, have long been a focus of the Tax Division's investigative and prosecution efforts. For decades, tax defiers have advanced frivolous arguments and developed numerous schemes to evade their income taxes, assist others in evading their taxes, and frustrate the IRS, under the guise of constitutional and other meritless objections to the tax laws. Frivolous arguments used by tax defiers include, for example, spurious claims that an individual is a "sovereign citizen" not subject to the laws of the United States, that the federal income tax is unconstitutional, and that wages are not income. Schemes utilized include the use of fictitious financial instruments in purported payment of tax bills and other debts, as well as the filing of false liens and IRS reporting forms,

such as Forms 1099, designed to harass and retaliate against government employees and judges. In the most extreme circumstances tax defiers have resorted to threats and violence to advance their anti-government agenda.

Tax defiers are identified by the schemes in which they participate and the tactics they utilize. It is important to note that those who merely express dissatisfaction with the tax laws should not be, and are not, prosecuted. The right to free speech, however, does not extend to acts that violate or incite the imminent and likely violation of the tax laws.

Because a segment of the tax defier community will to resort to violence to advance their cause, it is essential that local law enforcement be prepared to respond rapidly to threats against agents, prosecutors, and judges. The Tax Division has implemented a comprehensive strategy using both civil and criminal enforcement tools to address the serious and corrosive effect of tax defier and Sovereign Citizen activity. Led by a National Director, the Tax Division's Tax Defier Initiative facilitates coordination among nationwide law enforcement efforts. Increased coordination allows new and recycled tax defier and related schemes and arguments to be identified quickly, and a coordinated strategy to be developed.

For example, Sovereign Citizen ideology overlaps with and is often indistinguishable from tax defier rhetoric and tactics. Through the Tax Defier Initiative, the Division has leveraged our expertise to develop a government-wide approach to monitoring and combating these crimes. As a result, our National Director for the Tax Defier Initiative, working with representatives of IRS Criminal Investigations, Treasury Inspector General For Tax Administration, the FBI Domestic Terrorism Operations Unit, and the Department's National Security Division, developed and implemented a national training program for prosecutors and investigators.–The close working relationships fostered by our Initiative have enabled us to identify and respond more quickly and efficiently to trends in the tax defier community.

Several recent cases demonstrate the scope and seriousness of tax defier misconduct.

- In May 2012, Karl Herrington was sentenced to 8 years and 1 month in prison for corruptly endeavoring to obstruct the administration of the internal revenue laws, filing false tax forms, and being a felon in possession of 6 different firearms. Herrington filed Forms 1099-OID, falsely reporting that

he had paid a form of interest income to law enforcement personnel and judges involved in a criminal case against him in Jackson County, Michigan.

- In April 2012, Kevin P. Mahoney of Attleboro, Massachusetts, was sentenced to 5 years in prison for corruptly endeavoring to obstruct the tax laws, filing false tax returns, and violating a permanent injunction to cease preparing and submitting false forms with the IRS. Mahoney, a financial advisor, attempted to pay tax-related debts by submitting to the IRS more than $2.2 million in fictitious financial instruments called Bills of Exchange. Mahoney obtained the fake Bills of Exchange from American Rights Litigators, a defunct Florida-based organization that was permanently enjoined from promoting and selling a variety of fraudulent tax schemes.

- In February 2012, Andrew Issac Chance of Clinton, Maryland, was sentenced to 5 years and 5 months in prison for filing false claims for refund and for filing a false retaliatory lien against a federal prosecutor. At the time Chance filed the false retaliatory lien and the false claims for refund, he was on federal supervised release after a 2007 conviction for filing a false refund claim.

Every prosecution and conviction sends a strong message that any attempt to promote or participate in a fraudulent tax scheme will not be tolerated. Those who engage in tax defier activity risk criminal prosecution resulting in conviction, substantial penalties and time in prison, as well as the collection of taxes, interest and penalties. Prosecution of tax defiers also reassures the vast majority of taxpayers that their voluntary compliance with the tax laws is justified and that everyone will be held accountable under the law

Thank you again, Mr. Chairman for the opportunity to appear this morning to discuss the important work of the Tax Division. I am happy to answer any questions that you or the other Members of the Subcommittee may have.

Mr. COBLE. Thank you, Ms. Keneally.

Thanks to each of you for your testimony.

We try to adhere to the 5-minute rule as well, and we usually comply pretty much in order. So if you will keep your answers as tersely as possible to meet the 5-minute rule.

We have been joined by the distinguished gentleman from South Carolina, Mr. Gowdy. Good to have you with us, Trey.

And I remind the Members again we are supposed to vacate the room on or about 1:15 because of the Subcommittee on Immigration.

Mr. Delery, let me start with you. It has been brought to my attention that hospitals are more frequently facing False Claims Act charges stemming from the decisions of physicians to admit certain patients. I also understand that in many of these suits hospitals settle claims to forego the cost and agony of a protracted trial and discovery process and to protect their respective reputations. Does the Justice Department have a policy or guidelines for bringing these charges and can you share any statistical information on these cases to help us verify the frequency of the litigation and the awards that have been paid through judgments and settlements?

Mr. DELERY. Thank you, Mr. Chairman, for that question.

As to that particular type of False Claims Act case, I do not here today have statistics to share with you but would be happy to provide that information to the Committee.

Mr. COBLE. If you would do that, we would appreciate that.

Let me put another question to either of the three of you, probably Mr. Delery to begin with.

Estimates of yearly fraud in Medicare and Medicaid range from 20 to $80 billion. Yet the Civil Division's fraud recoveries from all sources in 2011 were less than $4 billion. What are you all doing to make sure that Medicare and Medicaid fraud finally comes under control—or under better control?

Mr. DELERY. Thank you, Mr. Chairman. I can answer that.

So certainly the fraud in those programs is a serious problem and one that the Civil Division is devoting significant and substantial resources to addressing. The recoveries over the last 3 years have been the highest over any comparable period, reflecting that diligent work.

Obviously, it is a large problem, and we are doing the best that we can with the resources that we have available to try to leverage the successes that we do have into prevention. Among other things, we are attempting to focus on nonmonetary remedies as part of our—in addition to the substantial recoveries, as part of the resolutions of these cases to improve compliance, to improve procedures in place in the organizations, to prevent recidivism, and hopefully to serve as models for other organizations so that they can help to crack down on this serious problem.

Mr. COBLE. I do not mean to be ignoring the two ladies, but it appears that this is your bailiwick, right, Mr. Delery, so let me come to you with another question.

Civil fraud recoveries from all sources since 1987 are about $34 billion. This is less than 1 year's estimated fraud in Medicare and Medicaid alone. Can Civil do a better job of stamping out fraud and recovery of tens if not hundreds of billions of dollars that taxpayers lose every year?

Mr. DELERY. I think, Mr. Chairman, we certainly continually try to do better in this area. As I indicated, it is a very serious problem.

Among other things, we think that we could be helped with full funding of the President's request for funding for the Civil Division so that we can maintain current levels at least and add some re-

sources to address various kinds of financial fraud. So that is one thing that could help us improve the rate of recoveries in this area. But it is a very large problem. We have devoted substantial resources to it and continue to work on innovative solutions to try toimprove our effectiveness.

Mr. COBLE. Thank you, sir.

My red light has not yet appeared. Do you other ladies want to contribute to either of these questions?

Ms. MORENO. Congressman Coble, the questions that you posed are addressed to the Civil Division. They are in the competency of the Civil Division. I have nothing to add.

Mr. COBLE. Okay. Ms. Keneally.

Ms. KENEALLY. I agree. I thank you for the opportunity, but I defer to my colleague from the Civil Division.

Mr. COBLE. Thank you.

I recognize the distinguished gentleman from Tennessee, Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair.

I noticed in the—Mr. Delery.

Mr. DELERY. Delery. Like celery but with a D, Congressman.

Mr. COHEN. Thank you. That makes it easy. Mr. Celery.

Mr. DELERY. Yes. I am happy to take that, Congressman.

Mr. COHEN. Just a little humor.

You mentioned some cases where you have made some massive recoveries for the United States, and they involve drug companies and they involve people who had—the shipping company that had defrauded the country by inflating the invoices. Settlements in the area, I see one here was $222 million, another was 31.9 at *qui tam*, and then there were some others here in the drug war which were even higher.

Do you believe that we should give you or do you have greater—a greater hammer? I mean, when people defraud the government, particularly in the war effort, as this shipping company did, it seems like there is not a sufficient remedy. Do we need to give you more powers?

Mr. DELERY. I think, Congressman, that certainly the Department does have significant tools in place. These cases are complicated because they often involve accounting irregularities, other forms of financial conduct that are difficult to identify and then to pursue. So they are resource intensive, and they take some time to develop.

So I think, while it may be that there are some additional tools that would be useful, and we are certainly happy to work with the Committee on that, we would be happy to work with you and your colleagues, I think that, from our perspective, the False Claims Act and other tools are powerful tools.

We are attempting to be creative, as I indicated in the health care context earlier, in coming up with parts of the remedies in these cases that would allow for greater compliance going forward; and we are always conscious of the need for resources to do these labor-intensive cases.

Mr. COHEN. Well, let us take this—and I guess you pronounce it, is it Maersk?

Mr. DELERY. Yes, I believe that is correct.

Mr. COHEN. You say the Department announced that Maersk Line Limited agreed to pay $32 million—$31.9 to resolve *qui tam* allegations that it inflated invoices for transporting thousands of shipping containers to the U.S. military operating in Iraq and Afghanistan. Now, inflated invoices is not the same thing as difficulty in accounting. This seems like fraud.

Mr. DELERY. That is correct. That is correct, Congressman. My reference was to the process of needing to identify—presumably, the fraud is done in cases like this over the course of many transactions, many invoices, and the exercise of putting it all together.

Mr. COHEN. Was there any criminal action brought against the Maersk Line?

Mr. DELERY. I would have to check on that. I am not certain that there was.

Mr. COHEN. It just seems like if somebody is ripping off the—Iraq—it is enough that the Afghanis are ripping us off, but then our own. And Maersk, where are they? Are they out of Sweden? Where are they from? Where is their——

Mr. DELERY. Again, I am not sure of the home.

Mr. COHEN. But, wherever they are, all they are doing is passing that $32 million on to their customers. And unless there is a stronger penalty, which there should be, we are paying for it. We are paying for their corruption.

Mr. DELERY. Congressman, I completely agree with you about the conduct; and that is why the Civil Division has, as one of its highest priorities, protecting the taxpayers from fraud, waste, and abuse. So I would be happy to work with you and other Members of the Committee on any ideas that you have for additional penalties as we continue to try to tackle this very serious problem.

Mr. COHEN. Well, I appreciate it. Because I would like to look into something for legislation. I mean, I do not know exactly what we can do. But all this is is the cost of doing business to some of these folks.

The same thing with the drug companies. You had down I think it was—I forget which drug company, but it was a settlement, and Abbott Labs paid $1.5 billion, and GlaxoSmithKline paid an additional $600 million civil claims.

Mr. DELERY. Again, that is a very serious problem. And to make sure that these amounts are not viewed as simply the cost of doing business the Department is very focused on, as I indicated, nonmonetary components of the remedies. So in the Abbott case, for example, the company is subject to court-supervised probation in connection with the settlement.

Mr. COHEN. Let me ask you about those things: deferred-prosecution agreements and court-supervised probations. Do you have anything to do with deferred-prosecution agreements?

Mr. DELERY. There could be some in these cases. Principally, it is other parts of the Department.

Mr. COHEN. My red light is about to come on. You can answer. Be honest.

Let me tell you this. We had hearings when I was Chair of this Committee on some deferred-prosecution agreements with some of the manufacturers of medical devices; and we found that Chris Christie, when he was the U.S. Attorney, had given one case to the

former United States Attorney and he made like $30 million out of it. And then there was another guy who had not prosecuted his brother, something to that effect, and he made $20 million or something. It was outrageous.

Are there any controls in this Department of Justice to see to it that U.S. Attorneys cannot use their positions to enrich others and make the companies have to be basically prisoners of a private Attorney General?

Mr. DELERY. So, Congressman, on that, respectfully, I am not familiar with those cases or with the internal processes that would govern the U.S. Attorneys in those areas. The Abbott resolution that I was talking about did not involve a situation like that.

Mr. COHEN. Well, let me ask you, right now, when the U.S. Attorneys appoint somebody in a deferred-prosecution case to be the monitor, does it come through your office at all or does the Justice Department in Washington have any controls?

Mr. DELERY. I would have to look into that. I certainly have not encountered that situation in my tenure here on the Civil Division, so we could certainly get back to you.

Mr. COHEN. Do either of you have any knowledge of this?

Ms. MORENO. Congressman, as a general matter I would say that the Department has a core goal of fair administration of justice. We—at least I will speak for the Environment Division, we work very closely with U.S. Attorneys Offices—we enforce the laws enacted by Congress, and we take a look at the facts in every case very carefully, as well as the law, and we proceed accordingly and exercise our discretion.

Mr. COHEN. But you do not know if you have implemented any reforms to make sure that there is some control and protection even for the companies that might be evildoers in the past but not continuing to keep them in an abject position of almost corporate slavery.

Ms. MORENO. All I can tell you is how we handle the cases and matters that come before us, and we do so very mindful of the rights of all the parties involved.

Mr. COHEN. And you are going to ditto it. That is the company line and I got you.

Thank you very much. I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

As to the Christie matter—I am doing this from memory—I do not think there was any finding of wrongdoing on that, but I am going just from my memory on that.

The gentleman from Arizona, Mr. Quayle, is recognized. In order of arrival I think you were the first one here.

Mr. Quayle, you are recognized for 5 minutes.

Mr. QUAYLE. Thank you, Mr. Chairman.

Ms. Moreno, did your Department negotiate the proposed consent decree entered into by the National Parks Conservation Association and eight other environmental organizations with EPA Administrator Jackson on December 2, 2011, which established deadlines in which EPA must take action on States' regional haze implementation plans or promulgate Federal implementation plans?

Ms. MORENO. That would be a consent decree within the Division, yes.

Mr. QUAYLE. So your Division was the one that was negotiating that?

Ms. MORENO. Yes.

Mr. QUAYLE. Did you consult with the State of Arizona, local governments, the Navajo nation, or any stakeholder that would have to come under these regulations prior to entering into the proposed consent decree?

Ms. MORENO. Congressman Quayle, to the extent that we entered into a consent decree—and let me step back and speak generally, and then I can address the specifics of your question. If we are in a situation where there has been a missed deadline, the agency is already in violation of a requirement enacted by Congress, what we will do is we will do outreach to interested parties in the context of the lawsuit. We will——

Mr. QUAYLE. How do you define "interested parties"? Because this is a big problem with these consent decrees and sue on settlement agreements, is that those stakeholders who are going to be coming under the regulations do not actually get a lot of outreach, do not get a seat at the table, and these consent decrees and sue on settlement agreements are actually done behind closed doors, and often in the case is that a complaint is filed in the same day that the agreement is filed as well, completely shutting out stakeholders.

So when you say "interested parties" are you just talking about those that are actually suing the EPA or other agencies, rather than those that are actually going to be under the regulatory burdens that are going to be placed by the consent decree?

Ms. MORENO. Thank you for the opportunity to be more clear and to respond to your question.

There are the parties in the litigation and then there are the stakeholders that you have mentioned. If an agency has missed a deadline, our goal is to get the agency to be in compliance with the mandatory requirements that Congress has reflected in the statutes. To that end, what we will do is we will seek to get the agency in compliance by negotiating an agreement in the context of litigation—and I am speaking generally—that will get the agency into compliance on a specific deadline.

In the context of those agreements, whether they be consent decrees or settlement agreements on a deadline suit, we will negotiate the agreement. We will file it to the court usually by way of stipulation. We do not always agree with parties in the litigation.

Mr. QUAYLE. I just do not have that much time. So can you just get to the question of did you actually consult with the State of Arizona, the Navajo tribe, local governments, and other stakeholders when you entered into the consent decree—the proposed consent decree on December 2, 2011?

Ms. MORENO. As I sit here, I cannot tell you specifically as to all of those stakeholders, but I would like to get to an important point.

Mr. QUAYLE. Well, if you could just get back to me on that, that would be great.

Ms. MORENO. I would be happy to.

Mr. QUAYLE. But one of the things that is troubling about the manner in which these types of decrees and agreements are—are you aware that this agreement actually affects the Navajo gener-

ating station in Arizona? And if the Navajo generating station is forced to shut down, that is going to cost hundreds of jobs in Arizona. Many of them are Native Americans, the vast majority of them will be Native Americans, and it will possibly triple energy costs and water costs for the whole entire State of Arizona. These type of factors, are they even taken into consideration when you enter into a consent decree or a settlement agreement?

Ms. MORENO. As you know, what we do at the Department of Justice is we enforce the laws as enacted by Congress. We do not make policy. We are not the agencies who in fact go through the public and notice process under the Administrative Procedure Act to adopt rules. The Environmental Protection Agency in the case that you have mentioned would be the agency that certainly would do that.

In settlements—and now I want to give you a different example. For example, under the Clean Water Act, we often do consider the party's—for example, a municipality's ability to pay in enacting—in agreeing with a municipality on Clean Water Act commitments that may be sequenced over time.

So in the context of trying to get a municipality or another party into compliance in the Superfund context we also consider ability to pay. We do try to structure the agreements in a way that compliance will be achieved, because that is our ultimate goal.

Mr. QUAYLE. Mr. Chairman, just one last question.

No other Administration has utilized consent decrees and settlement agreements as broadly as this Administration has, whether it is Bush—either Bush or Reagan or Clinton. Was there a decision from either Attorney General Holder or from others higher up within the Administration to say that we are going to use this process to make sure that we have different regulations that have—I mean, this has just never been done before where we have stakeholders completely cut out of the process.

There is the Meese memo, which I am sure you are aware of, that was put forth in Reagan that was pretty much abided by by future Administrations but not this one. What is the decision behind utilizing this process as a way to really I think go around Congress to make sure that we have, you know, the rulemaking authority that has gone through the courts rather than through the executives?

Ms. MORENO. Congressman Quayle, I can personally tell you that we are fully complying with the Meese memo. In fact, in consent decrees that I approve and review I look to make sure that in fact we are complying with the Meese memo requirements that are now—also appear in regulations.

Parties to these consent decrees are agreeing to or stipulating to a deadline. The agency continues to go through the rulemaking process with all of the Administrative Procedure Act protections to ensure notice and public comment. So on the substance there is an opportunity for stakeholders to participate. And in the context of the litigation itself there is an opportunity under Federal Rule of Civil Procedure 24 for parties to intervene in the litigation.

I can say to you that we are very, very mindful of our role. I cannot give you a point of comparison in terms of the use of consent decrees in other Administrations and this one. All I can tell you is

that we look at each case individually. That is how we proceed with career prosecutors and with my office and things that come to my desk. We proceed with great care, given the role of the Department of Justice, in the fair administration of justice.

Mr. QUAYLE. Okay. Thank you very much.

I see my red light is on, so I yield back.

Mr. COBLE. The distinguished gentleman from Florida, Mr. Ross, is recognized for 5 minutes.

Mr. ROSS. Thank you, Mr. Chairman.

Ms. Moreno, to follow up with you, you have about 7,000 cases that your Division handles?

Ms. MORENO. Currently, we have about 7,000 filed cases and matters.

Mr. ROSS. Active. About how many of those would you say involve NEPA, the National Environmental Policy Act?

Ms. MORENO. I would have to provide that information. I do not have those statistics off the top of my head.

Mr. ROSS. Half of them probably?

Ms. MORENO. I could not say. Half of our docket is defensive in nature, and there would be certainly some NEPA cases, and I am happy to provide the statistics.

Mr. ROSS. If you would not mind, I would appreciate that.

Now, as you know, under NEPA, of course, while there is a process, there is no procedure. And it can take years, it can take decades in some regards to the resolution of matters in the permitting process under NEPA. Would you not agree that there should be some procedure in place that would streamline the litigation that ensues—well, not only with the litigation but the process itself?

Ms. MORENO. Congressman Ross, I can say that in this Administration the Council on Environmental Quality has in fact issued a number of documents, guidance to try to streamline processes under NEPA.

Mr. ROSS. And that would include also maybe standing? That an interested party would have to have—would develop standing to sue only after they have been involved in the permitting process?

Ms. MORENO. I do not believe that the reforms that the Council on Environmental Quality has adopted include that particular aspect, but I would have to check.

Mr. ROSS. But wouldn't you agree that one of the biggest problems that we have in defending NEPA cases is the fact that you have people come in after the issuance of a permit who allege standing and do so within a 6-year statutory of limitations period?

Ms. MORENO. I couldn't say that that is a broad-based problem that we see.

As you know, we do defend NEPA cases. The cases do not require any particular outcomes. The cases certainly—well, I should say the statute certainly requires a process, consideration of environmental impacts, both beneficial and detrimental, for certain——

Mr. ROSS. Let us talk about the statute of limitations here. It is 6 years, right, under NEPA for somebody to bring a suit under NEPA? I mean it defaults to the APA statute.

Ms. MORENO. It does.

Mr. ROSS. So, therefore, 6 years. I mean, wouldn't it be more prudent that if we are interested in actually seeing these projects go

through the permitting process to maybe have a shortened period? Wouldn't that be a little bit more advantageous in your defense of some of these cases if we had a shorter statute of limitations period from 4 to 2—6—go down to 4 or even 2 years?

Ms. MORENO. To the extent that there is a consideration of proposals to amend existing requirements under the Administrative Procedure Act I am not in a position to address those.

Mr. ROSS. But it would help in your—it may lighten your caseload if you had a reduced statute of limitations, would you not agree?

Ms. MORENO. As a general matter, I could say that defense lawyers always like having as many tools available as possible.

Mr. ROSS. And would another tool that would be good would also be that which would constitute standing, and that in order to have standing you should be involved in the permitting process and at least present your concerns at that point in order to be able to sue later on?

Ms. MORENO. Congressman, I am not in a position to address——

Mr. ROSS. But as a defense lawyer representing the EPA who is your client in this case, would it not be better, more advantageous, to at least define what standing would be and to have standing to be allowed only when you have been involved in the permitting process and not after the fact within the 6-year period of time?

Ms. MORENO. I can tell you that we enforce and have the benefit of the laws enacted by Congress, but I am not in a position——

Mr. ROSS. But you would go for reduced litigation, would you not? I mean, you do not want to proliferate litigation, do you? I mean, as a defense lawyer, come on. Unless you are billing by the hour, I cannot understand that.

Let me move on to something else. You talked about the Clean Water Act and how—that you take that into consideration, the economic impact that it may have when entering into a consent decree.

I happen to be from the great State of Florida where we had the Clean Water Act imposed upon us through numeric nutrient water criteria. A lot of concerns over that. It is estimated anywhere between $800 million to $3 billion in compliance alone in the agricultural industry could cost as many as 14,000 jobs in the agricultural industry. That is a significant impact. Was that taken into consideration at the time the consent decree was entered?

Ms. MORENO. Congressman, what we do in a context like that is we work with our client agencies. We work with our client agencies either to defend or enforce.

Mr. ROSS. But you did not take into consideration—I mean, you testified with Mr. Quayle's question that especially with the Clean Water Act you took into consideration the economic impact, the financial impact. But yet you do not know if you took it into consideration or not when entering into the consent decree regarding the numeric nutrient water criteria with Florida. You do not know. It would be safe to say you do not know, unless you do know.

Ms. MORENO. Well, I am trying to answer your question in the context of what I do know.

Mr. ROSS. Okay.

Ms. MORENO. And I am trying to separate out what considerations the agency may have had in setting the criteria and the considerations that we have in litigation. Filing a case is different than settling a case. In the Clean Water Act context that I was talking about before, I was talking about in the context of settlement where we do have more opportunities to work with a party sued by the United States to come up with a plan that is not only feasible but that can be complied with and implemented.

Mr. ROSS. I agree.

I see my time is up, but I want to request that if you would supplement your answer with any evidence that would indicate that those economic impacts were taken into consideration when entering in that consent decree with the numeric nutrient criteria.

I yield back.

Ms. MORENO. I will be happy to——

Mr. COBLE. And I will say to the gentleman from Florida we will keep this record open for 5 days so we can address that.

The distinguished gentleman from South Carolina, Mr. Gowdy, is recognized.

Mr. GOWDY. Thank you, Mr. Chairman.

To whom should I direct my question about why the State of South Carolina was sued for its efforts to assist in immigration enforcement?

Mr. DELERY. That would be a Civil Division matter, Congressman.

Mr. GOWDY. And why was the State of South Carolina sued for trying to do what the Federal Government has been woefully inadequate at doing? In fact, we have had hearing after hearing where immigration enforcement officials have come and said they are overworked and underpaid and a whole litany of reasons why they cannot do it; and then a State wants to assist and they wind up being sued, which is not an infrequent occurrence with my State. I think we very three current lawsuits that the Department of Justice has filed against us. So why don't you want our help with immigration enforcement?

Mr. DELERY. I think, Congressman, the Federal Government certainly looks for and relies on the assistance of States in enforcing immigration laws, and that has been reflected in the policy statements of the government and in the pleadings that have been filed in that case. But when the State crosses from cooperation with Federal law and Federal priorities into creating, in effect, a State-level immigration policy, that is where the government concluded the constitutional violation occurred.

Mr. GOWDY. But when States pass guest worker laws on their own you do not sue them.

Mr. DELERY. Well, Congressman, in the State of Utah, that is one that I am aware of——

Mr. GOWDY. Have you filed suit in the State of Utah?

Mr. DELERY. We have filed in the State of Utah but not against the State worker program, because it does not go into effect until 2013. But we have told the State of Utah that, in our view, that provision of the State law is preempted because it conflicts with Federal law and that if it remains on the books at the time that

it is scheduled to go into effect next year we would be prepared to take action at that time.

Mr. GOWDY. We have concurrent jurisdiction in drug cases, agreed?

Mr. DELERY. That is my understanding.

Mr. GOWDY. We have concurrent jurisdiction in bank robbery cases. The good ones go to the U.S. Attorney's Office and the ones that are tougher to prove go to the State DA's office, right?

Mr. DELERY. Again, that is my general understanding.

Mr. GOWDY. When a stop and rob is robbed, it could be a hobjack case if the United States Attorney's Office wants to take it or it could just be a garden variety common law robbery case in State court.

We have had hearing after hearing—and I do not even want to get into administrative amnesty by memo. They say they do not have the tools, they do not have the workers, they do not have the time, they are having to prioritize who is removed, where it is enforced, where it is not enforced. I would just think that you would welcome the help from States, and it just doesn't seem like that is the case.

Mr. DELERY. Congressman, again, I think the Federal Government does welcome and does work closely with States and immigration enforcement.

Mr. GOWDY. You can understand how the filing of a suit against a State might lead that State to conclude otherwise.

Mr. DELERY. I think, Congressman, here the situation was, as I indicated, that after careful review the government concluded that, in the case of South Carolina and some other States, that by creating a State-level immigration policy in an area that the Constitution reserves to the Federal Government and creating a patchwork of immigration laws that that not only conflicted with the constitutional structure but would be problematic.

Mr. GOWDY. What portion of the Constitution do you read as giving exclusive—are you talking about article I, Section 8, where it says the process of naturalization? Is there another basis for it?

Mr. DELERY. I think—and other enumerated authorities related to foreign affairs. I think the Supreme Court has recognized that immigration is—because it is connected closely to foreign affairs is an area of Federal authority.

Mr. GOWDY. To whom should I direct my questions about Medicare and Medicaid fraud?

Mr. DELERY. That would also be me, Congressman.

Mr. GOWDY. In the last 12 months, how many active prison sentences have been meted out for Medicaid or Medicare fraud?

Mr. DELERY. I am sorry. Active prison sentences.

Mr. GOWDY. Active prison sentences. Not fines, not corporate, you know, don't do it again. Active prison sentences.

Mr. DELERY. Right. I don't know that number, Congressman, but we could certainly——

Mr. GOWDY. Yes. Round number.

Mr. DELERY. I am sorry. I don't have that.

Mr. GOWDY. Ten? Hundred?

Mr. DELERY. Unfortunately, Congressman, I can't speculate. I am happy to get back to you with——

Mr. GOWDY. Do you know how many times you filed a motion for upward departure in those sentencing hearings to try to send an even clearer message?

Mr. DELERY. I don't, Congressman.

Mr. GOWDY. Would you be willing to give me that information?

Mr. DELERY. To the extent that we can identify it, we will certainly get back to you.

Mr. GOWDY. You would know. I mean, I assume you are a supervisor in the Department. You have to approve motions for upward departure, don't you?

Mr. DELERY. I think it depends—actually, I think usually those have not come to me, at least in my experience.

Mr. GOWDY. Are you familiar with the Texas orthodontia fraud case?

Mr. DELERY. Not specifically.

Mr. GOWDY. There was more money given out in the State of Texas for orthodontists—and I am not aware of any study that shows there is more crooked teeth in Texas than there is any other State—but more money was doled out in Texas than all other States combined. In fact, they were advertising free braces. Far be it for me to tell the bureau or anyone else where they ought to look, but that just strikes me as a case that probably would not be that tough to prove.

I yield back, Mr. Chairman.

Mr. COBLE. I thank the gentleman. We are coming in on the 1:15 deadline.

Ms. Keneally, you have been on the sideline. Let me put one question to you, if I may. Is it true that, as currently written, the aggravated identity theft statute, 18 USC 1028(a), does not help you specifically to reach this issue?

Ms. KENEALLY. Thank you for that question.

I believe that that statute, along with the tax statutes and other statutes that we have, are providing us very, very good tools to address the stolen identity refund fraud cases.

Mr. COBLE. Could you benefit from additional investigative tools or resources to handle tax fraud cases, or is the operation adequate as is?

Ms. KENEALLY. I am pleased to report that I believe we are doing a very effective job in these areas, but I do understand that there are various legislative proposals, and we would be happy to work with the Department to comment on any of them.

Mr. COBLE. You can get back with us on that.

Ms. KENEALLY. Thank you.

Mr. COBLE. Mr. Cohen, for one final question.

Mr. COHEN. Thank you, sir.

Ms. Keneally, in my jurisdiction there is a company called Mo' Money Taxes, and you smile. You know about Mo' Money Taxes. Congressman Scott and Congressman Thompson and others have asked, as well as I have, to look into what they have done or allegedly done in terms of checks and not getting refunds, et cetera. I am sure some of these companies—and maybe this company as well—do a great service, but the IRS has a service where you all, as I understand it, will do taxes for folks free of charge; is that

not—am I not right on that? I know you are not IRS, but you know about it, don't you?

Ms. KENEALLY. I am sorry. I am actually unfamiliar with that service.

Mr. COHEN. You are not familiar with that service.

Well, let me ask you this then. Is there anything the Tax Division does on a proactive basis to try to ferret these folks out before they either misdirect their checks or lose their checks or keep their checks or whatever?

Ms. KENEALLY. The Tax Division is very committed to all forms of enforcement against fraudulent return preparers.

Mr. COHEN. Right.

Ms. KENEALLY. It would be inappropriate for me to comment on any particular cases.

Mr. COHEN. I know that. But do you do anything in a proactive way to seek out and find folks that might not be doing things in the proper way to protect the taxpayers?

Ms. KENEALLY. The Tax Division cases come to it by referral from the IRS or by request from U.S. Attorneys Offices to open a grand jury investigation.

Mr. COHEN. Right.

Ms. KENEALLY. We have made very clear that this is an enforcement priority. We have a number of situations where we have our prosecutors very actively involved in ongoing investigations, and we are bringing every resource and making every effort——

Mr. COHEN. And that is great, but is there anything that you do—maybe it is the IRS's job, but is there anything you do to try to proactively find these folks before it gets to an enforcement case?

Ms. KENEALLY. It is primarily the IRS's job. I have said and will say as many times as I can that we would rather charge these cases as attempted than completed. We would rather get to them before the crime occurs. We are making every effort to use the information that we are learning in these investigations to develop better investigative tools, to work with the IRS in training on what we have learned, to learn from them, and to be as proactive in this area as we can.

Mr. COHEN. Thank you. I yield back.

Mr. COBLE. I thank the gentleman, and we thank the witnesses for your testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made a part of the record.

This hearing stands adjourned.

[Whereupon, at 1:13 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

I thank Chairman Coble for holding today's hearing on three of the Department of Justice's litigating divisions—the Civil, Tax, and Environment and Natural Resources Divisions.

Two years ago, when I was Chairman of this Subcommittee, we held a very fruitful oversight hearing on the Civil Division. I am glad to have the Civil Division back before us today.

I also appreciate the opportunity to hear from the Tax and Environment and Natural Resources Divisions to discuss their activities, accomplishments, and resource needs.

Every day, the attorneys of these Divisions, like all Department of Justice attorneys, do the yeoman's work of representing the American people in court on a broad range of matters, from defending the United States in national security matters to going after health care fraud, pursuing tax collections, and protecting the environment and consumers.

Given the importance of their work, Congress should ensure that these Divisions, like the Department as a whole, are provided the funds and other resources necessary to carry out their missions.

For fiscal year 2013, the President requests $298,040,00 for the Civil Division, $110,360,000 for the ENRD, and $106,459,000 for the Tax Division.

These are modest amounts in light of the overall federal budget, and, especially, in light of the returns to the taxpayer from the work of these Divisions.

For example, last year the ENRD obtained more than $650 million in civil recoveries and criminal fines and saved taxpayers another $2.1 billion by successfully defending against meritless claims.

The Civil Division's civil fraud recoveries since 2009 have exceeded $9 billion. Moreover, the Division successfully defends the United States in cases sometimes involving billions of dollars.

The Tax Division's work brings in $13 in tax collections for every dollar spent on the Division.

And beyond the monetary benefits of these Divisions' work are the hard-to-quantify, but in some ways even more valuable, benefits, like ensuring clean air and clean water, maintaining public health, and securing dignity for all Americans.

Unfortunately, we have already seen some evidence that not everyone in Congress shares my view of the value of these Divisions' work. As Acting Assistant Attorney General Stuart Delery notes in his written testimony, the House recently passed an FY 2013 appropriations bill that did not include requested funding for the Civil Division's financial fraud work or for adjustments-to-base, which are intended simply to keep pace with the cost of things like increases in rent, contracts, and health benefits coverage.

Such a funding approach is short-sighted. While no one likes wasteful spending, the money requested by these Divisions is far from being wasted. Rather, it is an investment in protecting the public fisc as well as ensuring that our laws be enforced and that justice be served.

I thank our distinguished witnesses for taking the time to update us on the work of their respective Divisions and I look forward to their testimony.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The Department of Justice plays a critical role in enforcing our Nation's laws and protecting the rights of all Americans.

This agency is essentially the federal government's lawyer, a tremendous responsibility that must be implemented in a nonpartisan and truly fair manner that is above reproach.

Today, three components of the Justice Department will report to us about their work and accomplishments, namely, the Civil Division, the Environment and Natural Resources Division, and the Tax Division.

The Civil Division plays a major role in defending the interests of the United States and its citizens over a broad spectrum of issues that pertain to, for example, national security, health care fraud, immigration enforcement, and mortgage fraud.

The ENRD is charged with protecting the environment and the Nation's natural resources, as well as safeguarding the interests of Native Americans.

The Tax Division ensures compliance with the U.S. Tax Code and that the Nation's tax revenues are collected. The last time our Committee conducted any oversight of this Division may have been in 1978, according to an informal survey by the Congressional Research Service.

Accordingly, there is much ground to cover, and in particular, I want to focus on these issues.

To begin with, the Judiciary Committee—as the authorizing committee for the Justice Department—must ensure that these Divisions have the resources and funding from Congress that they need so that they can fulfill their important missions.

Adequate funding is vital to ensuring that these Divisions, like other components of the federal government, can continue to perform their duties on behalf of the American people.

Each of these Divisions recovers or saves far more in taxpayer dollars than is spent to keep them operating.

For example—

- Last year alone, the ENRD saved American taxpayers more than $2.1 billion by defending the United States against unmeritorious claims and obtained more than $650 million in civil recoveries and criminal fines.
- For every dollar invested in a Tax Division attorney, $13 in tax collections is generated for the Nation's Treasury.
- And, Civil Division attorneys each year litigate thousands of cases that concern billions of dollars in claims and recoveries. For example, the Division's civil fraud recoveries since 2009 have exceeded $9 billion.

Yet, earlier this month, the House passed appropriations legislation that fails to include some of the Administration's requested increases that would fund critical programs, such as the Civil Division's financial fraud investigation and prosecution task force.

It also fails to include enhanced funding to cover increases in rent, employee health benefits, and other fundamental expenditures needed to keep this agency functioning.

Unfortunately, the current political climate appears to be dominated by a short-sighted agenda that irrationally prioritizes budget cuts, when, in fact, those cuts may ultimately prevent these agencies from doing their jobs. These cuts are advocated without much thought to the long-term consequences of doing so.

Second, with respect to the use of settlement agreements and consent decrees, I note that the Divisions appearing before us today rely heavily on these tools to carry out their duties in a manner that is efficient, cost-effective, and fair.

In fact, there are repeated references to these settlements and their many benefits in the prepared statements submitted by the witnesses for today's hearing.

Nevertheless, some of my colleagues on the other side of the aisle have expressed serious concerns about the use of settlement agreements and consent decrees.

In fact, earlier this year, this Subcommittee conducted a legislative hearing on two bills introduced in response to these purported concerns.

The proponents of these measures argue that consent decrees involving state and local government defendants may be too difficult to terminate or modify and that they therefore unduly undermine the authority of state and local government officials.

We also heard that agencies collude with sympathetic plaintiffs in order to engage in back-door rulemaking via consent decrees or settlement agreements.

Frankly, I have strong doubts that either of those points have much—if any—merit.

Finally, I note that the Civil Division plays a prominent role in the Administration's Financial Fraud Enforcement Task Force. In particular, the Division is a co-chair of the Mortgage Fraud Working Group and the recently formed Residential Mortgage-Backed Securities Working Group.

While I appreciate the efforts that the Justice Department has undertaken to address fraudulent activities in the mortgage lending industry and in the securitzation process, much more needs to be done.

For example, it appears from the written testimony that 2,100 defendants have been charged with mortgage-fraud related crimes. That number, however, does not appear to include any of the principal mortgage lenders and Wall Street players that had a role in causing this financial disaster.

I want assurances that those responsible for causing one of the Nation's most severe financial crises since the Great Depression are brought to justice.

The millions of American homeowners who were tricked into mortgages that ultimately caused them to lose their homes, the many who were victims of fraudulent foreclosure practices, and the millions of us whose retirement investments disappeared in the wake of the so-called Great Recession deserve at least that much.

Responses to Questions for the Record submitted to
Stuart Delery, Acting Assistant Attorney General,
Civil Division, U.S. Department of Justice
from the May 31, 2012 hearing before the
Subcommittee on Courts, Commercial and Administrative Law,
Committee on the Judiciary,
U.S. House of Representatives,
entitled
"The Department of Justice—Civil, Environment and Natural Resources, and Tax Divisions"

From Ranking Member Steve Cohen:

1. You note at the end of your prepared statement that the House-passed version of the Justice Department's appropriations legislation does not include the Administration's requested increase in funding for the Department's financial fraud-related work.

   Please outline the consequences of this lack of additional funding.

Answer: The failure to fund the Administration's request for additional resources to combat financial fraud would hamper the ability of the Department to defend and pursue important and difficult cases, would limit its ability to recover ill-gotten gains for the public and private victims of such fraud, and would therefore shortchange the American public.

The Department's Civil Division has achieved remarkable results fighting financial fraud. As I previously noted in my testimony, the Department's successes have included the landmark $25 billion settlement with the nation's five largest mortgage servicing companies, which will provide nearly $1 billion to the federal Treasury and $20 billion in consumer relief, and will require new servicing standards that will protect consumers from future abuses. As I also noted in my testimony, the Civil Division is actively defending against a number of lawsuits relating to the Government's rescue of our nation's financial system – lawsuits that seek potentially billions of dollars in damages from the Treasury.

Our ability to successfully pursue and defend such cases – which require, by their nature, enormous investments of attorney and staff time, not to mention technological infrastructure – requires that we have the necessary financial support to do so. With the additional resources requested by the Administration, the Civil Division will continue its active pursuit of financial fraud in a variety of areas, including:

- **Actively conducting investigations nationwide as part of the Financial Fraud Enforcement Task Force. Civil Division attorneys play a leading role in cases now under review by the Task Force's Residential Mortgage Backed Securities, Mortgage Fraud, and Consumer Protection Working Groups;**

- **Continuing our joint efforts with HUD and the HUD-IG to identify lenders that defrauded the Federal Housing Administration by failing to comply with applicable underwriting requirements;**

- **Making expanded use of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 to pursue fraud involving financial institutions;**

- **Using the False Claims Act and its treble damages and civil penalties provisions, as well as other appropriate tools, to protect federal programs important to the nation's economic recovery, such as small business and student loan programs;**

- **Redoubling our efforts to identify and root out fraud in the government's minerals royalty program, one of the largest nontax sources of federal revenue; and**

- **Protecting vulnerable consumers from financial fraud, especially frauds targeting low-income individuals, the elderly, immigrants, and service members.**

These ongoing efforts are needed to help protect the American consumers, to support our strengthening economy, and to protect and to restore plundered funds to the Treasury. Moreover, such an investment in the Civil Division will continue to pay for itself many times over, as it has in the past. That is why I reiterate my request that you support the additional resources requested by the Administration for this critical aspect of the Civil Division's enforcement efforts.

Responses to Questions for the Record Submitted to
Ignacia S. Moreno, Assistant Attorney General,
Environment and Natural Resources Division, U. S. Department of Justice,
From the May 31, 2012 Hearing Before the
Subcommittee on Courts, Commercial and Administrative Law,
Committee on the Judiciary,
U.S. House of Representatives,
Entitled
"The Department of Justice—Civil, Environment and Natural Resources, and Tax Divisions"

Questions from the June 8, 2012 Letter:

From Representative Trey Gowdy:

1. In his 2012 State of the Union Address, President Obama issued the following challenge to business and government leaders: "Ask yourselves what you can do to bring jobs back to your country, and your country will do everything we can to help you succeed."

a. In the Environment and Natural Resources Division's negotiation of consent decrees and settlement agreements, and evaluations of potential enforcement actions, what is the Division doing to promote policies, actions, decrees, and settlements that encourage manufacturers to bring jobs and manufacturing back to the U.S. from overseas locations?

b. When manufacturers propose to move jobs from overseas locations as part of settlements or consent decrees under environmental statutes that are related to alleged violations tied to overseas certifications of compliance with environmental laws and standards, what does the Division do to facilitate such decrees and settlements?

c. In such decrees and settlements, what is the Division doing to credit the return of jobs to the U.S. and the associated assurance of compliance with environmental laws and standards, when evaluating proposed consent decrees and settlements?

Answer: In negotiation of consent decrees and settlement agreements and evaluation of potential enforcement actions, the Environment and Natural Resources Division (ENRD or the Division) considers whether the facility involved has violated an applicable federal environmental or natural resources statute or regulation and, if so, we take enforcement action to bring the facility into compliance with the applicable requirements. ENRD does not have specific authority to require a company to bring jobs or operations back to the United States from overseas. However, we generally seek penalties to account for any illegal economic benefit gained by a company from not complying with the applicable requirements so as to ensure a level playing field for law-abiding companies and deter future illegal actions. We are not aware of situations in which manufacturers have

proposed to move jobs from overseas locations to the United States as part of settlements or consent decrees under environmental or natural resources statutes or regulations.

2. How does the Environment and Natural Resources Division assure that it prioritizes enforcement against significant violations of environmental laws, as opposed to paperwork violations and other less significant violations?

Answer: ENRD takes enforcement action where it determines that the facts and the law warrant enforcement. Cases are prioritized in consultation with client agencies, taking into consideration a number of factors, including the significance of the harm to public health and the environment and the ongoing nature of the violations if there is a need for injunctive relief.

3. How effectively do bonding provisions assist in assuring compliance with environmental laws and standards by overseas manufacturers and suppliers?

Answer: We are uncertain what bonding provisions this question refers to.

4. In its enforcement activities, what does the Department do to assure that it takes reasonable account of the difficulties U.S. retailers, manufacturers, and other entities face in assuring the validity of certifications of compliance with environmental laws and standards by overseas manufacturers, suppliers and other vendors?

Answer: Where ENRD takes enforcement action against a U.S. entity in connection with products manufactured or supplied overseas, it is because that entity is subject to liability under U.S. law. Occasionally, ENRD has enforced the requirements of the Clean Air Act with respect to persons who import and sell motor vehicle engines (including the requirement to obtain a certificate of conformity with Clean Air Act requirements).

Civil statutes enforced by ENRD typically impose strict liability upon violators. The federal government typically considers a defendant's good faith efforts to comply with the law as one statutory factor in seeking an appropriate civil penalty. As noted in the response to Question 1, the federal government also considers a defendant's economic benefit obtained as a result of its noncompliance in seeking an appropriate penalty, in order to ensure a level playing field for companies who comply with the law.

To the extent the question relates to enforcement under the Lacey Act, we would note that the Lacey Act does not require any certifications of compliance with environmental laws and standards by overseas manufacturers, suppliers or other vendors, or by U.S. importers of products that fall within the scope of the Lacey Act. The Lacey Act does require that U.S. importers of plants and plant products submit a declaration that identifies the genus and species of the plant being imported, value of the importation, quantity of plant material, and country of harvest. However, this declaration does not require any representation by the importer that the materials were taken, possessed, transported or sold in compliance with any relevant laws.

The Lacey Act makes it illegal for anyone to traffic in wildlife, plants or plant products when, in the exercise of due care, they reasonably should have known that the product was taken, possessed, transported or sold in violation of a valid underlying law as described in the Lacey Act. Due care looks at what a reasonable person would do to ensure that there is no violation of the law. Due care is applied differently to different categories of persons with varying degrees of knowledge and responsibility. ENRD recognizes that if a U.S. retailer, manufacturer or other entity importing products from overseas obtains a certificate of compliance under local laws from an overseas vendor, the certificate constitutes some initial evidence by the U.S. entity of the exercise of due care. The federal government will consider all of the known circumstances of the entities' reliance on the certificate.

4a. For example, how does the Department account for difficulties U.S. entities face in verifying that overseas manufacturers, suppliers, and other entities have not committed paperwork or other violations in connection with products supplied to the U.S. entities?

Answer: See response to Question 4 above.

4b. Before taking enforcement action against a U.S. entity based on violations of environmental laws or standards by an overseas manufacturer, supplier or other entity, does the Division consider whether it was difficult or impossible for the U.S. entity to determine whether the overseas entity had complied with all applicable environmental laws and standards?

Answer: Yes. See response to Question 4 above.

4c. If the Division did not take reasonable account of such difficulties, wouldn't it risk imposing a strict liability standard on U.S. entities for violations of environmental laws and standards by their overseas manufacturers or suppliers?

Answer: In a Lacey Act case, ENRD must prove beyond a reasonable doubt that the entity charged knew, or reasonably should have known, that the product was taken, possessed, transported or sold in violation of law. The Division considers and takes into account evidence that a company attempted to determine the legality of the plants or plant products involved in a transaction and that a company did not know of their illegality. Judges and juries must apply the legal standards required by a statute and we do not see a risk of the creation of an extra-statutory strict liability standard.

From Ranking Member Steve Cohen:

1. What are some of the benefits of consent decrees and settlement agreements?

Answer: Resolution of cases through consent decree or settlement agreement (collectively referred to as "settlement") minimizes the cost to the American taxpayer of litigating these cases. Settling cases on terms that are at least as favorable as those that are likely to result from litigation consumes less ENRD attorney time, and allows ENRD attorneys to handle other cases where litigation may result in significant benefit, including direct cost savings, to the public. In addition, in many of our cases, settlement also substantially reduces the federal government's risk of liability for money judgments that may far exceed a negotiated settlement amount, as well as for plaintiffs' attorney fees and costs that must be paid under the law in certain circumstances. The major environmental statutes contain provisions allowing the court to grant a successful plaintiff reasonable fees and costs. Litigation, as opposed to settlement, increases the federal government's liability for fees and costs.

2. You referred to the Meese Memo in your oral testimony. Please explain what the Meese Memo, which has been codified in the Code of Federal Regulations, requires.

Answer: The "Meese Memo" establishes different rules for consent decrees, which result in an enforceable court order, and for settlement agreements, which do not.

In the simplest terms, the "Meese Memo" prohibits entry of a consent decree that grants relief a court could not itself order or that, put another way, converts a discretionary duty to a mandatory duty. Memorandum from Attorney General Edwin Meese, III, to All Assistant Attorneys General and United States Attorneys Entitled "Department Policy Regarding Consent Decrees and Settlement Agreements" (March 13, 1986); 28 C.F.R. § 0.160. Thus, for example, in a suit to enforce a nondiscretionary duty, the court could order the defendant agency to carry out the nondiscretionary duty by a new date certain, but could not direct the agency decision or in any way influence the substance of the resulting agency decision. ENRD's consent decrees expressly preserve the agency's discretion, and do not alter the administrative procedures applicable to the agency's decision. Thus, for example, if Congress set a date for an agency to promulgate a rule, the agency missed that date, and a consent decree set a new date for promulgation, the agency would still have to follow all public hearing and notice-and-comment procedures that would otherwise be applicable to the promulgation of that rule. The rights of parties affected by the rule to participate fully in that process and seek judicial review of the rule are not affected by the consent decree.

Settlement agreements are used to resolve cases that challenge the substance of agency actions—such as Administrative Procedure Act challenges to the provisions of new rules. ENRD settlement agreements ensure that applicable administrative procedures must be followed if the agency chooses to modify a challenged action to preserve the rights of interested third parties. Typically, the agency would commit in a settlement agreement to propose a modification to the challenged rule, and to take final action on the proposal, but would not commit to take the specific action proposed because comments received from third parties on the proposal might suggest reasons for a different outcome.

2a: Over the course of your tenure with the ENRD, has there been any issue regarding compliance with these guidelines?

Answer: I am not aware of any issue during my tenure regarding compliance with the "Meese Memo."

3. Are you aware of any so-called "sue and settle" collusive settlements or consent decrees that the ENRD has entered into?

Answer: No—none.

4. Please explain how Federal Rule of Civil Procedure 60(b) works with respect to modification or termination of consent decrees.

In your view, is the right of intervention provided for by Federal Rule of Civil Procedure 24 sufficient to allow parties affected by a potential consent decree or settlement agreement to ensure that their interests are represented?

Answer: ENRD typically includes in its consent decrees and settlement agreements an express provision that allows modification of any requirement by written agreement of the parties (and notice to the court in the case of a consent decree), and that allows either party to move the court in the case of a consent decree to modify any provision over the other party's objection under Fed. R. Civ. P. 60(b). Fed. R. Civ. P. 60(b) describes various grounds for relief from a final judgment, order or proceeding and Fed. R. Civ. P. 60(c) describes the timing and effect of filing the motion.

Intervention under Fed. R. Civ. P. 24 is a vehicle by which any party with an interest in a consent decree can present its views to the court, and even oppose a motion for entry of a negotiated consent decree. Frequently in the Division's defensive cases, courts conclude that the concerns of the intervenor are really concerns about the substance of the action the agency will take, rather than the timing, and that the intervenor's interests will be protected by the subsequent administrative process and the right to judicial review of any final action taken pursuant to the consent decree.

Parties resolve disputes through out-of court settlements. As discussed in the response to Question 2, however, ENRD's settlement agreements in defensive cases ensure that any action an agency takes pursuant to the settlement agreement must be taken in accordance with applicable administrative procedures. Nothing in a settlement agreement can abrogate or modify the statutory standards governing the agency's subsequent action, or an intervenor's right to participate in the administrative process and, if dissatisfied, seek judicial review of that action.

Questions from the May 31, 2012 Hearing Transcript:

From Representative Dennis Ross:

1. REPRESENTATIVE DENNIS ROSS (R-FL): Thank you, Mr. Chairman. Ms. Moreno, to follow up with you, you have about 7,000 cases that your division handles?
MS. MORENO: Currently, we have about 7,000 filed cases and matters.
REP. ROSS: About how many of those would you say involve NEPA, the National Environmental Policy Act?

Answer: The Division's records show that as of June 4, 2012, we have 532 pending cases involving some type of National Environmental Policy Act claim.

2. REP. ROSS: I happen to be from the great state of Florida, where we have the Clean Water Act imposed upon us through the numeric nutrient water criteria. A lot of concerns over that. It is estimated anywhere between $800 million to $3 billion in compliance alone in the agricultural industry could cost as many as 14,000 jobs in the agricultural industry. That's a significant impact. Was that taken into consideration at the time the consent decree was entered?

Answer: We assume that your question refers to the consent decree originally entered on December 30, 2009 in the case of Florida Wildlife Federation, Inc. v. Jackson, No. 4:08-cv-00324 (N.D. Fla.). In January 2009, the Environmental Protection Agency (EPA) issued a determination under the Clean Water Act (CWA) that numeric nutrient criteria were necessary in order to protect the designated uses of waters in Florida. The determination triggered a statutory duty on the part of EPA to promptly propose and then promulgate numeric nutrient criteria for Florida unless the State adopted (and EPA approved) numeric nutrient criteria first. Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B). The December 30, 2009 consent decree did not impose any obligation on EPA not already imposed by the CWA or address the substance of the numeric nutrient criteria. Rather, the consent decree merely set a schedule for EPA to perform its statutory duties pursuant to rulemaking processes under the CWA and Administrative Procedure Act unless the State of Florida adopted and EPA approved numeric nutrient criteria.

EPA's January 2009 determination was made pursuant to section 303(c)(4)(B) of the CWA, which authorizes the Administrator to make a determination that new or revised water quality standards are necessary. The Clean Water Act states that water quality standards shall "protect the public health or welfare, enhance the quality of water and serve the purposes" of the Act. Section 303(c)(2)(A). The Clean Water Act's implementing regulations further provide that to serve the purposes of the Act, water quality standards "should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.2.

Water quality standards such as the numeric nutrient criteria you asked about are calculated to protect Florida's designated uses, which in this case are Class I (Potable Water Supplies) and Class III (Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife) uses. In other words, the criteria set the benchmark in terms of the water quality conditions sufficient and adequate to protect potable water supplies, recreational uses, and healthy, well-balanced fish and wildlife. As such, water quality criteria are derived based on scientific factors.

On November 14, 2010, following a full public notice-and-comment rulemaking process under the CWA and Administrative Procedure Act, EPA issued a final rule setting numeric nutrient criteria for Florida's lakes, springs and all flowing waters (except those in South Florida). (Additional rules addressing numeric nutrient criteria for various Florida waters are currently in development, pursuant to extended schedules secured from the court.) EPA explained in the preamble to its November 2010 rule that it was translating the State of Florida's existing narrative criterion for flowing waters, lakes and springs in Florida into numeric criteria. Since the promulgation of EPA's numeric nutrient criteria, the State of Florida has continued its work toward the development of numeric nutrient criteria.

From Representative Ben Quayle:

1. REP. QUAYLE: Ms. Moreno, did your department negotiate the proposed consent decree entered into by the National Parks Conservation Association and eight other environmental organizations, with EPA Administrator Jackson on December 2, 2011, which established deadlines in which EPA must take action on states' regional haze implementation plans or promulgate federal implementation plans? . . . . Did you consult with the state of Arizona, local governments, the Navajo Nation, or any stakeholder that would have to come under these regulations prior to entering into the proposed consent decree?

Answer: Yes, ENRD represented EPA in negotiating the consent decree in National Parks Conservation Ass'n v. Jackson, No. 1:11-cv-1548 (D.D.C.). Consistent with section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), the Department of Justice and EPA invited public comment on the proposed consent decree before asking the court to enter that decree. See 76 Fed. Reg. 75,544 (Dec. 2, 2011); 77 Fed. Reg. 281 (Jan. 4, 2012). The State of Arizona, local governments, the Navajo Nation and all other persons with an interest in the implementation of the regional haze requirements of the Clean Air Act in the 34 states at issue in the lawsuit had an opportunity to present their views on the proposed consent decree through the notice-and-comment process required by the Clean Air Act and, in fact, Arizona and other affected states did submit comments. Based on these comments, EPA and the Justice Department made certain revisions to the proposed consent decree before submission to the court for entry of a final consent decree.

The State of Arizona also took the opportunity to participate in the National Parks Conservation Ass'n v. Jackson litigation as authorized under current law. On December 22, 2011, Arizona moved to intervene for the purpose of opposing entry of the proposed

partial consent decree, which motion was granted. Following the court's entry of the consent decree on March 30, 2012, Arizona moved for reconsideration of the order as to Arizona, and on April 3, 2012, the court entered a minute order staying the execution of the consent decree as to Arizona and setting a briefing schedule on Arizona's formal opposition to entry of the decree. On May 25, 2012, after consideration of Arizona's memorandum in opposition to entry of the consent decree, the court issued a memorandum opinion and order rejecting Arizona's arguments, lifting the stay of execution and giving Arizona until June 28, 2012 to file any notice of appeal from entry of the consent decree.