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Before the U.S. House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law

Hearing on H.R. 3041, the "Federal Consent Decree Fairness Act," and
H.R. __, the "Sunshine for Regulatory Decrees and Settlements Act of 2012"

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Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity extended to me by the Subcommittee to provide my views on H.R. 3041, the "Federal Consent Decree Fairness Act," and related legislation.

I am John C. Cruden, President of the Environmental Law Institute ("ELI"). Prior to assuming this position in July 2011, I served for over twenty years at the Environment and Natural Resources Division, U.S. Department of Justice ("DoJ"), as either the career Deputy Assistant Attorney General or Chief of Enforcement. The Environment and Natural Resources Division, with U.S. Attorneys, is responsible for all environmental enforcement—civil and criminal—in the United States, and also defends the federal government. The Division also has responsibility for federal ligation related to pollution, public lands and natural resources, wildlife, condemnation and inverse condemnation, and Native American cases involving over 100 federal statutes. In that capacity, I personally negotiated or approved hundreds of consent decrees, and I presented argument in court pertaining to consent decrees. Those consent decrees often involved hundreds of millions of dollars, requiring companies, or municipalities, to come into compliance with the law over a series of years on a defined schedule that included stipulated penalties for violations of the agreement. In addition, I have served as the Chairman of the American Bar Association's Section on Environment, Energy, and Natural Resources. My views on the value and role of consent decrees are obviously informed by my government career, but I am not speaking on behalf of the Department. Also, while my testimony is intended in part to advance ELI's educational mission, the views presented here are my own, and do not necessarily reflect the views of ELI's Board of Directors or its members. I will start by explaining the role of the Environmental Law Institute, then turn to the law of consent decrees, before providing an analysis of H.R. 3041.

The Environmental Law Institute

Founded in 1969 and based in Washington, DC, the Environmental Law Institute is a highly respected non-governmental organization that does not litigate or lobby. Our primary mission is to provide the highest quality educational materials, publications, research, and training in the areas of environment, energy, and natural resources. ELI seeks "to make law work for people, places, and the planet," and our institutional vision calls for "a healthy environment, prosperous economies, and vibrant communities founded on the rule of law."

The Institute's staff includes lawyers as well as scientists, and we have worked throughout the United States and around the world. Our flagship publication, the *Environmental Law Reporter*, is the most cited legal journal of its kind. Additionally,

last year ELI presented on average one educational program each week. Internationally, we are best known for providing judicial education on environmental subjects, and we have now completed the training of over 1,000 judges in 23 different countries.

The subject matter of H.R. 3041 touches on several core aspects of ELI's mission and priorities. We have deep institutional expertise in environmental law, and ELI is committed to the U.S. Constitutional foundations on which our environmental law framework stands. We are dedicated to having all parties follow the rule of law. And at the heart of ELI's mission is a desire to make environmental law work—to ensure that laws on paper can be implemented successfully in the real world. To this end, ELI works closely with a wide range of institutions and stakeholders—and especially with states and municipalities, which often find themselves on the front lines of environmental protection. We also promote robust enforcement of the law. Ultimately, the ability of states, localities, federal agencies, NGOs, and other stakeholders to have their voice heard is critical to environmental protection.

I. Current Law Concerning Consent Decrees—Including Their Modification and Termination

Before addressing H.R. 3041, it is important to first understand the legal nature of consent decrees and the context in which they are used. While my own experience is rooted in environmental law, this analysis is equally applicable to a variety of diverse cases affecting state and local parties, including cases relating to prison conditions, race-based affirmative action, discrimination, Medicaid programs, and infrastructure projects.

As stated by then-Attorney General Edwin Meese III in a memorandum to "All Assistant Attorneys General and All United States Attorneys" in 1986:

> Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment.

The Meese memo required high-level government approval of certain consent decrees. Regulations reflecting this policy appear in the Code of Federal Regulations (28 C.F.R. §§ 0.160-0.163).

Consent decrees are a recognized tool for making environmental laws work. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known as Superfund, specifically requires that an agreement concerning remedial action "shall be entered in the appropriate United States district court as a consent decree." That statute further requires that the Attorney General provide an opportunity for public comment before the consent decree is finally approved and entered by the district court. (42 U.S.C. § 9622(d)(1)(A), (d)(2)(B).) It clearly makes settlements, in the form of judicially approved consent decrees, the preferred course of action.

By policy, the U.S. Department of Justice routinely seeks public comment on most consent decrees arising out of enforcement actions. After the parties agree, DoJ "lodges" the consent decree with the court and seeks public comment. Once complete, DoJ then negotiates any necessary changes before requesting that the court "enter" the consent decree. The legal standard for the court to apply is that the consent decree is "reasonable, faithful to the statute's objectives, and fair (both procedurally and substantively)." *United States v. Charles George Trucking Inc*., 34 F.3d 1081, 1084 (1st Cir. 1994). *See also Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525-26 (1986). Once entered, the consent decree becomes a judicial order and can be enforced in a court of law like any other judicial order. Judges can, and frequently do, hold hearings, seek evidence, or inquire of the parties the meanings of specific terms before they agree to enter a consent decree. And consent decrees are occasionally rejected by courts. *See* John C. Cruden & Bruce S. Gelber, "Federal Civil Environmental Enforcement: Process, Actors, and Trends," 18 *Nat. Resources & Env't* 10 (2004).

Sometimes, of course, consent decrees arise not in the context of federal enforcement actions, but in circumstances where the United States is a defendant. For example, agency decisions may be challenged under the Administrative Procedure Act: "Agency Action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Specifically, "[t]he reviewing court shall," among other actions, "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Other sections of Title 5 control rulemaking (553), the record on review (2347), intervention (2348), court of appeals jurisdiction (2349), and review in the Supreme Court (2350).

Litigants may challenge an agency for failing to conduct timely rulemaking when there is a clear congressional dictate and a mandatory duty to do so, or they may challenge completed rulemaking as arbitrary and capricious. The United States frequently resolves such lawsuits with a consent decree or settlement agreement in which the parties agree to dismiss the litigation and the agency agrees to a rulemaking schedule, process, or amendment. A challenge to a lack of a prescribed regulation, for

instance, may result in a settlement or consent decree wherein the parties agree simply to a date for producing a proposed and then final regulation. A challenge to an existing regulation may be settled by the agency agreeing to propose an amendment to the regulation, but preserving its discretion after appropriate notice and comment to decide either not to make any change, or to make different changes. If an agency proposes changes to an existing regulation, there will be an opportunity for public notice and comment on the proposed regulation, as well as an opportunity to challenge any final regulation in court. *See* Jeffrey M. Gaba, "Informal Rulemaking by Settlement Agreement," 73 *Geo. L.J.* 1241 (1985); Jim Rossi, "Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement," 51 *Duke L.J.* 1015 (2001).

There are several ways in which a consent decree can be changed or amended after a court has approved it. First, and most commonly, the parties can simply agree on changes and seek permission of the court to amend the consent decree. Second, the Federal Rules of Civil Procedure (or "FRCP"), which are binding on all courts, include a separate rule, Rule 60, to afford "Relief from a Judgment or Order," which covers consent decrees along with other final judgments. Rule 60 provides for (a) corrections of clerical mistakes, oversights, or omissions in orders; and (b) grounds for relief from a substantive error in a final judgment, including mistake, newly discovered evidence, and fraud.

Most relevant to today's discussion, Rule 60(b)(5) and (b)(6) already allow a petitioner relief on a variety of grounds: if "the judgment has been satisfied, released, or discharged; [if] it is based on an earlier judgment that has been reversed or vacated; [if] applying it prospectively is no longer equitable; or [if] any other reason [] justifies relief." There are numerous cases in every court of appeals and in the U.S. Supreme Court construing and applying Rule 60 to final judgments, including consent decrees.

The grounds for modifying a judgment under Rule 60 are far from new: the rule is rooted in traditional principles of equity. A court issuing a forward-looking judgment has always possessed inherent authority to modify that judgment if circumstances change. Rule 60 merely regularized the procedures by which parties may seek relief, and codified some specific types of changed circumstances that historically have prompted courts to modify judgments.

Significantly, the Rule 60 standard is flexible and allows the court to consider a variety of factors like the importance of finality, the sanctity of a consent decree as a contract, the public interest, and whether the changed circumstances were foreseen. In cases of changed circumstances, Rule 60 leaves the ultimate decision of whether to modify or set aside a judgment within the court's discretion, as guided by sound legal and equitable principles and informed by the positions of the parties. Under Rule 60,

the burden lies with the party seeking relief to demonstrate that subsequent changes in circumstances have rendered a judgment unjust. This scheme recognizes and promotes the need for finality: if it were too easy for parties to overturn orders, the value of consent decrees as reliable, final methods of case settlement would be greatly diminished.

The Supreme Court in several cases has discussed the use of Rule 60(b) to modify ongoing consent decrees. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Court confirmed that the Rule creates a "flexible standard" that is particularly well suited to complex decrees involving government institutions. But the Court stressed that flexibility does not simply mean "when it is no longer convenient to live with the terms of a consent decree;" and accordingly it held that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree."

More recently, in *Frew v. Hawkins*, 540 U.S. 431 (2004), a unanimous Court reaffirmed that Rule 60(b)(5) provides the established, equitable path for modifying consent decrees, and also held that this approach does not offend state sovereignty. While a federal court should "'give significant weight'" to the views of state and local officials who are operating under a consent decree, the burden remains on the moving party to establish reason to modify the decree. "[W]here it has not done so," Justice Kennedy wrote, "the decree should be enforced according to its terms."

Simply put, the Supreme Court has spoken to the issue of modifying consent decrees: when circumstances change, a state or municipality has a clear and ready means of seeking termination or an appropriate modification from the court.

II. There Is a Mechanism for Amending the Federal Rules of Civil Procedure, When Necessary

Even assuming that Rule 60(b) is somehow no longer up to the task of ensuring proper modification or termination of consent decrees, there is an established, bipartisan, well respected way to amend the Federal Rules of Civil Procedure: through the Judicial Conference of the United States. The Judicial Conference, as the national policy-making body for the federal courts, was established by Congress and is composed of federal judges from each judicial circuit, the chief judge of the Court of International Trade, and the Chief Justice of the United States. It promotes judicial uniformity, fairness, simplicity, and efficiency in the rules that govern the courts. A key feature of the Judicial Conference is the Committee on Rules of Practice and Procedure (also known as the "Standing Committee"), which oversees the practical aspects of

proposing and changing rules. The Judicial Conference also has authorized the appointment of advisory committees to recommend rule amendments. 28 U.S.C. §§ 331, 2071-77.

Congress has established robust procedures for amending the Federal Rules of Civil Procedure that have served for almost eighty years. The process includes the participation of court experts, the public, and two co-equal branches of government. Any member of the public may submit a proposed rule change to the Civil Rules Advisory Committee for its consideration. If the Advisory Committee approves of the suggestion, it will prepare a draft rule amendment. With the Standing Committee's approval, the draft amendment is published and opened to comment for six months, during which time members of the public have the opportunity to submit comments and participate in one or more public hearings on the proposal. Following the comment period, the Advisory Committee reconsiders the proposal in light of public input. The Advisory Committee, Standing Committee, Judicial Conference of the United States, U.S. Supreme Court, and Congress must then each approve the proposed amendment before it can take effect. This deliberative, collaborative process for amending the Federal Rules gives due regard both to the complex nature of procedural rules and to the great impact they can have on the administration of justice and the proper functioning of the courts. Indeed, this process has already been used four times to change Rule 60 since its adoption.

III. H.R. 3041 Presents Legal Concerns

As H.R. 3041 would (1) essentially modify the Federal Rules of Civil Procedure by adding new grounds and procedures for relief from a consent decree; (2) place limits on federal courts' traditional equitable jurisdiction and discretion, and contravene Supreme Court precedent; and (3) make it more difficult for states and municipalities to achieve settlement in practice, there are important legal concerns about the proposal.

First, this bill would have the effect of circumventing the process for modifying the Federal Rules. It would place a gloss on Rule 60(b) that—if truly necessary—would best be accomplished through the available Judicial Conference process.

Second, bypassing that process means that Congress would be directly dictating procedures to and limiting the jurisdiction of the federal courts—something that should never be done lightly. This is especially true when dealing with injunctive remedies, which derive from courts' centuries-old inherent equitable power to enforce their own judgments and modify them as circumstances require.

To create an artificial, external timetable for motions to modify consent decrees; shift the burden of proof away from the party that has already agreed to operate under the decree; and require courts repeatedly to revisit all the agreed-upon provisions is to interfere substantially with courts' equitable power, and to undermine their ability to provide final relief. It also would upset the careful federal-state balance struck by the Supreme Court in *Rufo* and *Frew*. Indeed, while the findings contained in H.R. 3041 cite the *Frew* opinion at length, the bill ignores the fact that the justices unanimously found existing Rule 60(b) to be a sufficiently flexible accommodation to state and local sovereignty, not a threat to it.

Third, creating new obstacles to reaching settlements, and giving subsequent officials excessive leeway to modify or even vacate prior agreements, actually can do as much to undermine state and local sovereignty as to preserve it. It is true that, as Justice Kennedy wrote in *Frew*, a state or municipality "depends upon successor officials, both appointed and elected, to bring new insights and solutions. . . ." But that observation alone was not enough for the Court to alter a party's burden of proving that the equities have tipped in its favor before that party is allowed to rescind its prior sovereign obligations.

As the Court has repeatedly said, consent decrees are both judicial decrees and contracts, and entering into binding contracts is one of a sovereign's defining functions. A state or municipal government's authority to commit itself to future actions both validates its existence and dignity as a continuing entity, and serves practical purposes, such as the ability to obtain long-term financing, which I will discuss below. The proposed legislation would require courts to tip the scales in favor of undoing extended commitments and projects and would call the sovereign's credibility into question, thus likely depriving state and local governments of this important tool in the future.

IV. H.R. 3041 Will Have Adverse and Unintended Practical Consequences

As a practical matter, there are at least seven major adverse and unintended consequences of this legislation. The result will be to undermine environmental enforcement, add significantly to transaction costs for states and municipalities, and create enormous uncertainty. While these adverse consequences would occur in all litigation, not just environmental matters, they would be particularly acute in environmental cases. Unlike other areas of the law, environmental remediation is often a lengthy process, requiring scientific analysis, sophisticated engineering, and quality assurance in order to be successful. Environmental actions can frequently involve complex activities, such as the dredging of contaminated sediments from swift flowing rivers; the installation of sophisticated pollution-abatement equipment on pollution

sources that are in use; upgrades to Public Owned Treatment Works that are vitally needed; or the repair of damaged wetlands or beaches that were oiled after a spill, as evidenced by the recent disaster in the Gulf of Mexico. One area where there are frequent consent decrees, which I will use as an example of the potential problems with H.R. 3041, is municipal Clean Water Act enforcement actions.

In every Administration in the last twenty years there has been enforcement against municipalities for violations of the Clean Water Act, principally from inadequate or outdated sewer and stormwater infrastructure. There are countless examples of raw sewage running through streets, entering people's basements, and flooding neighborhoods. Although the legal liability for these unpermitted discharges is often quite clear, the actions needed to remedy the problem are expensive and time-consuming. In most instances the municipality needs to completely study the causes of the problem, develop a mufti-faceted plan, and then undergo a lengthy and expensive remedial project.

Because the municipality will need to raise money for such a project, and the engineering is important, the "combined sewer overflow" consent decrees legitimately take over a decade to complete, with complex projects taking even more time. It is also not uncommon for the parties to agree to amend these consent decrees during their life, to take into account better methods that may be less expensive, or to extend time when unforeseen problems have emerged. There are also unexpected, *force majeure* events, such as was experienced by the City of New Orleans in the aftermath of Hurricane Katrina, which allow the municipality to not have to comply with affected consent decree requirements. One important aspect of this type of enforcement is that Congress has mandated that States be a party to this litigation. 33 U.S.C. § 1319(e). Accordingly, H.R. 3041 would adversely impact States, acting as significant enforcers of environmental laws.

Although virtually all of the municipal Clean Water Act cases over the past two decades have settled with a consent decree, nearly all of them have lasted for over four years. Examples of such consent decrees appear in the "Illustrative List of Recent Consent Decrees" at the end of this written statement. The proposed legislation would likely adversely affect all parties to these and other kinds of environmental settlements in the manner described below.

1. An End to the Effective Use of Court-Approved Settlements

Because H.R. 3041 would allow municipalities to withdraw from a consent decree at various times, it is very likely that those charged with enforcing the nation's

laws—the federal government, states, tribes, and citizens—will forgo the newly uncertain path of the consent decree and simply pursue court-adjudicated decisions. This legislation eliminates a key benefit of the consent decree: finality and certainty. Since any future administration could move to withdraw, requiring the original plaintiff to establish evidence that then might be years old, it is quite likely that consent decrees will simply not be pursued. That is true even though a municipal defendant may well want to settle, may have the resources to settle, and it may well be in the public interest to achieve settlement and immediately start remedying the environmental harm. Instead, it is far more likely that discerning plaintiffs, concerned that any agreement they reach will prove illusory, may well decide to seek the finality of a judicial determination.

Full-fledged judicial determinations would not be bound by any artificial time limit and would be more time consuming, more expensive to obtain, and far more proscriptive. Consent decrees, on the one hand, provide flexibility, allow innovative and less costly solutions, and encourage the parties to work together in implementation. Judicial orders, on the other hand, are always directed at the defendant and leave less room for innovation.

2. Increased Litigation, Attorney Fees, and Transaction Costs for All Parties

If state, federal, or citizen plaintiffs cannot be certain that consent decree terms can or will be met, then the most likely outcome will be that they simply do not seek settlement. These parties are absolutely entitled to seek discovery, take depositions, require expert reports, prove liability, and then seek a remedy directed by the court. If so, the time limitations of H.R. 3041 simply do not apply. Since litigation is already quite expensive, often resulting in millions of dollars of transaction costs, having legislation that would undoubtedly result in increased litigation is not in the public's best interest. Congress has repeatedly emphasized its preference for settlements in a variety of statutes. Under the Alternative Dispute Resolution Act of 1998 (28 U.S.C. §§ 651 et seq.), every federal court in the country now has an alternative dispute program to encourage settlement and reduce court caseloads. H.R. 3041 would undermine this important public policy goal.

The increase in litigation would also bring new demands on our already over-burdened court system. In addition, these types of cases are often the most time-consuming and expensive to litigate, since the relief necessarily will extend for years and will be based on expert testimony, municipal finances, and the nature of the environmental harm.

3. Undermining Authority and Increasing the Costs for Municipalities

Another unintended consequence of the legislation would be to significantly disadvantage a municipality by increasing its transaction costs. First, to obtain financing for large engineering projects, a municipality must obtain outside financing based on the estimated time of completion, the certainty of the project, and the guarantee that the municipality will meet the terms of the financing agreement, no matter who is the elected or appointed leader. Legislation that would allow subsequent municipal leaders to disavow the municipality's prior commitments and attempt to avoid their legal requirements would make it extremely difficult for a municipality to obtain the financing that it will need.

In addition, federal, state, or citizen plaintiffs that do continue to negotiate consent decrees may come to demand unrealistic time frames, such as no more than four years, in order to assure that the consent decree terms will be met. If so, the short-term costs will dramatically increase. Every municipality that I have negotiated with has sought time in excess of four years, stressing the need for good initial studies, citizen involvement, and a quality output. This legislative proposal could inadvertently undermine those laudable goals.

Finally, an important part of the sovereignty of a state or municipality is the ability to make binding contracts, resolve litigation with finality, and speak with authority. No Governor would be able to successfully contract with private entities if there was the possibility that the State, under another administration, could easily renege on their contract requirements. An unintended potential consequence of H.R. 3041 would be to undermine municipal authority.

4. Disadvantaging Native American Tribes

Native American tribes also bring enforcement actions in their sovereign capacity, or lawsuits to protect their waters, resolve boundary disputes, or obtain rights guaranteed by treaties. Those actions are often settled with agreements in the form of consent decrees, which can last for decades. *See*, for instance, the Michigan case described in the "Illustrative List of Recent Consent Decrees" at the end of this written statement. Tribes are often acting with few resources to support litigation seeking protection over their homeland, access to drinking water, or resolution of their hunting and fishing rights. Because treaty rights frequently require extensive historical documentation and the use of expert testimony, they can be quite expensive if a trial is necessary. Consent decrees, on the other hand, allow the Tribe and state or municipality to cooperatively resolve and then implement any agreement.

5. Disadvantaging Local Citizen Groups and Citizen Enforcement

In environmental laws, Congress has created a specific and quite important role for local citizens to assure compliance with the law. Lawsuits brought by local groups or individuals assure compliance with the law, serve to deter illegal conduct, and are a uniquely American legal remedy that affords citizens a role in protecting their local environment. In many of the municipal sewer overflow cases described in the "Illustrative List of Recent Consent Decrees," the lawsuit was originally brought by a citizen group concerned about untreated sewage entering drinking water sources or leaking into their basements. Many times the citizens joined with states to seek corrective action, as they lacked sufficient resources to fully litigate a case to conclusion. Consent decrees provide an option for a faster, less expensive, but still comprehensive resolution of a dispute. Obtaining a consent decree with a municipality frequently allows for faster cleanup, thereby improving the environment in a more expeditious fashion. Citizen groups, however, must have certainty when they resolve their case, as they will often not be in a position to re-litigate the matter in future years. Again, an unintended consequence of H.R. 3041 would be to undermine citizen suit enforcement.

6. Not Accomplishing the Intended Purpose

Even in cases where parties did agree to a consent decree, and the consent decree were to be vacated under the authority of H.R. 3041, little would ultimately be accomplished. Ongoing violations of, for instance, the Clean Water Act are still a violation of law and would still need to be resolved. A federal court would retain jurisdiction over a filed case, and the parties would simply re-enter the litigation process. Now, of course, a new settlement would be virtually impossible to achieve, and the parties would go through the entire litigation process to resolve liability and have the court determine new injunctive relief. During that time period the violations of law would continue, the ultimate relief would probably be more costly to achieve, and the attorney fees and transaction costs would multiply.

7. Creating New Environmental Problems

If a municipality, having agreed to a major engineering project such as sewer removal and upgrading, were successful in getting out of their agreement after four years, this would create other significant problems. First, the partially completed engineering project could itself be a public nuisance. Second, the costs of restarting

such a process would result in substantially increased costs and a longer time frame to completion. Finally, the existence of an unfinished project could itself add environmental liability, as partially completed sewer lines spew additional untreated sewage into the Nation's waters or citizen's basements.

Conclusion

Federally approved consent decrees are valuable settlement tools that promote expeditious resolution of cases, save transaction costs for all parties and for the court, and achieve finality while protecting the parties to the agreement. Existing federal law, together with relevant Supreme Court decisions, provide methods for modifying consent decrees. Any truly necessary changes to the Federal Rules should be achieved through the process that has been established for doing so. H.R. 3041 raises significant legal concerns and would have unintended real-world consequences that risk undermining enforcement, disadvantaging municipalities, and making resolution of litigation significantly more expensive and time-consuming.

Illustrative List of Recent Consent Decrees

Following are examples of consent decrees into which the Department of Justice has entered during the last several years. These descriptions are drawn directly from press releases issued by the Department.

- *Chicago (2011)—Clean Water Act*

The United States entered into a settlement with the Metropolitan Water Reclamation District of Greater Chicago (MWRD) to resolve claims that untreated sewer discharges were released into Chicago-area waterways during flood and wet weather events. The settlement is intended to safeguard water quality and protect human health by capturing stormwater and wastewater from the combined sewer system, which services the city of Chicago and 51 communities. MWRD will complete a tunnel and reservoir plan to increase its capacity to handle wet weather events and address combined sewer overflow discharges. The project will be completed in a series of stages in 2015, 2017, and 2029. The settlement also requires MWRD to control trash and debris in overflows using skimmer boats to remove debris from the water so it can be collected and properly managed, making waterways cleaner and healthier.

- *Newport (2011)—Clean Water Act*

The city of Newport has agreed "to eliminate illegal discharges of sewage into Narragansett Bay from its wastewater treatment plant and wastewater collection system. The settlement is the result of a federal and state enforcement action brought by the U.S. Department of Justice, on behalf EPA, the State of Rhode Island through the Rhode Island Department of Environmental Management, and the National Environmental Law Center on behalf of Environment Rhode Island and certain Rhode Island citizens. The consent decree alleged that Newport violated the federal Clean Water Act, including illegal discharges of sewage and stormwater containing bacteria and other pollutants that pose threats to human health and the environment.

- *St. Louis (2011)—Clean Water Act*

The Metropolitan St. Louis Sewer District (MSD) agreed last August to make extensive improvements to its sewer systems and treatment plants, at an estimated cost of $4.7 billion over 23 years, to eliminate illegal overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The settlement reached between the United States, the Missouri Coalition for the Environment Foundation and MSD, requires MSD to install a variety of pollution controls, including the construction of three large storage tunnels ranging from approximately two miles to nine miles in length, and to expand capacity at two treatment plants. These controls and similar controls that MSD has already implemented will result in the reduction of almost 13 billion gallons per year of

overflows into nearby streams and rivers. MSD will also be required to develop and implement a comprehensive plan to eliminate more than 200 illegal discharge points within its sanitary sewer system. Finally, MSD will engage in comprehensive and proactive cleaning, maintenance and emergency response programs to improve sewer system performance and to eliminate overflows from its sewer systems, including basement backups, releases into buildings and onto property. The settlement resolves claims brought by the United States in a lawsuit in which the Missouri Coalition for the Environment Foundation later intervened under the citizen suit provisions of the Clean Water Act. The United States alleged that on at least 7,000 occasions between 2001 and 2005, failures in MSD's sewer system resulted in overflows of raw sewage into residential homes, yards, public parks, streets and playground areas.

- *Jersey City (2011)—Clean Water Act*

A settlement between the United States and the Jersey City, N.J. Municipal Utilities Authority (JCMUA) is intended to resolve alleged Clean Water Act violations by JCMUA for failing to properly operate and maintain its combined sewer system. These included releases of untreated sewage into the Hackensack River, Hudson River, Newark Bay and Penhorn Creek. Under the settlement, JCMUA is required to comply with its Clean Water Act permit and will conduct evaluations to identify the problems within the system that led to releases of untreated sewage. JCMUA will also complete repairs to approximately 25,000 feet of sewer lines over the next eight years. Finally, JCMUA will invest $550,000 into a supplemental environmental project that will remove privately owned sewers from homes in several neighborhoods in Jersey City and replace them with direct sewer connections, creating better wastewater collection in those areas.

- *Evansville (2011)—Clean Water Act*

The city of Evansville, Indiana agreed to make extensive improvements to its sewer systems that are expected to significantly reduce the city's longstanding sewage overflows into the Ohio River in a comprehensive Clean Water Act settlement with federal and state governments, the Justice Department, the U.S. Environmental Protection Agency, and the state of Indiana. Evansville's sewer system has a history of maintenance and system capacity problems that result in it being overwhelmed by rainfall, causing it to discharge untreated sewage combined with storm water into the Ohio River. Under the settlement, the city will improve operation and maintenance, as well as develop and implement a comprehensive plan to increase capacity of its sewer system to minimize, and in many cases, eliminate those overflows. Costs may exceed $500 million. The plan must be fully implemented by calendar year 2032 or 2037, depending on Evansville's financial health. Additional measures to improve the capacity, management, operation, and maintenance of its separate sanitary sewer system to eliminate overflows of untreated sewage will begin immediately. Also, the

city will take immediate steps to upgrade the treatment capacity of its two-wastewater treatment plants. The measures undertaken by the city of Evansville and required by today's settlement will help eliminate over four million pounds of pollutants and hundreds of millions of gallons of untreated overflows discharged into the Ohio River and Pigeon Creek every year.

- *Saginaw Chippewa Indian Tribe of Michigan (2010)—Settlement between State and Tribe*

The Saginaw Chippewa Indian Tribe of Michigan and the United States settled a longstanding dispute with the State of Michigan over the boundaries of the Isabella Reservation. As part of the settlement, the Tribe, State of Michigan, City of Mt. Pleasant, and Isabella County also executed various intergovernmental memoranda of agreement to improve the parties' interactions regarding day-to-day matters, such as taxation, regulation, land use, law enforcement, and the Indian Child Welfare Act.

- *Indianapolis (2010)—Clean Water Act (Amended Consent Decree)*

The United States and the state of Indiana reached an agreement with the city of Indianapolis to amend a 2006 consent decree that will make Indianapolis' sewer system more efficient, leading to major reductions in sewage contaminated water at a savings to the city of approximately $444 million. Prior to 2006, the city of Indianapolis and its 800,000 residents experienced Combined Sewer Overflows (CSO's) totaling approximately 7.8 billion gallons per year. A consent decree approved by a federal court in 2006 required the city to construct 31 CSO control measures, including a 24-million gallon capacity shallow interceptor sewer, to reduce the city's overflows to approximately 642 million gallons per year. With the proposed changes, the city is now expected to reduce the amount of total annual discharge to about 414 million gallons, a significant improvement from the 642 million gallons that were expected under the original consent decree, and reduce the cost of the project by about $444 million. The project's modifications would also result in an accelerated construction schedule to capture 7 billion gallons of CSO discharges and their associated disease-causing organisms.

- *City and County of Honolulu (2010)—Clean Water Act*

The City and County of Honolulu signed a consent decree intended to address Clean Water Act compliance at Honolulu's wastewater collection and treatment systems. The other parties were the Justice Department, U.S. Environmental Protection Agency, Hawaii Attorney General's Office, Hawaii Department of Health, the Sierra Club, Hawaii's Thousand Friends, and Our Children's Earth Foundation. The consent decree includes a comprehensive compliance schedule for the city to upgrade its wastewater collection system by June 2020. Under the settlement, the Honolulu wastewater treatment plant will need to be upgraded to secondary treatment by 2024. The Sand

Island plant will need to be upgraded by 2035, but could be extended to 2038 based on a showing of economic hardship. Work on the wastewater collection system will include rehabilitation and replacement of both gravity and force main sewer pipes, backup strategies to minimize the risks of force main spills, a cleaning and maintenance program, improvements to Honolulu's program to control fats, oils and grease from entering into the wastewater system from food establishments, and repair to pump stations. The city will be paying a total fine of $1.6 million to be split between the federal government and the state of Hawaii to resolve violations of the Clean Water Act and the state of Hawaii's water pollution law, such as the March 24, 2006 Beachwalk force main break that spilled approximately 50 million gallons of sewage into the Ala Wai Canal.

- *Williamsport (2010)—Clean Water Act*

The Williamsport, Pa., Sanitary Authority (WSA) agreed to make significant improvements to its combined sewer system at an estimated cost of approximately $10 million, in order to resolve long-standing problems with combined sewer overflows to the Susquehanna River, which flows to the Chesapeake Bay. Under the consent decree, WSA will expand the treatment capacity of its Central Wastewater Treatment Plant and increase its storage capacity to cope with high flow during wet weather to guard against combined sewer overflows to the West Branch of the Susquehanna River, and ultimately, the Chesapeake Bay. The Commonwealth of Pennsylvania was a co-plaintiff. When fully implemented, this agreement is expected to reduce the amount of untreated sewage being discharged into the Susquehanna River by more than 52 million gallons per year.

- *Kansas City (2010)—Clean Water Act*

The city of Kansas City, Mo., agreed to make extensive improvements to its sewer systems, at a cost estimated to exceed $2.5 billion over 25 years, to eliminate unauthorized overflows of untreated raw sewage and to reduce pollution levels in urban storm water. The consent decree requires the city to implement the overflow control plan, which is the result of more than four years of public input. The plan is designed to yield significant long-term benefits to public health and the environment, and to provide a model for the incorporation of green infrastructure and technology toward solving overflow issues. When completed, the sanitary sewer system will have adequate infrastructure to capture and convey combined storm water and sewage to treatment plants. This will keep billions of gallons of untreated sewage from reaching surface waters. Kansas City will spend $1.6 million on supplemental environmental projects to implement a voluntary sewer connection and septic tank closure program for income-eligible residential property owners who elect to close their septic tanks and connect to the public sewer. Since 2002, Kansas City has experienced approximately 1,294 illegal sewer overflows, including at least 138 unpermitted combined sewer

overflows, 390 sanitary sewer overflows, and 766 backups in buildings and private properties. The overflows are claimed to be in violation of the federal Clean Water Act and the terms of the city's National Pollution Discharge Elimination System (NPDES) permits for operation of its sewer system. Kansas City's overflows result in the annual discharge of an estimated 7 billion gallons of raw sewage into local streams and rivers, including the Missouri River, Fishing River, Blue River, Wilkerson Creek, Rocky Branch Creek, Todd Creek, Brush Creek, Penn Valley Lake, and their tributaries.

- *Puerto Rico (2010)—Clean Water Act, Safe Drinking Water Act*

The Puerto Rico Aqueduct and Sewer Authority (PRASA) agreed to implement major capital improvements and upgrades to resolve alleged longstanding violations of the Clean Water Act at 126 drinking water plants across the island and violations of the Safe Drinking Water Act at three others. Most of the communities served by the drinking water treatment plants that will be upgraded under the agreement are in low-income communities. The consent decree requires PRASA to implement measures to properly handle harmful pollution from 126 drinking water treatment plants that discharge into Puerto Rico's lakes, rivers and streams, some of which are sources of drinking water. The work required by the agreement, when fully implemented by PRASA, is estimated to cost more than $195 million. Under the consent decree, PRASA will implement multiple capital improvement projects and other upgrades at 126 drinking water treatment plants and related systems over the next 15 years. PRASA will complete 291 short-, mid-, and long-term capital improvement projects, which will include the construction of 34 treatment systems at facilities that currently are discharging untreated sludge into local waterways, installation of flow meters and high-level indicators at all PRASA facilities, improvements to sampling locations, capacity evaluations at over 50 facilities, implementation of an island-wide preventive maintenance program and facility operator training. PRASA's efforts to improve the water quality of either Lake Toa Vasa or both Lake Toa Vaca and Lake Cidra will address the growing amount of nutrients in the lakes, both of which are drinking water sources for portions of Puerto Rico. Increased levels of nutrients in water bodies can severely impact ecosystems and human health.

- *New Orleans (2010)—Clean Water Act (Amended Consent Decree)*

The Sewerage & Water Board of New Orleans agreed to reinstate its comprehensive program—stalled for several years in the aftermath of Hurricane Katrina—to make extensive improvements to reduce or eliminate sewage overflows into the Mississippi River, Lake Pontchartrain and its storm drainage canal system. According to a 1998 agreement, the Sewerage & Water Board, which operates the publicly owned treatment works that serves the citizens of New Orleans, has agreed to continue to repair its antiquated sewage collection system. Prior to 1998, the system had been overwhelmed causing overflows of raw sewage into waterways and streets of

New Orleans. Those efforts were put on hold for several years due to Hurricane Katrina in 2005. As part of its ongoing remediation program, estimated to cost more than $400 million from its inception in 1998, the board has agreed to repair all of its 62 pump stations damaged by the hurricane, as well as any other hurricane damage in the portions of the collection system served by those pump stations. By no later than July 2015, the board will complete additional studies required by EPA and make all necessary repairs and upgrades to its collection system, including measures designed to provide dependable electrical services at its treatment plant in the event of a future catastrophic event. The 1998 agreement resolved a 1993 lawsuit brought by the United States alleging violations of the Clean Water Act including effluent overflows at the East Bank treatment plant and unauthorized discharges from the East Bank Collection System. A coalition of citizens groups under the direction of the Tulane Law Clinic has joined the government in the action and is part of the modified settlement. The state of Louisiana also participated in the settlement.

- *Other Municipalities and Localities (Various Years)*

In the past, the United States has reached agreements with numerous municipal entities across the country, including: Jeffersonville, Ind.; Fort Wayne, Ind.; Indianapolis, Ind.; Nashville, Tenn.; Mobile, Ala.; Jefferson County (Birmingham), Ala.; Atlanta; Knoxville, Tenn.; Miami; New Orleans; Toledo, Ohio; Hamilton County (Cincinnati), Ohio; Baltimore; Los Angeles; Louisville, Ky.; and northern Kentucky's No. 1 Sanitation District.