

The Environment and Natural Resources Division of the United States Department of Justice: Planning for the Transition to the Next Administration

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If, as it is often described, the United States Department of Justice is the “nation’s lawyer,” then the Environment and Natural Resources Division within the Department is the “nation’s environmental lawyer.” The Division is the dominant litigator in the federal courts in cases arising under federal pollution control and natural resource management laws. It represents federal agencies in bringing criminal and civil enforcement actions against parties allegedly in violation of federal environmental laws, as well as in cases alleging that federal governmental actors have themselves violated those laws.

Because the Environment Division represents both plaintiffs and defendants in environmental litigation, the Division’s role as litigation counsel frequently goes far beyond that of expressing the client’s legal position in the strongest possible way consistent with professional bounds. The Division’s lawyers must necessarily evaluate the competing demands of many client agencies in deciding which cases warrant priority for filing and in allocating the assistance of Division lawyers. Division lawyers also have an overriding responsibility, independent of that of each client agency, to ensure the reasonableness of the legal position advocated by the federal government. In addition, when, as they frequently do, conflicting views arise within the government concerning the meaning of federal environmental law, the Division plays a central role in evaluating the competing arguments and in determining the unified position of the “United States” that the executive branch will advocate in court. A balance must be struck between competing policies and priorities of the Administration that falls within the permissible legal frame-

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work of existing regulations, statutory provisions, and, of course, the Constitution.

It is therefore extremely important that the incoming presidential Administration focus on the work of the Environment Division in planning its transition into office between the election in November and the inauguration in January. During the transition there will invariably be important pending litigation that must be carefully maintained to safeguard the interests of the United States and the important policies and purposes of the nation's environmental and natural resources laws. There will also be significant policy matters implicated by planned and pending litigation that will require immediate attention and sometimes even resolution almost as soon as the new Administration takes office. These related policy matters may include shifting governmental litigation priorities and the pursuit of new litigation initiatives favored by the incoming Administration.

Transitions between administrations are both exceedingly important and extremely challenging for the Environment Division. The Division frequently advances and defends legal positions in litigation in support of policies that are the products of hard-fought disputes within the political process, occurring both between and within competing branches of the federal government as well as between federal and state government agencies. Environmental lawmaking is, by its nature, fraught with political controversy. A new administration invariably shifts the political equation and creates the opportunity for the development of new policy positions that may require the support of very different legal theories.

The challenge of the transition for the Environment Division is correspondingly fraught with potential pitfalls. The Division leadership—both political and career—must be vigilant in maintaining the essential integrity of the Department of Justice that depends on insulation from politics. Yet, the Division must simultaneously be responsive to legitimate changes in policy that may occur between administrations.

This Article offers specific guidance to the drafters of the transition team report on the Environment Division that will advise the incoming Administration about the Division's work. Much of this guidance is based on the authors' intimate knowledge of the Environment Division, the Department of Justice, and the transition process.

Three overarching principles are reflected in the guidance set forth in this Article. First, the transition team should advance a smooth transition process. If done properly, the transition process is what allows power and responsibility to shift effectively between administrations, notwithstanding the existence of strong disagreements and sometimes even animosity between those leaving and those arriving. The nation cannot afford to have those disagreements undermine the immediate effectiveness of the new Administration in safeguarding the nation. To that end, the transition team must set a tone that is respectful to those departing from government service, and it must listen to those both inside and outside the government who can educate the team concerning the immediate challenges of governing.

Second, the transition team must be scrupulously fair and recognize that the Justice Department and the Division must be insulated from politics to ensure the integrity of its law enforcement function, even though Department leadership positions are filled by presidential appointees. The transition team must promote steps to reestablish Division integrity damaged during the Bush Administration through politicized hiring and to improve morale injured through the adoption of untenable legal positions.

Third, the transition team should promote a rigorous and inclusive transition that supports the unique role of the Environment Division in working across agencies to ensure effective implementation and enforcement of environmental laws. This role presents special challenges and opportunities. The challenges derive from the pressure often brought to bear on the Division by powerful economic and political interests that resist full implementation of environmental protection laws.¹ In the face of this pressure, the Division must ensure that legal mandates for pollution control and resource conservation are met. The transition team should focus on ensuring that such mandates are not lost or otherwise undermined by the fragmented law-making and law implementation authority of the executive branch.

A strong transition approach and transition report for the Environment Division will reflect these three principles. A new Assistant Attorney General will want to fashion her or his own priorities for the Division, so a transition report is a guide but not a final plan. Further, no one outside the government—including the transition team—has access to federal agency materials and case strategy because of attorney-client privilege restrictions. The transition team must therefore gather information about cases and make suggestions about areas of focus, but it is the lawyers and officials who lead the new Administration who will make final decisions.

This Article is a guide to the guides. The Article suggests general purposes to be kept in mind by the transition team in light of its important role, and it suggests some specific areas of policy development the team may wish to advocate. Part I presents the history and structure of the Division in order to underscore what the Division has been and what it can be for those charged with preparation of the transition report. Part II discusses the purposes of preparing a transition report and suggests for the transition team several broad areas of focus geared toward securing a smooth transition. Part III describes some of the changes to Division policy and procedure that the transition team may want to advocate in order to promote fairness and restore the Division's independence and integrity in the aftermath of the Bush Administration. Finally, Part IV suggests opportunities for positive change that the transition team may want to explore to assure that the Division's many strengths and capabilities as the nation's environmental lawyer are put to effective use.

¹ See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW*, 24–28 (2004) (explaining that the controversy surrounding environmental law stems from inherent “conflicts over enormous natural resources wealth, human health, and sharply contrasting values”).

I. DIVISION HISTORY AND OPERATIONS

The transition team for the next Administration will find an Environment Division with extraordinary responsibility, talent, and potential. Anyone preparing a transition report needs to be familiar with the structure of the Division as well as its basic background and historical context in order to understand how to maximize the Division's capabilities and its possibilities for development.

The new Administration will likely inherit a Division with approximately 420 attorneys, organized in nine litigation sections and one administrative section, 660 total staff (including attorneys),² a budget for the year of approximately \$125 million,³ and field offices in six cities.⁴ The Division's mission sweeps broadly to include cases brought under over 200 statutes covering pollution, public lands and natural resources, wildlife, certain Indian cases, and land and inverse condemnation.⁵ These resources and broad areas of jurisdiction empower the Division to have an enormous impact on federal environmental law and the nation's environment.

As the transition team considers ways to strengthen the Division's position as the nation's premier environmental law firm, it should look to the history of the Division's growth for insight into its current role and its ongoing potential to transform federal environmental initiatives. In particular, the tenure of James W. Moorman, appointed by President Carter in 1977 as Assistant Attorney General, provides inspiration for an administration seeking a Division able to anticipate and promote developments in environmental law and regulation.

The Division's predecessor, the Public Lands Division, was created on November 16, 1909, by Attorney General George Wickersham.⁶ Its responsibilities, which extended to all cases concerning "enforcement of the Public Land Law" including Indian rights cases, were to be carried out by only six attorneys and three stenographers.⁷ By 2004, the Division had expanded to include 625 full-time employees⁸ with a budget of approximately \$105 million (\$77 million through the Justice Department appropriation and \$28 million from the Environmental Protection Agency (EPA) for Superfund).⁹ This

² Interview by Lois Schiffer with Environment and Natural Resources Division source, in Wash., D.C. (Mar. 27, 2008).

³ Of this amount, \$100 million is funded through the Department and \$25 million is funded through the Environmental Protection Agency Superfund program. *Id.*

⁴ The six cities are Anchorage, Boston, Denver, Sacramento, San Francisco, and Seattle. Env't & Natural Res. Div., U.S. Dep't Justice, About ENRD, http://www.usdoj.gov/enrd/About_ENRD.html (last visited Apr. 8, 2008).

⁵ *Id.*

⁶ *Id.* The Division was later renamed the Land and Natural Resources Division, and then in 1990 the Environment and Natural Resources Division.

⁷ *Id.*

⁸ See Interview, *supra* note 2.

⁹ See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 07-43, SUPERFUND ACTIVITIES IN THE ENVIRONMENT AND NATURAL RESOURCES DIVISION FOR FISCAL

growth was spurred in large part in the 1950s by the establishment of field offices across the country as the nation acquired property for building the interstate highway system, abated in the 1960s, and occurred again in the early 1970s after Congress enacted a raft of new laws to respond to public concern about the environment.¹⁰

Moorman was instrumental in spurring the Division's growth during this latter period. He understood that the sweep of new environmental laws provided the basis for a greatly invigorated Division. His central insight was that the Division's resources were the limiting factor in determining whether the Division would play a significant role in enforcing and defending the nation's new environmental protection laws. Moorman consequently made obtaining more resources a top priority, and he fought hard for significant increases, especially in personnel.¹¹ As a result, Division personnel grew from 226 in 1977 to more than 350 in 1981.¹²

Moorman also reorganized Division resources to reflect the Division's new statutory responsibilities and priorities and to enable the Division to be more proactive in developing new litigation initiatives and theories. For example, he expanded the number of litigating sections from seven to twelve.¹³ Among the new sections was the Policy, Legislation, and Special Litigation Section, a think tank for new ideas and initiatives. This section's attorneys wrote memoranda that surveyed the Division's litigation approaches under existing authorities and explored new ways to serve the purposes of the pollution control statutes. Out of these memoranda grew the Hazardous Waste and Wildlife Sections. Within eighteen months, the Hazardous Waste Section had filed thirty lawsuits seeking the cleanup of abandoned and inactive hazardous waste sites throughout the country.¹⁴ Not only did many of those lawsuits yield relief,¹⁵ but the enforcement initiative brought the problem to Congress's attention, resulting in the enactment of one of the nation's most

YEARS 2004 AND 2005 at 2 (2007), available at <http://www.usdoj.gov/oig/reports/OBD/a0743/final.pdf>.

¹⁰ LAZARUS, *supra* note 1, at 67–75.

¹¹ See *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1980. Part 5: Department of Justice*, 96th Cong. 305–07 (1979) (testimony of Kevin D. Rooney, Assistant Att'y Gen., Admin.).

¹² Compare *id.* with *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies for 1982. Part 6: Department of Justice*, 97th Cong. 360–62 (1981) (testimony of Acting Assistant Att'y Gen. Anthony C. Liotta).

¹³ See *Department of Justice Authorization: Hearing Before the H. Comm. on the Judiciary*, 95th Cong. 144–45 (1978) (testimony of Assistant Att'y Gen. James Moorman); *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies for 1982*, *supra* note 12. In 1980, the Division included the following sections: Appellate; Indian Resources; Indian Claims; Policy, Legislation, and Special Litigation; Wildlife; Marine Resources; Pollution Control; Environmental Enforcement; Hazardous Waste; Energy; Land Acquisition; and General Litigation. *Id.* at 359.

¹⁴ *U.S. Suing 11 Chemical Companies Over Dumping of Hazardous Wastes*, N.Y. TIMES, July 16, 1980, at A10.

¹⁵ See, e.g., *United States v. Solvent Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Diamond Shamrock Corp.*, 1981 U.S. Dist. LEXIS 18568 (E.D. Ohio May 29, 1981).

significant laws, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”).¹⁶

In just a few years, Moorman transformed the work of the Division: he expanded and restructured the resources, responsibilities, and capabilities to better reflect national statutory priorities, and significantly expanded the caseload. As a result, he created an exciting Division known for the superb quality of its work.

The transition team should also take inspiration from Carol Dinkins, who was appointed by President Ronald Reagan in 1981 to replace Moorman. Dinkins maintained the Department’s reputation through the transition notwithstanding the sharply different environmental policies of the Carter and Reagan Administrations. Dinkins made some modifications to the section configuration in the stated interests of efficiency.¹⁷ However, even while pursuing the new administration’s policies, Dinkins quickly earned the respect of career attorneys with her professionalism, understanding of the career civil service, and retention of the ambition of the Division that she inherited from Moorman.

Under Dinkins’s stewardship, the Division embraced an important new initiative. In 1982, the Division created a unit for the exclusive purpose of focusing on criminal prosecution,¹⁸ separated in 1987 into a new Environmental Crimes Section.¹⁹ In addition, the Division staff and budget continued to grow, and the nature of the Division’s caseload evolved, both in response to the expanding role of the Superfund program.²⁰

The transfer of power from the Administration of President George Bush to that of President Bill Clinton in December 1992 and January 1993 is another example of a successful transition for the Division. The policy differences between the incoming and outgoing Administrations were stark, as in 1980. This time, the shift was from a Republican Administration in which the Division was under sharp attack from a Democratic majority in Congress to a Democratic Administration that enjoyed a Democratic majority in Con-

¹⁶ See generally Martin H. Sokolow, Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, and No Solutions*, 14 CONN. L. REV. 307 (1982); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2000).

¹⁷ Dinkins eliminated the Energy Section and folded its duties into the General Litigation Section, and combined the Wildlife with the Marine Resources Section, which today remains the Wildlife and Marine Resources Section.

¹⁸ 1983 ATT’Y GEN. ANN. REP. 150–51.

¹⁹ John F. Cooney et al., *Criminal Enforcement of Environmental Laws: Part I*, 25 ENVTL. L. REP. (Envtl. L. Inst., Washington, D.C.) 10,459, 10,462 (1995).

²⁰ See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T JUSTICE, AUDIT REPORT 07-43, SUPERFUND ACTIVITIES IN THE ENVIRONMENTAL AND NATURAL RESOURCES DIVISION FOR FISCAL YEARS 2004 AND 2005 1–2 (Sept. 2007), available at <http://www.usdoj.gov/oig/reports/OBD/a0743/final.pdf>; see also JUSTICE MGMT. DIV., U.S. DEP’T JUSTICE, BUDGET TREND DATA: FROM 1975 THROUGH THE PRESIDENT’S 2003 REQUEST TO THE CONGRESS 54–61 (Spring 2002), available at http://www.justice.gov/jmd/budgetsummary/btd/1975_2002/2002/pdf/BudgetTrend.pdf (comparing the budget of the Division without funding from Superfund); LAZARUS, *supra* note 1, at 115–16.

gress (until January 1995, when Republicans won control of both Houses of Congress). In general, career staff welcomed the direction of the new Administration to support stronger environmental protection.

Lois Schiffer (one of this Article's co-authors) headed both the 1992 transition and then the Division throughout most of both Clinton terms. Her tenure was a period of great stability for the Division marked by a series of significant and successful litigation initiatives, including emphasis on industry-wide pollution enforcement cases, an effective Superfund program, and successful litigation to defend the President's forest management and other natural resource protection policies. She reinvigorated the Environmental Crimes Section that had been the subject of many problems during the prior Administration. In addition, she worked to ensure that the Division developed effective cooperative relationships with client agencies, U.S. Attorneys Offices, state environmental enforcement agencies, and state attorneys general. Emphasis was placed on strengthening management and providing career managers with tools to be effective. New ethics and alternative dispute resolution programs were developed, and the Division worked on international matters as well. Morale was high, able staff was hired and retained, and the Division prospered. During the 1990s and 2000s, staff size and budget generally increased, though far more slowly than in the 1970s and 1980s as a result of limited governmental resources.

A transition team that learns from Division history can invigorate this important environmental law and public service enterprise through an effective transition to meet the challenges and opportunities of the new Administration.

II. EFFECTING A SMOOTH TRANSITION

A good transition report is crucial to an incoming administration's effectiveness, as it allows the executive to begin the business of governing immediately upon taking office. The transition process for executive agencies following a presidential election is a sprint. This year, there will be fewer than eighty days between the time the next president is elected on November 3, 2008, and Inauguration Day on January 20, 2009. Yet upon taking office, the new President must be prepared to direct the activities of the entire executive branch. The transition team for the Environment Division will have until mid-December to prepare a report that informs the new Administration and provides a blueprint for its early work in the Division.

The team should focus on enabling the Administration to address pressing concerns immediately upon taking office. For example, there may be extremely controversial cases—with briefs due within the first few days or weeks after Inauguration Day—in which the national news media or powerful congressional representatives may take an interest. The new Division leadership needs to be ready for litigation and to respond to related inquiries. There may be cases that the Division needs to file prior to the lapse of stat-

utes of limitations. And, there may even be cases where the new Administration may have a different point of view and want to consider taking the fairly unusual step of changing the federal government's legal position before a court. Among the transition team's most important tasks is to make the incoming Administration and the Division aware of such matters before the President takes office.

Additionally, the report should provide a basis for the Administration to develop a longer-term plan for the Division. A new Administration will likely know its own goals, but not the detailed work of the Division and how it may advance those goals. A good transition report will explain what has to be done right away and over the long term to promote the Executive's purposes. The report should therefore address how the Division fits into the Administration's overall program for the Justice Department, environmental agencies, and the government generally. It should furthermore discuss those factors that may affect the Administration's ability to advance its policies through the Division's work, such as any congressional interest in the Division and its agenda, and a realistic appraisal of budgetary needs.

In order to produce a complete report that can facilitate a smooth and efficient transition, the transition team must employ a fair and respectful process of preparation. The key to such a process is consultation during the initial information-gathering phase with a full range of interested persons and groups who affect and who are affected by the work of the Division.²¹ This is a considerable challenge because of the wide variety of governmental and nongovernmental people, companies, and groups with strong views on environmental and natural resources laws. However, it is essential for two reasons.

First, only by gleaning information from and considering the positions and interests of all significant parties can the transition team design well-considered, comprehensive advice about the Department's long-term activities and at the same time be prepared for controversies that may arise in the first few weeks of the new Administration. The transition team should consult parties as diverse as outgoing political appointees in the Division and its client agencies, representatives of the regulated community, representatives of public interest groups including environmental groups, state and local government officials including enforcement officials, members of Indian tribes, and members of Congress and their staffs. Interviews with the Division's career leadership and staff will be among the most important. There is no more fruitful source of information and advice than the career legal and professional staff of the Division concerning the issues facing the Division and its cases.

Interviewing career attorneys will also serve a second major purpose: to identify and recommend steps to correct problems within the Division and

²¹ Assuring that at least some members of the transition team have experience in or working with the Division will provide valuable understanding and perspective.

improve the efficiency and effectiveness of its work. Career attorneys can provide the transition team with information about the Division's operations. Furthermore, given their enormous legal skills, integrity, and professionalism, no administration can succeed without their support. Providing career attorneys with an opportunity to be heard will establish the basis for a productive relationship between the new Administration and those on whom it must rely.

III. RESTORING DIVISION INTEGRITY THROUGH FAIR HIRING PROCEDURES AND PROFESSIONAL APPROACHES

The Division's career attorneys are crucial to its operation. The Environment Division, like other litigating components of the Justice Department, has few political appointees—an Assistant Attorney General appointed by the President and confirmed by the Senate, one or two political Deputy Assistant Attorneys General, and a few politically-appointed special assistants or counsel. Since James Moorman's era, the great strength of the Division as the nation's premier environmental law firm has come from its long-standing and deserved reputation for excellent career lawyers acting with high integrity.

The transition report may want to focus on two important areas to promote integrity and ensure high morale. Assuring competitive and politically impartial hiring is the first—and an extremely important—step in maintaining and—where there may have been lapses during the Bush Administration—reestablishing excellence and integrity. Second, the Division has been asked to defend some untenable legal positions that have, inevitably, lost in court; putting career attorneys in a position where sound legal advice is consistently ignored to advance partisan interests is demoralizing. A new administration can reverse this approach.

A. *Assuring Non-Politicized Personnel Decisions*

Only through a merit system of hiring and promotion can the Division attract and retain lawyers of excellence and integrity. The transition team should recommend reestablishing the settled tradition of insulating the hiring and promotion of the career attorneys who serve as the backbone of the Division from political considerations and especially from any kind of political litmus test.

Attorneys—both recent law school graduates and those with greater career experience—have joined the Division because of their dedication to public service, their desire to further the interests of the people of the United States, their attraction to the subject matter of the Division's cases, and their commitment to the fair and effective implementation of the nation's environmental and natural resources laws, whether in the context of an enforcement action or in defense of an agency alleged to be in violation of those laws.

Outstanding law students and lawyers will decline to seek jobs in the Division if they fear they will not be hired, promoted, or retained because their political views do not align with those of the administration.

The Department of Justice has failed the critical test of non-politicized hiring in recent years.²² This failure has been most well-publicized in the context of hearings about the hiring and firing of U.S. Attorneys throughout the nation during the past several years. Testimony regarding these personnel decisions made evident that political and other litmus tests have been applied to hiring of career attorneys throughout the Department.²³ This testimony gives credence to reports that political factors improperly influenced career attorney hiring in the Department, including in the Department's crown jewel, the Attorney General's Honors Program,²⁴ which serves as the exclusive means for bringing top law school graduates into the Department's ranks.²⁵

When personnel decisions are based on political factors, some of the best qualified lawyers may be denied career positions, may decide not to apply for them, or may decide to serve only under certain administrations and therefore not develop the skills and knowledge of a career Division attorney. For those who do choose to become career Division attorneys, the potential failure of political appointees to provide effective support may lead to an erosion of morale with a possible concomitant effect on quality of work. If attorneys hired based on political considerations rather than demonstrated excellence decide to continue to work in the Division, their work should be assessed fairly on its quality and merits.

Therefore, assuring competitive and politically impartial hiring, retention, treatment, and promotion is a crucial step in staffing the Division with talented career attorneys to serve as outstanding representatives of the United States in court. The transition report should urge the Division and the Department to promote hiring and retention policies that are based on lawyers' academic and professional qualifications and performance. Whether or not an applicant shares the policy outlook of the client agencies formulating environmental policy to be enforced or defended in court should not be a factor in Division hiring.

²² See Dan Eggen & Paul Kane, *Mukasey Vows Not to Bow to Political Power*, WASH. POST, Oct. 17, 2007, at A1 (describing nominee Michael Mukasey's pledge during the nomination process to depoliticize hiring in the wake of the U.S. Attorneys scandal).

²³ See, e.g., David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. TIMES, May 24, 2007, at A1.

²⁴ Dan Eggen & Amy Goldstein, *Political Appointees No Longer to Pick Justice Interns*, WASH. POST, Apr. 28, 2007, at A2 (describing allegations of political influence in Department of Justice Honors Program hiring); Dan Eggen, *Justice Dept. Hiring Changes Draw Fire, Law Grads Chosen Based on Politics, Say Critics*, WASH. POST, Jan. 12, 2003, at A8.

²⁵ President Dwight Eisenhower's Attorney General, Herbert Brownell, first established the Honors Program as a means to attract the best and the brightest recent law school graduates from across the country to the Department and to public service. Eggen, *Justice Dept. Hiring Changes Draw Fire*, *supra* note 24. The Environment Division relies heavily on the Honors Program and the excellent and diverse group of new attorneys it provides.

A transition report will accordingly need to set forth methods to cast a wide net to identify the next wave of strong and capable public servants. With a change in administration, there is reason to expect an influx of qualified candidates with outstanding credentials that match those of career attorneys already within the Division. It is nonetheless incumbent upon those drafting the transition report to stress that these new hiring opportunities are not an occasion for a new Administration to repeat the errors of the current one by allowing politics to reenter the hiring process for career appointments. Depoliticization of Division hiring is essential for the integrity of the Department, no matter which party is in the White House.

The report should consider several specific proposals. First, it should stress that the Division's hiring program, and its participation in the Department of Justice's Honors Program, should be run by career attorneys and based on principles of broad recruiting, inclusiveness, diversity, and merit. While the political leadership of the Division may be involved in active recruitment of both Honors Program and lateral attorneys to expand the pool of interested attorneys—after all, senior partners in law firms assist in recruitment to underscore the value of new employees—both recruitment approaches and selection criteria must preclude political considerations and, in the first instance, should be left to career staff committees. Second, while interest in the environment, or where appropriate in Indian matters, is a sound and reasonable factor in selection, membership in particular organizations or attendance at particular law schools is not. Third, the idea that the Honors Program should be run out of the Attorney General's office—with the attendant appearance of partisanship—must be set aside.

B. Avoiding Unnecessary Litigation Losses That Demoralize Career Staff

The Division, like the Department as a whole, is ultimately only as effective as the legal arguments that it can make in court in advancing and defending government policies. The Division, accordingly, can undermine its effectiveness by making weak and untenable arguments. The Division's natural preference for strong legal arguments can conflict with the interests of client agencies that simply want unquestioned defense of the policies they have adopted. The transition report needs to address the resulting tension and make clear that the Division need not reflexively defend client agency policies, regardless of the merits of the necessary legal arguments, but instead can and should avoid the ready adoption of untenable legal positions that undermine the Division's long-term effectiveness. Of course, early coordination between the Division and agencies adopting policies and developing regulations is most likely to assure outcomes the Division can comfortably represent.

In addition to diminishing the Division's essential credibility in litigation, the repeated maintenance of untenable legal arguments may have serious impacts on Division morale. It is discouraging to a lawyer for the United States to have to present marginal arguments in federal courts be-

cause political appointees ignored the legal advice of Division career staff. The resulting demoralization can encourage excellent career lawyers to leave the Division prematurely. It also potentially discourages some excellent outside lawyers and potential Honors Program applicants from applying to the Division in the first instance. Additionally, it threatens the credibility and perceived integrity of Division and Justice Department lawyers.

To be sure, government lawyers and government programs cannot win in every case. Indeed, an attorney who wins every enforcement case may be an attorney who is not pushing more aggressive cases. But no attorney likes to lose a case because the client agency failed to follow advice that the policy position was not legally defensible and the agency had clearly stepped outside applicable statutory bounds. Over the past seven years, however, Division attorneys have had to defend a string of cases where courts have roundly rejected clearly erroneous regulations and agency positions with dismissive opinions that suggest a loss of the credibility that the Justice Department must maintain over the long term for successful representation of the United States. In a series of cases, the federal courts have repeatedly struck down federal agency administration of the Clean Water Act,²⁶ Clean Air Act,²⁷ Federal Land Policy and Management Act,²⁸ and National Forest Management Act.²⁹

Two recent high profile decisions made by the EPA seem to be similarly destined, placing the Division in a challenging position in defending its client agency's decision in federal court. In the first, the EPA's Administrator last December announced the denial of a waiver of Clean Air Act preemption rules that California had requested in order to put in place more stringent automobile emission control requirements for the purpose of addressing climate change.³⁰ Not only has that ruling prompted an immediate lawsuit challenging the Administrator's decision,³¹ but it has since been revealed that the Administrator ignored the advice of career employees who made clear their view that denial of a waiver was legally indefensible under these cir-

²⁶ See, e.g., *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) (invalidating agency regulation interpreting meaning of "daily"); *Riverkeeper v. EPA*, 475 F.3d 83, 115 (2d Cir. 2007) (striking down aspects of EPA's "best technology available" for cooling water intake structures).

²⁷ See, e.g., *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2007) (striking down portions of EPA's new ozone standard for being insufficiently stringent); *New Jersey v. EPA*, No. 05-1097, 2008 U.S. App. LEXIS 2797, at *24-25 (D.C. Cir. Feb. 8, 2008) (invalidating delisting rule).

²⁸ See, e.g., *W. Watersheds Project v. Kraayenbrink*, No. CV-05-297-E-BLW, 2007 U.S. Dist. LEXIS 41973, at *61 (D. Idaho June 8, 2007) (striking down Bureau of Land Management nationwide revisions to grazing regulations).

²⁹ See, e.g., *Citizens for Better Forestry v. Johanns*, 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007) (invalidating Forest Service 2005 rules); *California v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (invalidating Forest Service State Petitions Rule).

³⁰ Letter from Stephen Johnson, EPA Administrator, to Arnold Schwarzenegger, Governor of California (Dec. 19, 2007); see also *California State Motor Vehicle Pollution Control Standards*, 73 Fed. Reg. 12,156, 12,156-69 (Mar. 6, 2008).

³¹ Felicity Barringer, *California Sues EPA Over Waiver Denial*, N.Y. TIMES, Jan. 3, 2008, at A14.

cumstances.³² It is the Environment Division that is responsible for appearing in federal court to defend that ruling.

The second, as described in recent news media reports,³³ is even more unsettling. According to those reports,³⁴ EPA's Administrator concluded that the Clean Air Act and scientific information required that the Administrator set a standard for ozone at one level, but he was overruled by the President, who insisted that he set a less stringent standard.³⁵ In dictating that the EPA promulgate a weaker standard, the President apparently ignored the opinion of the Solicitor General that the President's decision rested on a meritless legal theory—that costs could be considered in establishing air quality standards under the Clean Air Act.³⁶ The Solicitor General had so advised the Supreme Court in 2000, and in 2001 the Court unanimously agreed.³⁷

Litigation losses in such cases occur notwithstanding the best efforts of career attorneys in the Division. The Division attorneys understand their professional responsibilities to defend the positions of the client agencies. But repeatedly defending such untenable positions takes a serious toll on Division morale. In addition, these losses reflect poorly on the credibility of the Division and the Department before the federal courts, which affects not only the cases in which those arguments are made but also others that the Division litigates. The credibility of the Division's arguments in court is essential to the Division's ability to represent effectively the interests of the United States, including the furtherance of the important environmental protection and natural resource management policies that are reflected in the nation's laws that the Division enforces and defends. Judges who find arguments untenable—especially when they are made by lawyers for the United States, who are supposed to look out for the interests of the nation—may look less favorably on future arguments made by Division attorneys.

Those who write the transition report will want to focus on redressing damage to the Division's reputation caused by tenuous legal positions that Division lawyers had to maintain during the Bush Administration. The transition team, for instance, may wish to undertake, with the assistance of career personnel both in the Division and client agencies, a full review of the Division's existing docket to determine whether there are pending cases in which the Division's legal arguments are especially weak. Such a review

³² Janet Wilson, *EPA Chief Is Said to Have Ignored Staff*, L.A. TIMES, Dec. 21, 2007, at A30.

³³ See, e.g., Juliet Eilperin, *Ozone Rules Weakened at Bush's Behest: EPA Scrambles to Justify Action*, WASH. POST, Mar. 14, 2008, at A1.

³⁴ We are well aware of the significant discrepancy that may exist between reports in the national news media and circumstances actually occurring within government agencies, and we refer to these cases and reports only for the purposes of illustration. An outstanding transition report should never rely on such reports for a fair and accurate description of the underlying facts, but media reports should serve as a trigger for the transition team's own careful and independent examination.

³⁵ Eilperin, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.* See also *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).

may lead to identification of some cases in which the government's legal arguments are unreasonable and warrant revisiting. A recommendation for a change of position in an enforcement action must be made with special sensitivity to avoid any actual or apparent politicizing of the administration of justice. Nevertheless, in some circumstances, changes of position in either enforcement or defended cases may well be warranted. For example, the new Administration may determine as a "first act" to grant a waiver to California that would moot the problematic defense described above. Even one or two changes of position taken with a client agency in problematic cases may go a long way towards restoring attorney morale in the Division.

For future cases, the transition team may want to consider recommending that the incoming administration carefully coordinate and develop litigation positions and facilitate early consultation when agencies engage in rulemaking. The transition team could also suggest the use of approaches designed to prevent putting the Division in the position of defending extremely weak legal positions. For example, a culture of openness within the Division promotes both the integrity and quality of decisionmaking. Including career staff in phone calls and meetings with high Justice Department officials, client agencies, and those on the other sides of cases ensures that political appointees make decisions based on accurate understandings of cases under review and confirms the integrity of the process by limiting the opportunity for back room dealing. Inclusion of career attorneys at all stages of decisionmaking is supposed to be routine practice, but there have been disturbing reports in recent years that this practice has not been consistently followed at the Department.³⁸ Its reinstatement is accordingly a key step in restoring integrity to the Department, including the Division. By implementing openness, the new Administration will have the opportunity to set a tone for inclusiveness that will improve agency and Division decisions and overall morale and excellence, thoughtfulness, and courage among political and career staff alike.

IV. INCLUDING INNOVATIVE APPROACHES FOR PROMOTING THE PUBLIC INTEREST IN ENVIRONMENTAL PROTECTION

Since the 1970s, a signature strength of the Division has been its development of innovative and creative litigation approaches and programs to address pressing environmental problems that are receiving too little attention. The Division has identified such problems, developed litigation theories capable of providing effective legal redress, and worked with client agencies to bring the necessary litigation to address the problems. In developing these initiatives, the Division has not simply responded to requests for litigation

³⁸ The exclusion of career attorneys from important decisions reportedly occurred in the Civil Rights Division during the Bush Administration. Dan Eggen, *Staff Opinions Banned in Voting Rights Cases: Criticism of Justice Dept.'s Rights Division Grows*, WASH. POST, Dec. 10, 2005, at A3.

made in the first instance by client agencies but rather has examined the law, developed strategies, and worked with (often multiple) client agencies, including U.S. Attorneys Offices and state governments. With its broader, government-wide focus, the Division has been able to spot important new opportunities for litigation initiatives, and to work with several clients to develop the necessary organizational structure, factual support, and institutional support to achieve the important goal of protecting the public.

As previously described, this kind of approach was one of the original central purposes of the Policy Section. Assuring that career attorneys have support and time to look at environmental problems receiving too little attention and to work with other parts of the Division, the Department including U.S. Attorneys Offices, and other agencies to develop tools and approaches to address such problems is an important capacity within the Division. For example, the Division commenced an important initiative in the late 1990s to address the serious public health problems caused by the presence of lead paint in residences. The federal government banned lead in paint in 1979 because of the potential of ingestion, especially by young children, when the paint fragments over time into small chips. The Division, accordingly, developed legal theories to address the problem and worked closely with the Department of Housing and Urban Development, the government of the District of Columbia, and the EPA to develop a series of cases to address problems caused by lead-based paint in rental housing. These successful cases resulted in a number of consent decrees and remediation of thousands of rental units.³⁹

Unfortunately, the Division's capacity to address new threats through coordinated action has languished in recent years. New Division leadership has an opportunity to reinstate the Policy Section's function as a think tank for developing innovative litigation initiatives.

The transition team may want to include proposals for several broad-ranging and ambitious initiatives designed to improve federal implementation and enforcement of environmental laws and regulations to protect the public and the environment. Areas for consideration include climate change and energy; wetlands and water; conservation, greening, and sustainability; and the City Project. Finally, smooth functioning of the Division may benefit from certain managerial changes and improvements that we mention briefly.

A. *Climate Change and Energy*

Climate change is clearly the defining environmental issue of our time. The scientific community has reached near consensus that man-made green-

³⁹ Bill Miller, *Landlords Agree to Fix Lead Paint; D.C. Settlement to Aid Health Efforts*, WASH. POST, July 16, 1999, at B1; Sewell Chan, *Lead Paint in Apartments Costs Landlords \$540,000; Two Companies Agree to Cut Hazards in District*, WASH. POST, Oct. 5, 2000, at B5.

house gas emissions across the world are causing climate disruption and time is getting short to reduce emissions sufficiently to reverse course on potential major damage.⁴⁰ Moreover, the United States, which until quite recently was the single largest source of greenhouse gases, contributing approximately twenty-five percent of worldwide emissions,⁴¹ has an especially compelling obligation to change its conduct quickly. The Supreme Court recognized the scope and scale of the problem in *Massachusetts v. EPA*,⁴² a landmark ruling in which the Court overruled EPA's effort to deny that it had statutory authority to regulate air pollutants that cause climate change.⁴³

Rather than being allowed to focus its attention on developing an effective program to work across the government to reduce greenhouse gas emissions, the Division has been called on to defend federal agencies' inaction in litigation brought by some states. *Massachusetts v. EPA* was one such case. Another case recently filed by California challenges the EPA's failure to grant the state a waiver under the Clean Air Act so that the state can require stricter emissions controls on automobiles than are imposed by federal standards.⁴⁴ A number of states that could adopt California's emissions controls under a provision of the Clean Air Act⁴⁵ have joined in the action.⁴⁶ While states and cities have stepped up to the plate and taken measures to address climate change, including suits against the federal government, the Bush Administration and the Division's leadership have missed an opportunity to design a plan of federal action to address greenhouse gas emissions and the resulting climate change that threatens our world.

The transition report should highlight for the incoming Administration the extent of this opportunity and the aspects of the Division that make it particularly well situated to address climate change. The Division's attorneys have extensive knowledge of federal environmental statutes, have worked with regulatory programs and enforcement approaches, and have been involved with U.S. Attorneys and state governments in every state. They have participated in international organizations such as the Commission for Environmental Cooperation, Interpol, and the International Network for Environmental Compliance and Enforcement (INECE). That experience and the Division's think tank capacity make it ideally suited to create and develop a Global Climate Change Initiative organized across the Division. Such an Initiative would serve as an engine both to invigorate and to unite the Division.

⁴⁰ See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT, CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

⁴¹ See *Graphic Detail: Gas Exchange: CO₂ Emissions 1990–2006*, 447 NATURE 1038 (2007).

⁴² 127 S. Ct. 1438 (2007).

⁴³ *Id.* at 1462–63.

⁴⁴ See *supra* text accompanying notes 30–31.

⁴⁵ See 42 U.S.C. § 7543 (2000) (allowing other states to adopt California's emissions standards provided that the standards adopted are identical).

⁴⁶ Barringer, *supra* note 31, at 33.

The Initiative might begin with an evaluation by each Section of its current docket of cases related to climate change, including an assessment of whether litigation positions are susceptible to future modification in the event of possible changes in underlying Administration policy and/or federal law related to climate change. Any such assessment would necessarily be undertaken in close coordination with client agencies.

Additionally, the Policy Section could undertake an in-depth examination of how existing legal authorities could be used to begin to address climate change. For example, there are a host of statutory provisions within the Clean Air Act governing regulation of stationary and mobile sources that could be enlisted to address climate change.

The transition report should also consider the need for the Division to stand ready to work closely with the Administration and Congress on pending climate change legislation and particularly to help assure the effectiveness of any law passed. In light of the wide-ranging nature of climate change, the legislation will likely sweep in the work of many sections of the Division, including Environmental Enforcement, Environmental Defense, Environmental Crimes, Wildlife and Marine Resources, and, of course, the Appellate Section. The legal issues that arise will be complicated, controversial, and pressing, and a Division-wide Climate Change Initiative would be an effective tool in this key area.

To assure a comprehensive approach within the Justice Department, the report may recommend that the Division work closely with other components of the Department and with its client agencies. For some areas of law currently handled by other Divisions in the Department, transfers of authority to assure a uniform and consistent approach may be warranted.

The report could also review client agencies with which it will be important for the Division to work on this issue, other than the traditional environmental agencies such as the EPA, in order to capitalize on its uniquely inclusive role in the federal government. The Department of Energy is one obvious agency but not the only one. It may be sensible for the Division to work closely with the Department of Agriculture on climate-change-related programs. If corn-based ethanol, or other sources of ethanol, are subsidized by USDA to encourage their development, litigation that arises from such programs will have a direct effect on the environment and could benefit from the Environment Division's expertise.

Finally, to assure that climate change litigation, and in particular a Global Climate Change Initiative, can be effective, the transition report should anticipate for the incoming leadership how climate change and related energy litigation—some of which is already handled by the Division—may require and warrant substantial additional resources and how a Global Climate Change Initiative that serves the new Administration's goals may require and use those resources.

B. *Wetlands and Water*

Due to several recent Supreme Court cases, the state of wetlands and the Clean Water Act is in flux.⁴⁷ Efforts at legislative clarification have commenced, but Congress has not yet amended the Clean Water Act to restate the definition of “jurisdictional” waters and wetlands since the Supreme Court rulings. Efforts within the Executive Branch to improve the problem have not resolved it. As a result, the Division is already handling a large number of wetlands cases and dealing with challenges in Clean Water Act cases. A transition report should assess what administrative, legislative, and legal approaches are necessary to assure that functioning wetlands continue to protect the waters of the United States, and that jurisdictional questions do not mar effective water pollution control efforts.

In addition to water quality issues, water quantity issues are increasing across the country. The Division has long handled water allocation issues in the West; those problems are now of even greater importance as such difficulties rapidly move east and growing cities like Las Vegas and Phoenix continue to face water supply problems.⁴⁸ The transition report may want to consider recommending the establishment of a special “Water Project” that assesses water allocation and water quality laws across the board, and develops possible new approaches.

Approaches may include working with a task force from across the federal government, possibly including state officials as well. For example, because the U.S. Army Corps of Engineers has not delineated all wetlands across the country, there is often no administrative record on which a challenge to delineation is tried, and the cases are expert-intensive. Consideration should be given to undertaking a national project to delineate all the land in the United States that may be wetlands, including its cost, its effect on water and land protection, and its effect on litigation.

As the nation turns its attention to conservation and water becomes an ever more precious resource, regulation will become increasingly important. The transition report or task force may therefore want to consider the role litigation does or could play in gaining effective water quality and quantity protections.

C. *Conservation, Greening, and Sustainability*

Historically conservation, greening, and sustainability have been approaches taken through exhortation and commitment rather than through legal regulatory requirements. At the federal level, one example is the U.S. Department of Agriculture conservation reserve program that pays farmers

⁴⁷ See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006).

⁴⁸ See, e.g., *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008); Shaila Dewan & Brenda Goodman, *New to Being Dry, the South Struggles to Adapt*, N.Y. TIMES, Oct. 23, 2007, at A1.

to protect land.⁴⁹ We are becoming more conscious of the importance of such approaches to our long-term success as a nation. A few are now part of our laws, including, for example, Corporate Average Fuel Economy (CAFE) standards for automobiles⁵⁰ and energy efficiency standards for air conditioners and other equipment. As these standards are promulgated under existing and future laws, they are likely to give rise to litigation, both to challenge the standards and to ensure enforcement. The transition report should encourage a systematic look at existing cases, potential legal theories, use of existing enforcement authorities, and potential new legislation to begin to secure conservation, greening, and sustainability.

D. The City Project

As the American population grows, certain cities expand greatly, and concerns about climate change and energy efficiency encourage use of public transit and inner city redevelopment, another productive area of study for the Division would be the examination of existing and potential legal tools to enhance cities and encourage environmentally sound urban growth. The transition report may consider whether a Policy Section project, or a Division Task Force, could productively examine use of legal tools to reinvigorate cities through, for example, use of Superfund and brownfields programs and litigation, transportation-related enforcement, water allocation litigation as some cities grow at a rate unsustainable for their water supply, or environmental justice emphasis and tools. Using a geographic basis as a model for legal examination would be a novel approach and could produce important results.

E. Potential Managerial Reforms

As anyone who has managed knows, management issues and structures are important to effective work. We list in cursory fashion several management reforms that the transition team may want to prompt incoming Division leadership to consider. First, the Division includes several very small sections; reallocation of workload to expand the work of those sections and reduce that of other large sections may provide an opportunity for improved supervision and legal work. Second, reinvigorating the Appellate Section by returning the staffing to appropriate levels and assuring that the work of the Section is not singled out for special political oversight would be a sound step for this Section and its important work. Third, an effective assessment of budget, technology availability and use, and the effect of salaries on hiring and retention in light of the changing market for lawyers is warranted. The assessment should consider in particular whether existing budgetary

⁴⁹ USDA Natural Res. Conservation Serv., Conservation Reserve Program, <http://www.nrcs.usda.gov/programs/crp/> (last visited Apr. 7, 2008).

⁵⁰ See Energy Policy and Conservation Act, 49 U.S.C. § 32902 (2000).

constraints preclude the Division from performing its important functions well. Fourth, the Division is currently handling a substantial number of Indian Tribal Trust claims and has a role in the huge individual Indian trust claims. Large amounts of money are at stake, the work is substantial, and, if not addressed adequately, these cases may affect the Division's capacity for other work. Evaluation of the Indian docket—both defensive (including the trust cases) and affirmative—is warranted. Finally, evaluating how to restore the “network,” the Division's historic approach of considering views of agencies that may have an interest in a case but are not parties to it, would be an important management advance.

V. CONCLUSION

The process of transitioning between administrations is a remarkable phenomenon. No matter how great the policy differences between those leaving and those arriving, a transition carried out in accordance with the three overarching principles set forth in this Article benefits the incoming and outgoing Administrations, the Division and the Justice Department, the federal government as a whole, and the American people. A smooth transition improves government effectiveness because if the outgoing Administration passes the baton cleanly, the new Administration has a sound start. A scrupulously fair transition underscores the importance of Justice Department and Division integrity. A rigorous and inclusive transition supports the unique role of the Environment Division in working across agencies to ensure effective implementation and enforcement of laws related to the environment because the transition process itself will be conducted to emphasize this approach.

The reports prepared by the transition team are always a critical part of the transition process, and that will certainly be true this year for the Environment and Natural Resources Division of the Justice Department. The environmental stakes are as high as ever, and the need for outstanding leadership is especially compelling.

We end as we started. To be effective, a transition report and a new Administration guided by it must reflect the interests and policy priorities of the new President, Attorney General, and Assistant Attorney General for the Environment and Natural Resources Division. The report, its development, and its use by the new Administration are important tools to further those interests and priorities as well as the broad goals of justice. We are hopeful that the next Administration will fully appreciate the necessity for fair and effective defense and enforcement of the nation's environmental protection laws. The Division has had a brilliant past and, under sound leadership, can have an equally brilliant future.