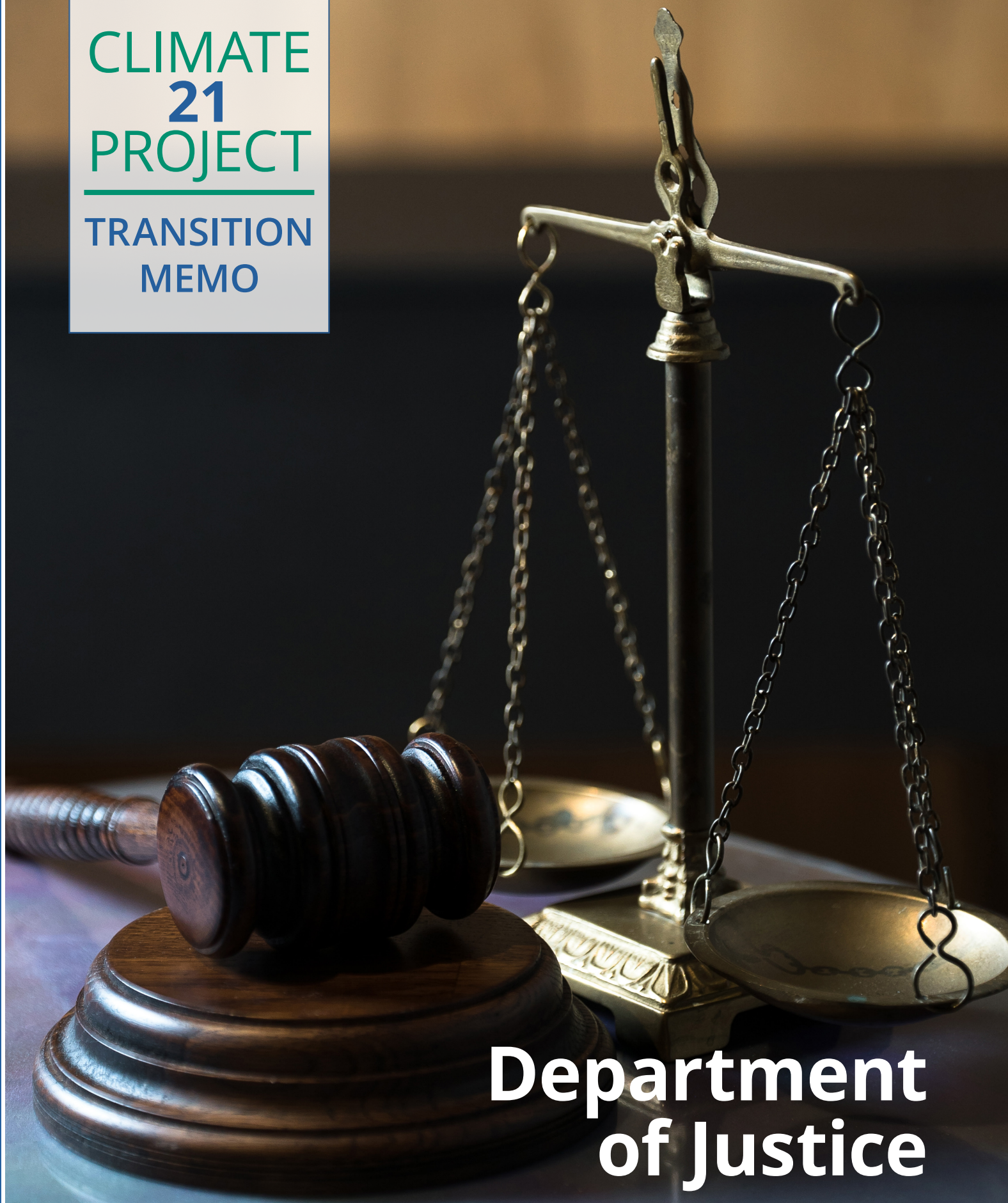


CLIMATE 21 PROJECT

TRANSITION MEMO



**Department
of Justice**

Department of Justice

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** Professional affiliation do not imply organizational endorsement of these recommendations*

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This memo is part of the **Climate 21 Project**, which taps the expertise of more than 150 experts with high-level government experience, including nine former cabinet appointees, to deliver actionable advice for a rapid-start, whole-of-government climate response coordinated by the White House and accountable to the President.

The full set of Climate 21 Project memos is available at climate21.org.

Department of Justice

Executive Summary

In many ways, the Department of Justice is the “tip of the spear” for the incoming administration’s climate strategy. While DOJ might not lead on the President’s climate agenda, many of its client agencies will. On Day 1, DOJ attorneys will already be engaged in litigation that holds deep implications for federal climate policy. Going forward, they will defend marquee climate initiatives. DOJ could also amplify the administration’s climate agenda by prioritizing cases with a climate nexus and negotiating supplemental climate projects in settlements.

To engage DOJ in this important work, the incoming administration should appoint an environmental transition team that is familiar with DOJ and its role with client agencies; encourage a cooperative relationship between the political teams at ENRD and client agencies; invite DOJ leadership to any inter-agency climate task force that is formed; and enable DOJ involvement in key rulemaking and client enforcement strategies at the earliest possible stages. Within DOJ, top leadership should signal that climate protection is a priority and encourage communication between DOJ components to enhance climate capacity.



DOJ employees pride themselves on loyalty to the mission and respect for the rule of law. Stories of career attorneys stepping off of cases or resigning since 2017 reflect unusually public displays of concern for current administration policies. Environmental enforcement is down and morale is low. In light of this, a successful climate strategy should be one that also reinvigorates enforcement, restores integrity to the department, and empowers career attorneys to help drive the climate mission forward.

This memo provides a number of recommendations that DOJ can implement beginning on Day 1 to support the new administration’s climate agenda. It begins with key management, budget, and structural opportunities to make climate a priority across every facet of the department. The second section outlines existing policies that will need to be reviewed—and others that will need to be reinvigorated—in order to pursue a robust climate agenda, and the third looks at how DOJ can best collaborate with its client agencies toward that end. Additional details on all of the proposals can be found in the appendices.

Department of Justice

RECOMMENDATIONS

MANAGEMENT, BUDGET, AND KEY STRUCTURAL AND ORGANIZATIONAL OPPORTUNITIES

- **Exercise funding discretion within DOJ ENRD to support climate litigation.** (*Day 1*)
- **Support modest expansion of the ENRD budget** and explore use of self-perpetuating funds such as the Three Percent Fund and the Superfund. (*100 Days*)
- **Appoint an Associate Attorney General with climate interest** to champion that work in the Department. Consider having someone in the Associate's office participate in any White House inter-agency climate change initiative or task force. (*Day 1*)
- **Leverage non-ENRD resources at DOJ to support the climate agenda.** The Civil Rights Division might work with ENRD, EPA, and EOP to craft an updated version of President Clinton's Environmental Justice Executive Order; the Tax Division might oversee enforcement of a carbon tax. (*100 Days*)

KEY PROGRAM OPPORTUNITIES AND RECOMMENDATIONS

- **Identify and reverse DOJ policies (and client agency policies related to DOJ litigation)** that could hamper robust defense of new climate policies or climate-related enforcement actions. (*Day 1 through the first 100 Days*)
- **Reinvigorate environmental enforcement more generally**, in partnership with enforcement offices in client agencies (e.g., EPA's Office of Enforcement and Compliance Assistance, the Bureau of Safety and Environmental Enforcement at DOI).
- **Coordinate with EPA and other client agencies** on actions to take with pending cases related to the incoming administration's climate policy. (*Day 1, have an action plan; first 100 Days, file motions to stay or take litigation positions, as necessary.*)
- **Embed a DOJ detailee** in a client agency or otherwise offer legal consultation with 1-3 marquee climate rulemakings (where a client agency welcomes the input).

CROSS-CUTTING PRIORITIES AND RELATIONSHIPS

- **Hire DOJ personnel with sensitivity to, relationships with client agencies.** (*100 Days*)
- **Revive the climate working group in ENRD and across DOJ Divisions** to discuss case strategy, consistent with the "unitary executive" principle. (*100 Days, longer-term*)
- **Work closely with U.S. Attorneys and State Attorneys General** wherever possible and appropriate. (*Day 1 and ongoing*)

1 Management, Budget, and Structure

DOJ is a large agency, with more than 110,000 employees and an annual budget of about \$30 billion. While many of the Department's components are unrelated to climate work, DOJ possesses deep environmental expertise and mission-driven, dedicated personnel who can be activated as a powerful force for climate change policy. While much of this expertise resides in the ENRD, it exists across many parts of the Department, particularly offices in the Civil Division. Other Department entities could also be important partners in Department-wide climate strategies, including the Solicitor General's Office, the Federal Programs Branch of the Civil Division, and the Civil Rights Division. (This memo describes some of the key non-ENRD components of Justice in the "Cross-Cutting" section below.)

Strict protocols and norms are deeply embedded into the culture of the Department. While this conservative tradition has been tested by the outgoing administration, in the past, DOJ has proven resilient to the winds of change. This can be advantageous: If an incoming administration signals a return to rule of law and to nonpartisan litigation, the entrenched instincts of the career ranks will re-emerge quickly. That said, efforts to reorganize the Department, particularly any seen as serving a partisan or political purpose, may be met with opposition, and thus take more time and resources to implement than at other agencies.

For instance, the one proposal under consideration is to create a new Environmental and Climate Justice Division at the Department. DOJ insiders have expressed some skepticism of that proposal, warning that it could result in an unproductive turf battle. For one thing, ENRD attorneys work on an array of cases under different statutes, including those that could be used to address pollution and climate effects in frontline communities. There would be no easy way to identify attorneys to peel away for a new Division. This structural change could also potentially silo environmental and climate justice and let ENRD and Civil Rights Divisions "off the hook" from incorporating these issues into their work.

That said, there are a number of options for how to proceed with such a division. The transition team could conduct a process that considers in practical terms what the new Division would spend its days doing. For example:

- As the Division would likely be focused on litigation, what specific statutory provisions could Division attorneys use to pursue environmental and climate justice litigation, and which client agencies would refer such cases?
- Are these cases pursued today and if not, why not?
- Are the obstacles to pursuit sited in the client agencies or at Justice?
- Are these legal obstacles, or are personnel resource-constrained or lacking training or awareness?
- Does expertise currently reside at the Department that could contribute to this work?

Based on the answers to these questions, next steps might differ. If there are insufficient client agency referrals and a need to be creative with legal hooks, perhaps a dedicated "swat team" in the ENRD Law & Policy Section could work with CEQ and sister policy shops in client agencies to draft new cases for ENRD or Civil Rights Division attorneys.

If EPA wants to prioritize cases about legacy pollution that impact communities of color, ENRD attorneys with expertise in Superfund and RCRA cases (which provide the statutory hooks for legacy pollution) could be grouped into one litigation group where they could learn side-by-side about the environmental justice aspects of these

cases. In the past, special litigation groups within ENRD have been created to tackle large policy priorities of client agencies—for example, to bring New Source Review/Clean Air Act claims against most coal-fired power plants in the country. These attorneys remained in ENRD and could still be called upon for other Division work, while spending the bulk of their time building expertise in these air cases.

By contrast, if legal hooks are lacking, creating a case pipeline becomes a legislative issue. As the Department's rules sharply limit interactions with the Hill,¹ this work may be better suited for EOP and CEQ.

These steps could build toward the creation of a new Division, if necessary, or a rebranding of ENRD as the Environment, Climate and Natural Resources Division. That said, there may be pressure to create the new Division early in the Biden administration. But given the confusion it may cause with current career attorneys in ENRD and the Civil Rights Division, it may behoove the administration to wait at least until after time-critical decisions are made regarding pending litigation from the Trump era, by Justice attorneys and their client agencies.

Institutionally, DOJ brings a different perspective to client agency rulemaking and enforcement—and that has the potential to be a double-edged sword. For example, Department attorneys have an understandable focus on litigation risk and can help to reduce that risk. On the other hand, this focus sometimes comes, in the eyes of its clients, at the expense of respect for the agency attorneys, engineers, and scientists who developed the rules or the enforcement action at the outset. Hiring a transition team sensitive to the perspectives of client agencies and DOJ will pay dividends down the road; Similarly, appointing DOJ leadership and hiring staff with established litigation backgrounds and track records of relationships with client agencies will engender inter-agency cooperation on big rules and enforcement initiatives.

ENRD represents about 3% of the Department budget, having been appropriated about \$130 million annually over the last decade. DOJ has some budgetary discretion within ENRD to meet personnel priorities, although the funds earmarked for Superfund litigation do pose a modest constraint. DOJ also has a thin political layer, reflecting its traditional commitment to apolitical decision-making. Combined, these realities suggest ENRD does not need a large infusion of new dollars to build the necessary capacity, but might need some additional funding.

ENRD is headed by a Senate-confirmed Assistant Attorney General (AAG). From the end of the Clinton administration through the second Bush administrations, that AAG was served by four Deputy Assistant Attorneys General (DAAG), including two political appointees and two career civil servants. Each deputy enjoyed separate oversight authority with two or more of the ten ENRD sections: Environmental Crimes; Environmental Defense; Environmental Enforcement; Natural Resources; Wildlife and Marine Resources; Indian Resources; Appellate; Land Acquisition; Law & Policy; and the Executive Office. (See Appendix A for the ENRD Organizational Chart.) In turn, each section was run by semi-autonomous career “chiefs”. During the Obama administration, a fifth Deputy position was created but not always filled. The career DAAGs reported directly to the AAG.

The Trump administration AAG for ENRD, Jeff Clark (who has recently moved to become AAG for the Civil Division), has eschewed reliance on career attorneys in favor of a highly politicized front office. He has restricted the independence of the section chiefs and the two career deputies, who in the past enjoyed equal footing with the political deputies on most matters. He has also engaged outside attorneys for two-year terms to run some of the Division's high-profile litigation, including a lawsuit against the state of California for its work on climate.²

Past administrations have tapped one of the career deputies to serve as Acting AAG for ENRD until a political team is installed. However, given the damage that has been done since 2017, it is strongly recommended that the new President appoint a political Principal Deputy on Day 1, who can then assume the Acting AAG role pending confirmation as AAG by the Senate. (There is also some concern that the outgoing political team may try to convert (or “burrow”) two political appointees into senior career deputies before Inauguration Day, making it even more important to have a Biden appointee in the front office on Day 1.) The political appointee should have previous federal experience, preferably at DOJ, and should be involved with the transition team. During the transition, that person could identify two people to be appointed as ENRD Special Assistants, also on Day 1. They should work cooperatively

¹ Department of Justice Manual, [Title 1-8.200](#) Congressional and White House Relations.

² See *United States v. California*, 2:19-cv-02142 (E.D. Cal 2019) (case dismissed).

with two career deputies, who should resume their traditional duties and independence—so long as those deputies are not the “burrowed” political appointees mentioned above.

Other key Day 1 DOJ appointments will be the Solicitor General (who will represent the U.S. in all Supreme Court cases); the Associate Attorney General (who will supervise DOJ’s litigation divisions); and the AAG for the Office of Legal Policy (the Department’s main line of communication with OMB—and also where DOJ’s “significant policy initiatives” are developed and Executive Orders reviewed) and the Office of Legal Programs (which vets candidates for federal judgeships).

The ENRD AAG has not filled ENRD spots as career people have retired or left the Department, leaving numerous positions open.³ In light of this, the transition team could consider empowering career folks to hire line attorneys starting Day 1. This would enable ENRD and other climate-relevant Justice components to ramp up capacity even before the full complement of DOJ leadership has been confirmed by the Senate. It would also send a strong signal to career attorneys that they will be relied upon to make substantive decisions. While it will be important to hire bright young minds to assist in climate work down the road, the DOJ Honors Attorney program will enable the Department to bring on recent law school graduates by the fall. Meanwhile, it will be important to bring back experienced talent with established relationships with EPA and Department of the Interior (DOI) personnel.

There may be additional budget flexibility to hire career staff if the incoming leadership decides to depart from the staffing model that AAG Jeffrey Clark has pursued. The new AAG should be able to reallocate funds that were used to hire politicals for two-year terms back to permanent career hires. Moreover, the AAG could use this flexibility to fund climate priorities and enhance enforcement.

Thinking proactively towards the Department’s FY2021 budget request, it may be difficult to push for an aggressive increase in ENRD funding, particularly if the economic fallout from COVID-19 continues to affect the federal budget. Nevertheless, in making its budget request, the Department should emphasize ENRD’s track record of bringing in more dollars to the federal Treasury than are appropriated to the Division to support its work. Moreover, it will be important to convey that ENRD needs to be able to support affirmative climate-relevant litigation for its client agencies, while also taking time-consuming steps to undo Trump administration actions and defend replacement rules. These roles may require additional litigation resources.

It may be useful to expand self-perpetuating “off the budget” funding sources for ENRD and DOJ. ENRD receives an annual allocation of funding from EPA to support Superfund litigation (lawsuits relating to recovery of hazardous substance cleanup costs). In addition, ENRD litigation can be supported by DOJ’s Three Percent Fund, which earmarks 3% of all of the Department’s civil debt collection funds (the remaining funds are deposited in the Treasury). The Fund’s Collection Resources Allocation Board (CRAB) determines how these funds will be distributed in the Department. CRAB has supported notable environmental enforcement litigation, including Clean Air Act cases that were filed by ENRD on behalf of EPA in 2000-02. Finally, ENRD can draw upon the Department’s account for Expert Witnesses in litigation. The Three Percent Fund and Expert Witnesses account are more flexible for deployment, as opposed to the Superfund funding that can only be used for one type of case.

The heart and soul of the climate team at the Department of Justice will no doubt be housed in the ENRD. That division has a deep bench of attorneys and professional staff focused on environmental protection, knowledgeable in climate strategy, and experienced in launching cross-topical environmental enforcement initiatives. The Division regularly wins the most popular place to work in the federal government, reflecting an ethical, highly motivated, and values-driven workforce. As noted previously, enforcement will be run out of the Environmental Crimes, Environmental Enforcement, and Wildlife and Marine Resources Sections. Defense (or decisions not to defend Trump administration rules) will occur in the Defense and Natural Resources Sections. Appellate should coordinate closely with these sections, initially most intensively with the defensive case work.

³ In addition, a number of Environmental Enforcement attorneys were detailed to the Natural Resources Section to help in defensive lawsuits during the Trump administration. Staying or settling some of these suits should have the added benefit of freeing up career enforcement personnel.

As noted, administrations of both parties have run the Division with a Senate-confirmed AAG and four deputies, including two career and two political appointees (but not confirmed by the Senate). In addition, the AAG has often been supported by one or more Special Assistants. All remaining ENRD employees are career civil servants.

As previously stated, the first Assistant Attorney General for ENRD under the Obama administration created a fifth Deputy AAG position. The ENRD organizational chart in Appendix A reflects that the Trump administration filled that slot with a political appointee. The Division should strongly consider reverting to four deputies, in order to regain the career-political balance that had served the Division for at least the prior three decades. If that step is taken, funding could be freed up to bring on recently retired career staff on a term basis, to fill much needed capacity while the longer civil servant hiring process unfolds. If the fifth deputy were retained, that person could also be designated as the “Climate” deputy that ensures integration of greenhouse gas mitigation and adaptation strategies across the Divisions caseload.

Beyond ENRD, it is critical that senior Department officials prioritize climate change policy and signal its importance in White House meetings and across DOJ’s components. Past ENRD leadership noted a perennial need to demonstrate ENRD’s value to the Department—and having top DOJ leadership bought into that notion would go a long way to elevating climate and environmental issues. Nevertheless, the Attorney General and Deputy Attorney General need not be environmental or climate appointments.

By contrast, climate leadership should be cultivated in the Associate Attorney General’s office.⁴ As evidenced by the DOJ Organizational Chart in Appendix A, ENRD and the other litigation Divisions report directly to the Associate Attorney General. Moreover, there is institutional precedent: A Deputy Associate Attorney General participated in cross-agency conversations about the Clean Power Plan under the Obama administration.

Similarly, the Associate Attorney General’s Office should participate in any inter-agency climate task force convened by the White House. That level of personnel will be able to bring ideas back from a task force and work with ENRD leadership to operationalize them at the Department. This is particularly the case for any work that would transcend litigating divisions and require, for instance, the Civil or Civil Rights Division to cooperate with ENRD. (ENRD should also be represented in an inter-agency task force, to the extent possible.)

Other DOJ components might play a strong role in climate policy as well. For instance, the Aviation, Space & Admiralty Litigation Section in the Civil Division’s Torts Branch played a lead role alongside ENRD in the enforcement cases against BP and Deepwater Horizon following the Gulf of Mexico oil spill in 2010. That section enjoys expertise in maritime pollution issues that might be relevant in the administration’s climate strategy. The Civil Division’s Federal Programs Branch might also play a critical role consulting with climate agencies to reduce their GHG emissions, while engaging in litigation related to waste from nuclear power plants and DOE’s Energy Star energy efficiency program.

In particular, the Civil Rights Division could be a powerful ally in climate justice work. The Civil Rights Division is run by an AAG, a Principal Deputy AAG, and four Deputy AAGs. The Civil Rights Division has been hit even harder by the Trump administration than ENRD. Moreover, it is likely to be tasked with many prospective Biden administration priorities, including criminal justice and police reforms. However, the Deputy AAG overseeing the Housing and Civil Enforcement, and Special Litigation Sections could be a “climate” hire. She or he could play point on joint actions with ENRD, and the drafting of an EJ EO 2.0.

In the past, the Civil Rights Division and ENRD have jointly represented the DOJ on the Interagency Working Group on Environmental Justice. They have also cooperated on environmental cases implicating Title VI of the Civil Rights Act, prohibiting exclusion or discrimination under “any program or activity receiving Federal Assistance.” Following the model of the OSHA-EPA joint enforcement initiative during the Obama administration, client agencies might direct the Civil Rights Division and ENRD to work together on cases involving both civil rights and environmental violations.

⁴ While the optics of engaging the Deputy Attorney General’s office in climate work could carry weight, the office is likely not staffed or structured to drive policy or sustained Department initiatives.

If conditions were right for carbon tax legislation, and the IRS were placed in charge of the program, DOJ's Tax Division could also be engaged in the climate effort as well.

There will be a need for the incoming administration to ramp up capacity in the Office of Legal Policy right away, in order to commence vetting judicial nominees and replenish the federal bench. It will be important to re-establish a transparent, merit-based review process. In addition, the Justice Management Division and the Bureau of Prisons could lead efforts to "green" buildings and facilities under the control of the Department.

2 Key Program Opportunities and Recommendations

Success in climate work at the Department will require a reinvigoration of environmental enforcement generally—and the re-establishment of the rule of law. Doing so will require DOJ to audit existing policies that undermine climate policy and climate-related enforcement actions—and to coordinate with client agencies to reinvigorate environmental enforcement more broadly.

Within ENRD, the sections most likely activated for renewed enforcement will be Environmental Crimes, Environmental Enforcement, and Wildlife and Marine Issues (for Endangered Species Act cases). While all three sections have seen a marked drop-off in enforcement, the Environmental Crimes mission, which primarily handles pollution violations, wildlife crimes, and vessel dumping, is in particular need of revitalization.

The ENRD should partner with the enforcement offices of its client agencies (Office of Enforcement and Compliance Assistance (OECA) at EPA, the Office of Environmental Policy & Compliance and the Bureau of Safety and Environmental Enforcement at DOI, NOAA's Office of General Counsel, Enforcement Section, etc.), to identify strategic enforcement opportunities that match administration priorities. While there will not be climate-explicit litigation hooks at the start of this administration, enforcement could be centered around themes that connect climate interests to more traditional policy areas and administration priorities, for instance, combined themes along the lines of “People First, Healthy Communities, Healthy Climate.” Environmental agencies might seek to use enforcement discretion to focus on violations of environmental law that occur in overburdened, environmental justice communities, or ones that have a climate nexus. Public lands agencies might seek to prioritize enforcement that aligns with Tribal interests,⁵ climate sequestration values, and a responsibility to the American people not to waste natural resources.

In light of the massive protests following the police murder of George Floyd in 2020, along with President Biden's strong support in the African-American community, it may behoove DOJ components to align climate work with civil rights and environmental justice priorities. It is widely acknowledged that President Clinton's Executive Order on Environmental Justice ([EO 12898](#)) expected too much from NEPA and Title VI of the Civil Rights Act. ENRD and the Civil Rights Division could work with EOP to update this Executive Order and to identify legal hooks in environmental laws that might be used to promote environmental justice.

For more operational guidance, incoming ENRD leadership could reinstate the Division's Environmental Justice working group. That group drafted memos for operationalizing EJ in the work of each ENRD section. Those memos are housed at the Law & Policy Section and could provide a good starting point for discussions about incorporating EJ considerations into litigation strategy. Beyond ENRD, the Attorney General might update and enhance Attorney General Holder's [2014 EJ guidance](#), or the 2011 [Environmental Justice Inter-agency MOU](#). In addition, DOJ could re-orient the grants administered by the Office of Justice Programs (OJP) to improve environmental conditions in community well-being programs.⁶

⁵ One of the litigation sections of the ENRD is the Indian Resources Section, which protects public lands held in trust for Indian tribes.

⁶ While the OJP grants tend to be thought of as grants to local law enforcement agencies, two of the four objectives for the OJP grants program in its [FY2016–FY2018 strategic plan](#), for instance, were to prevent and reduce crime (including through wrap-around services for resource gaps in high-risk communities); engage and empower those in at-risk environments (by improving community well-being). Objectives like these could be achieved through real community investment to improve environmental outcomes while enhancing community power.

The Trump administration created policy barriers that have undermined robust enforcement and effective settlement of claims that include community and climate investments. Therefore, any strategy to reinvigorate enforcement will require revisiting these policies.

The transition team should catalog policies put in place by the Trump DOJ that constrain the Department's ability to enforce environmental laws or negotiate settlements that can fund climate mitigation or adaptation activities. Incoming leadership could then revisit and rescind these policies early on in the administration, starting Day 1. For instance:

- A [January 25, 2018 memo by the Associate Attorney General](#) prohibits the use of agency guidance documents as evidence in affirmative enforcement cases, even where these documents have been relied upon by regulators and the regulated community for years and have become part of the interpretative fabric of a rule.
- A [June 5, 2017 DOJ memo and a January 9, 2018 ENRD memo](#) prohibit settlement payments to third parties, for instance to community health centers or land trusts.
- A [August 21, 2019 ENRD memo](#) prohibits supplemental environmental projects (SEPs) in judicial settlements. Billions of dollars in the VW settlement were distributed under a SEP for state electric vehicle charging infrastructure; that investment would be prohibited under current DOJ policy. SEPs, from solar installations on schools to electric bus fleets, deliver real greenhouse gas (GHG) reductions, and train DOJ lawyers to look for climate implications in traditional enforcement cases, which can enhance mitigation efforts even absent any climate-specific laws. They can also be a powerful tool for providing meaningful relief to EJ communities that have been harmed by environmental violations. Rescinding the SEP policy may take some legal analysis and need not be rushed but should be done in the first 100 days.

Similarly, the transition team and incoming DOJ leadership should work with client agencies regarding policies that constrain Department litigators in the Environmental Defense and Natural Resources Sections from effectively defending agency actions. For instance, [EPA Administrator Pruitt issued a policy](#) requiring EPA to conduct extensive affirmative outreach to states and other stakeholders when it received a petition for review of a rule (to fight the so-called “sue and settle” problem, a characterization of DOJ’s typical approach that is hotly contested by career agency attorneys)—and again before settling any litigation over such rule. While drafted by EPA, the policy has serious implications for the DOJ attorneys assigned to these defensive cases. Meanwhile, the DOI Bureau of Land Management (BLM) [no longer requires offsite compensatory mitigation](#) by users of public lands. Prior to the Trump administration, the BLM had used this tool to reach a decision of “No Impact” in NEPA analyses. Failing to require compensatory mitigation may make BLM’s permitting of mining, grazing, and timbering activities less defensible by DOJ when challenged. In a third example, the [White House proposed extensive changes to NEPA rules](#) in January 2020, which if finalized would preclude consideration of climate effects and cumulative impacts. These policies should be revisited on Day 1; in particular, the Trump-era NEPA policies should be reversed in anticipation of a large infrastructure package being enacted by Congress.

Finally, the transition team should track the shifts that have occurred in the Trump administration absent any formal (or at least public) policy. That includes reviewing DOJ’s defensive NEPA cases to determine whether the Department is already defending agency decisions not to consider climate change when considering environmental impacts of federal actions.

On Day 1, DOJ attorneys will have an active caseload with deep implications for the incoming administration’s climate policy. The Trump EPA’s replacement of the Clean Power Plan with the Affordable Clean Energy Rule; rollback of fuel efficiency standards; the rescission of methane standards, and a refusal to consider climate change in NEPA decisions are some of the many cases that may be pending at that time—and in many cases, they involve rules that are already effective.⁷ With a skeleton crew in place at DOJ and the agencies, the smartest course of action may be to immediately seek stays in key cases to give the agencies an opportunity to establish a position on whether

⁷ Interviewees suggested the transition team could use websites curated by [Columbia](#) and [Harvard Law School](#) to identify pending matters. They also suggested looking at the calendar to identify rules that could be subject to the Congressional Review Act, though use of this mechanism has consequences for future rulemaking.

to maintain or withdraw—consistent with the Administrative Procedure Act—regulations that appear harmful, poorly considered, poorly drafted, or otherwise unlikely to withstand judicial review. If briefing extensions or stays of litigation are not granted, the agencies will need to be prepared to take litigation positions. The transition team should identify the critical cases that may still be in play as of January 21, 2021 and game out how to proceed on each depending on the posture of the case at the time.⁸

Further on in the first 100 days, or as client agencies identify climate rulemaking opportunities, DOJ should work with those clients to participate in draft rule reviews. For marquee climate rules, DOJ might consider embedding an attorney from the Environmental Defense Section at the client agency from the publication of the proposal to finalization of the rule. Such an attorney could offer legal counsel on the drafting and communicate the substance of the rule to DOJ attorneys who may be called upon to defend the rule. This role would be markedly different than the role a government detailee usually plays, in that the DOJ attorney would retain their home affiliation and perspective rather than become an EPA attorney for the duration of the detail.

The detail model should be used sparingly. In addition, other mechanisms should be employed to engage DOJ early in the rulemaking or enforcement process. Previous administrations have scheduled regular case reviews between DOJ and its environmental and natural resource client agencies; these could be resurrected with a portion of the meeting dedicated to climate-relevant cases or issues coming down the pike. DOJ need not be involved in every possible climate case or rule that might eventually be referred to the Department. Instead, their involvement could be limited to big programmatic rules related to public lands or forest plans, along with path-breaking rules featuring novel legal arguments.⁹ A less impactful rule, or one that turns on technical rather than legal complexity, by contrast, need not be flagged early. Across the board, strong relationships between DOJ and client agency enforcement and general counsels' offices will be critical.

⁸ There may be climate-relevant cases pending with one or more U.S. Attorney's Offices, as well. Some of these offices have deep environmental expertise and may take on cases that would otherwise be handled by ENRD.

⁹ Interviewees noted that Justice attorneys should not weigh in on the wisdom of an agency's policy but help to figure out how best to accomplish that policy, through the record or the wording of the new rule.

3 Cross-Cutting Priorities and Relationships

Perhaps more so than for other agencies, cross-cutting relationships will determine the success of DOJ's contributions to the incoming administration's climate work. Therefore it is critical that the agency play a supportive, cooperative, and integrated role with its client agencies in any climate work. Recommendations toward that end are outlined below.

WITHIN ENRD

Even within ENRD, affirmative steps can and should be taken to ensure consistent, effective positions in affirmative and defensive litigation as well as between client agencies.

In the Department, attorneys talk about this in terms of a “unitary executive” that takes one position across all cases. To facilitate this consistency, it will be important to work across ENRD sections. ENRD leadership can organize cross-sectional conversations and set a cooperative tone.

There is precedent for this. In the past, the Division has brought attorneys together across sections where their work overlaps, for instance when the Crimes and Civil Enforcement Sections both began litigating Title V air permit claims against power plants and refineries. In addition, in the wake of the 2007 [Center for Biological Diversity v. NHTSA](#) case, the Natural Resources and Environmental Enforcement Sections began coordinating on the inclusion of climate considerations in NEPA analyses.

During the Obama administration, an informal climate group was established across ENRD sections (and DOJ divisions), to share information and strategy within the Department. This could be revived and run by the Law & Policy Section.

At times, the Division may reach a principled conclusion to make arguments that appear to be at odds with one another in different cases. For instance, in the early 2000s, the Environmental Defense Section was defending EPA amendments to Clean Air Act New Source Review (NSR) rules. At the same time, the Environmental Enforcement Section continued to enforce the pre-existing NSR rules against electric utilities, alleging claims based on actions that would no longer be violations after the new rules were finalized. The determination was made that the enforcement actions remained valid notwithstanding a decision to change the law on a going-forward basis. Similar issues could arise in the new administration, if DOJ is prosecuting or defending cases while client agencies are trying to reverse Trump administration policies. In some instances, though not all, a motion to stay the proceedings might be appropriate.

More could also be done to engage ENRD's appellate section, as there is often a disconnect between litigation at the district court and appeals in the circuit courts.

AMONG DOJ DIVISIONS AND OFFICES

Again, some of the Department's environmental work happens outside of ENRD. Whether because ENRD is handing off an appellate case to the Solicitor General's Office, or because the particular matter falls into another area of jurisdiction from the start (for instance, the Civil Division will handle maritime issues and environmental torts), environmental expertise resides throughout the Department and should be leveraged where possible. These possible overlaps were discussed in the previous section; leadership from the Associate Attorney General's Office can help to facilitate coordination and tamp down turf battles.

BETWEEN DOJ AND CLIENT AGENCIES

In the recent past, five agencies have provided ENRD with the bulk of its work. EPA and DOI each represent about 40% of ENRD's caseload, followed by referrals from the Department of Agriculture (Forest Service), Commerce (NOAA), and the Department of Defense (Army Corps). In addition, Homeland Security has played a big role in the Land Acquisition Section's work over the past 3 years, directing that ENRD section to bring eminent domain cases along the U.S.-Mexico border for construction of a border wall. HUD and DOT might become more important as climate-relevant client agencies, if a big infrastructure package were to pass Congress.

During the transition period, it will be important to set a tone of inter-agency cooperation between DOJ and its climate-relevant client agencies. This will allow the agencies to hit the ground running on Day 1, to reconsider Trump-era rules, draft and defend new rules, and enforce climate-relevant laws.¹⁰ Therefore, the client agency transition teams, in particular EPA and the DOI, should have a keen understanding of their relationship with the DOJ. Lisa Heinzerling's role on the transition team and as Senior Climate Policy Counsel at EPA for the first seven months of the Obama administration was held out as a positive example of this strategy. Similarly, CEQ will be a critical ally for climate work at the Department, particularly but not exclusively related to NEPA. Efforts should be made to ensure a productive relationship between the CEQ Chair and the ENRD AAG.

ENRD's Law & Policy Section might be able to establish productive links to policy shops in client agencies—and perhaps even to establish a working group to discuss how to implement an administration climate strategy under existing law. This network might help to temper the conservative tendencies of Offices of General Counsel in client agencies and build cross-agency relationships outside of particular cases or rulemakings.

For more specific case strategy, bonds should be developed between line attorneys as well as between the ENRD acting AAG and client agency leadership. Fortunately, there are good models to follow. For instance, the strong partnerships forged between DOJ and EPA's Office of General Counsel and OECA around the GHG endangerment finding, the Clean Power Plan, and the Clean Cars rule. While some pointed out OECA's tendency to hire leadership from DOJ's Environmental Enforcement Section as a source of tension, others felt this cross-fertilization helped cement collaboration.

EPA and DOI will want to prioritize legally defensible, easily mobilized yet high-impact climate rules. DOJ can help with this priority-setting, at least once client agencies have undertaken an initial assessment. Similarly, DOJ will want to work with these agencies to forge

an impactful enforcement strategy (both generally and with specific regard to climate). The New Source Review initiative was highlighted as a useful model for this type of cooperation.

BETWEEN DOJ AND CONGRESS

Congress funds DOJ and provides oversight to the agency. The tenor of this relationship will rely greatly on who claims the majority in each chamber following the 2020 elections. But in any event, it will behoove the incoming DOJ leadership to build relationships with the Commerce, Justice, and Science Subcommittees of both the House and Senate Appropriations Committees, as well as with the Judiciary Committees. Moreover, someone in the DOJ Office of Legislative Affairs should appreciate and be able to articulate the environmental work of the Department.

As noted, ENRD's budget has remained steady in recent years, and there are unfilled positions. It will be critical to fill those positions as soon as possible in 2021, in part to be able to make the case to maintain current budget levels or to increase the Division's appropriations. One important talking point when advocating for ENRD's budget is that the Division is a good investment, regularly bringing more dollars to the U.S. Treasury than it spends. For every dollar appropriated to ENRD over the ten-year period of FY2009 through FY2018, the Division assessed more than \$21 in fines, penalties, and costs. (Even after removing FY2016 from the calculus—that year ENRD settled both

¹⁰ For instance, several interviewees noted that this DOJ/ENRD transition memo should be shared with client agencies as well as with CEQ.

the Deepwater Horizon and Volkswagen lawsuits—the Division recovered \$11 for every dollar appropriated.) (See “Return on Investment” in Appendix A.) The benefit-cost ratio is even larger when considering the monetized value of Superfund cleanups and protection of natural resources, and the money saved by winning defensive litigation.

One source of funding for ENRD (and EPA) is a share in Superfund cleanup cost recovery. This “off the books” funding can be important to sustain attorney and professional staff efforts at ENRD. Similarly, the Three Percent Fund is used to support DOJ litigation. Exploring other “off the books” revenue to support climate efforts might be a useful exercise.

Finally, DOJ’s climate-relevant client agencies will be called to the Hill to discuss their positions and plans regarding climate change. To the extent possible, DOJ should coordinate with those client agencies on any position that might undercut or appear inconsistent with the positions DOJ is taking in court on the agency’s behalf. The timeline for being invited to the Hill to testify is often quite short, reinforcing the notion that a pre-existing relationship and strong lines of communication will be necessary between DOJ and client agencies to facilitate this coordination.

BETWEEN ENRD AND U.S. ATTORNEYS OFFICES

Ninety-four United States Attorneys serve at the Department in districts around the country. Each office is organized differently and may or may not have environmental expertise. They may receive direct referrals from climate-relevant client agencies; However, they are limited in bringing cases involving “new or unusual issues of law or policy, or issues of national significance.”¹¹

That said, the U.S. Attorneys Offices always house experienced litigators who know the local bar and the federal District Court judges that DOJ trial attorneys will face. Open lines of communication between “Main Justice” and U.S. Attorneys Offices (USAO) will be critical when large or novel climate cases are brought to a district. Assistant U.S. Attorneys often are willing to meet to discuss opposing counsel, unspoken rules of etiquette in the court, and litigation strategy. In some instances, they may join a Main Justice attorney at counsel’s table. There is also support for the idea of building environmental (and climate) capacity at some USAO, through trainings, or details from a USAO to ENRD.

BETWEEN DOJ AND STATE ATTORNEYS GENERAL

DOJ’s environmental work often intersects with that of a State Attorney General’s office (SAGO). In some instances, they may join forces on an enforcement action against a company located in the state where the SAGO is located. On other occasions, the state Attorney General may decline to co-prosecute, or may oppose federal involvement. Where DOJ is in a defensive posture, they may be representing a client agency that has been sued by a SAGO—and they may be joined in their defense by sympathetic SAGOs. Given all of these dynamics, there is no single strategy for working with these entities.

That said, in recent years a subset of SAGOs have led the charge on climate change litigation, both against the federal government and against polluters. In the last two decades, SAGOs have gained extensive experience and therefore have grown in stature on these issues—and ENRD’s relationship with such states should acknowledge this. The incoming DOJ leadership, at least at the Associate AG’s level, should reach out early to state AGs to discuss a range of issues; climate must be on the agenda for those state AGs with a proven track record of climate leadership.¹² In addition, incoming leadership in ENRD and climate-relevant client agencies should reach out to climate-friendly SAGOs and seek their input on administration priority-setting.

Finally, there is a precedent for ENRD and SAGOs to enter into cooperative agreements, to spell out when and how they will work together and to commit DOJ to providing notice to the state AG before initiating an action against a company in that state. Incoming leadership might consider this with several key states, as part of a broader climate strategy.

¹¹ Environment and Natural Resources Division, [Directive No. 2016-04](#), at 3 (cited in the [Justice Manual](#), 5-1.322).

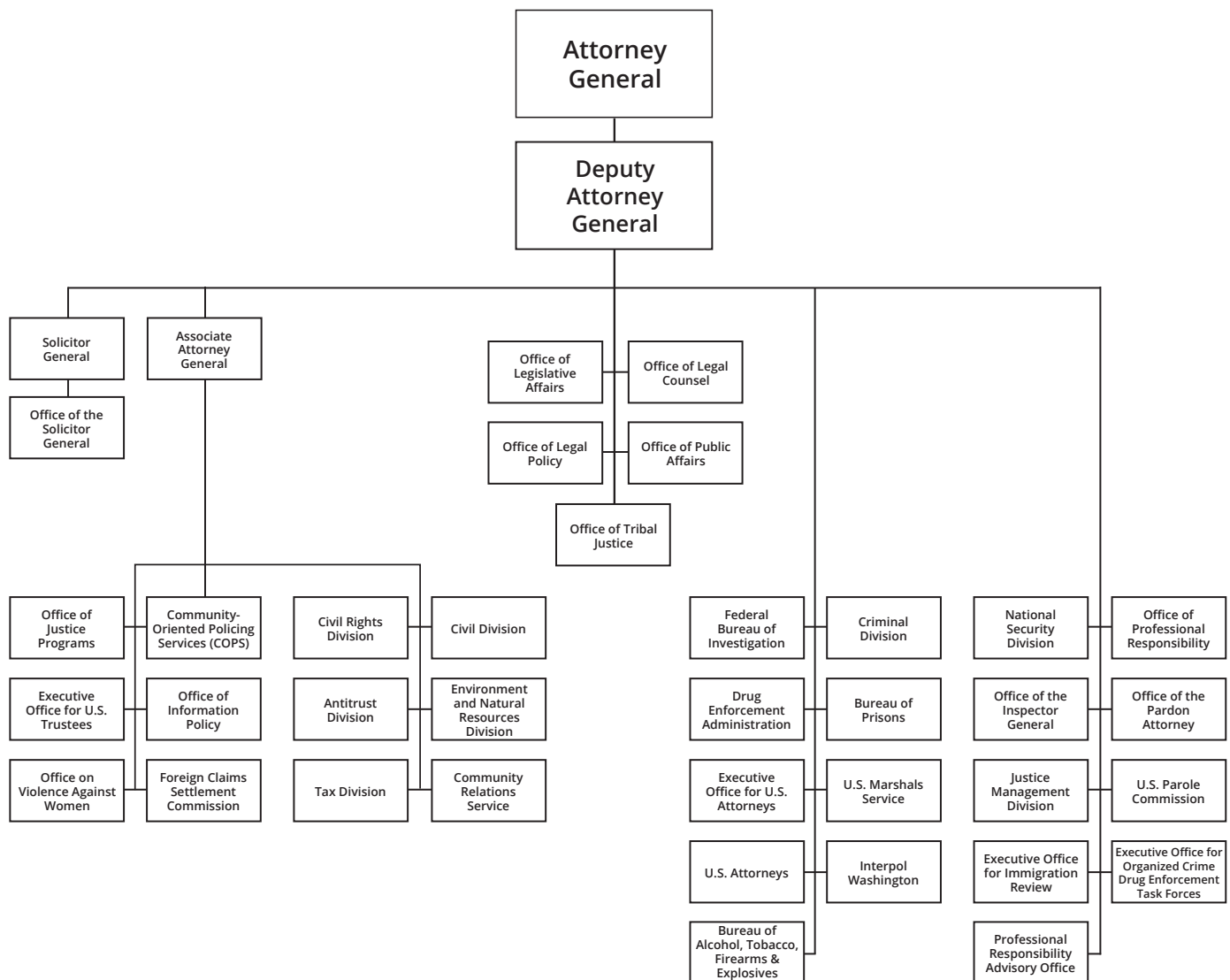
¹² Based on climate litigation and comments on major climate rules, California, Illinois, Massachusetts, and New York should be on this list. Other state AGO involved in climate work include Connecticut, Delaware, Illinois, Maryland, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Vermont, Virginia, and Washington.

Appendix A: DOJ Organization and Budget

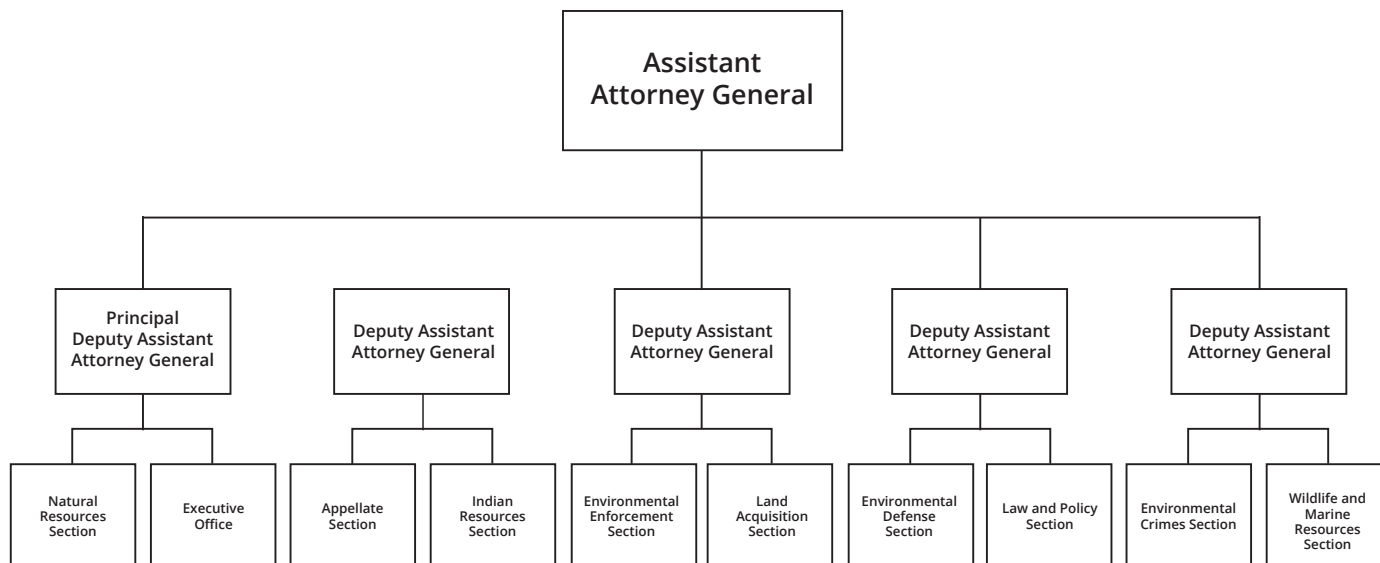
DOJ employs more than 110,000 individuals across the country, in regional enforcement offices, U.S. Attorneys offices across all 50 states and all U.S. territories, the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. Nearly 30% of the staffing and budget go to the federal prison system.

Leadership within the Associate Attorney General's Office (with strong support signals from the Attorney General herself) will be important for prioritizing climate change within the Department, including to its farthest-flung U.S. Attorneys Offices. Moreover, representation by top DOJ leadership will be needed in cross-agency White House convenings and strategy sessions.

U.S. Department of Justice



Environment and Natural Resources Division



The day-to-day operations of defending, implementing, and enforcing climate change statutes and regulations will reside in the Environment and Natural Resources Division (ENRD).

Other divisions and offices that could play a role in climate policy might be, from top to bottom and then left to right on the DOJ organizational chart:

- Office of Legal Policy (vetting judges)
- Office of Legislative Affairs (Congressional affairs, budget)
- Civil Division: Aviation, Space & Admiralty Branch; Federal Programs
- Civil Rights Division
- Tax Division (if a carbon tax is legislated and the IRS is placed in charge)
- Executive Office for U.S. Attorneys/individual U.S. Attorneys Offices
- Office of Justice Programs (community grantmaking)

Discretionary Budget Authority (BA)

The table below displays the Department of Justice's FY2018 enacted appropriation, FY2019 Annualized Continuing Resolution, and the FY2020 President's Budget request.

Federal programs	FY2018 enacted (mn)	FY2019 Annualized Continuing Resolution (mn)	FY2020 Request (mn)
Law Enforcement Operations	\$14,241	\$14,241	\$15,023
Law Enforcement Construction	423	423	-92
US Attorneys	2,137	2,137	2,255
Litigating Components	1,389	1,389	1,431
Executive Office for Immigration Review	505	505	673
Admin/Technology/Other	300	300	289
Adv. Manufacturing Office (EERE/AMO)	350	432	
WCF Rescission and Transfer	-155	-155	-100
Prisons and Detention Operation	8,650	8,650	8,929
Prisons Construction	162	162	-406
Subtotal, Federal Programs (BA)	\$27,653	\$27,653	\$28,002
State and Local Grants¹	\$2,780	\$2,780	\$1,755
Funding from CVF	[-492]	[-492]	[-493]
Subtotal, Discretionary BA w/o Mandatory Savings	\$30,433	\$30,433	\$29,757
ATR and USTP Fees	-357	-506	-531
Total, Net Discretionary (BA)	\$30,076	\$29,926	\$29,226

The chart above is found in the U.S. Department of Justice [FY 2020 Budget Request at a Glance](#).

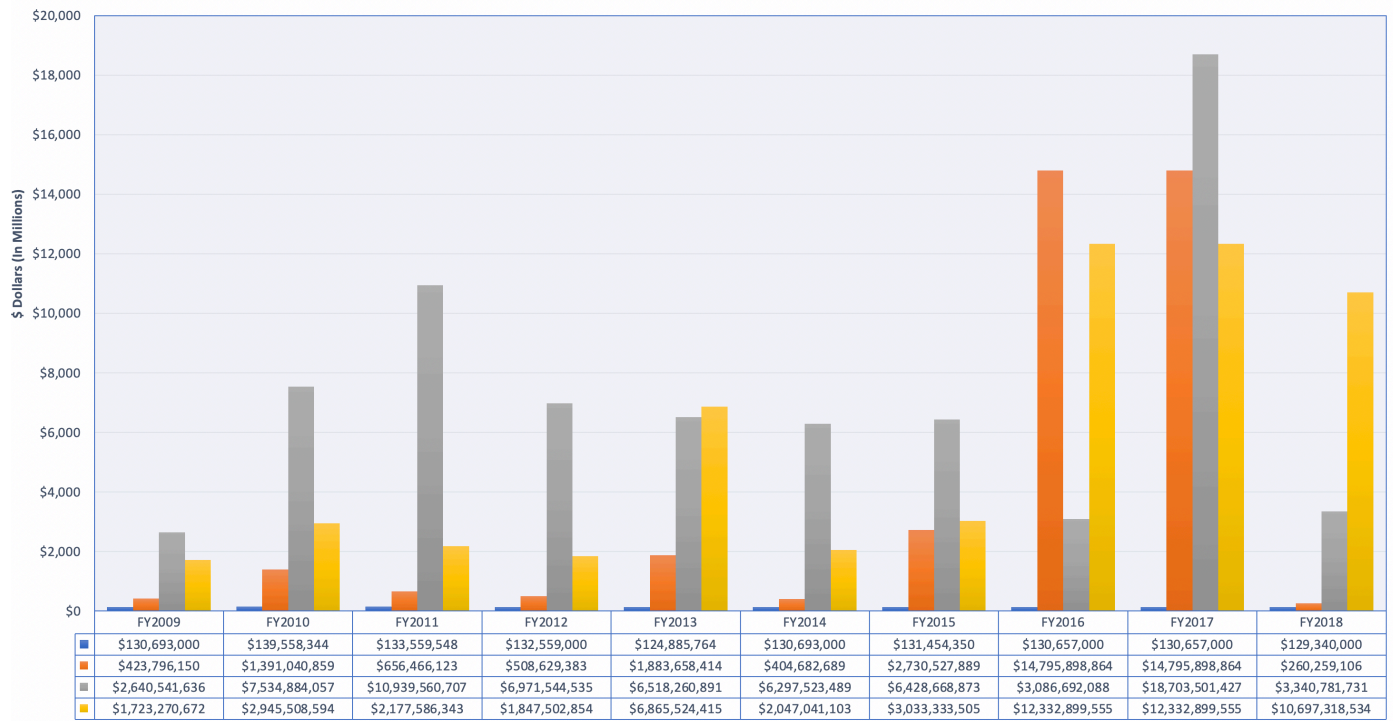
Environment and Natural Resources Division	Direct Positions (thousands)	Estimate FTE (thousands)	Amount (thousands)
2018 Enacted	537	580	110,512
2019 Continuing Resolution	537	580	110,512
Adjustments to Base and Technical Adjustments	0	0	-960
2020 Current Services	537	580	109,552
2020 Program Increases	10	5	960
2020 Request	547	585	110,512
Total Change 2019–2020	10	5	960

Information Technology Breakout (of Decision Unit Total)	Direct Positions (thousands)	Estimate FTE (thousands)	Amount (thousands)
2018 Enacted	18	18	5,499
2019 Continuing Resolution	18	18	5,499
Adjustments to Base and Technical Adjustments	0	0	0
2020 Current Services	18	18	5,499
2020 Program Increases	0	0	0
2020 Request	18	18	5,499
Total Change 2019–2020	0	0	0

As shown above, ENRD is a small part of the DOJ, although it represents one of the five major litigation components. ENRD similarly represents a small portion of the budget—about \$130 million in the last three budget cycles.

Both the ENRD budget breakout and the “Return on Investment” chart on page 18 come from a document entitled, U.S. Department of Justice, Environment and Natural Resources Division [FY2020 Performance Budget/Congressional Budget Justification](#).

Return on investment FY2009-FY2018



ENRD Budget (Includes GLA and Superfund)

Civil and Criminal Fines, Penalties and Costs Imposed (Includes Awards Payable to States, Territories, Local Governments and Indian Tribes)

Value of Clean-Up and Corrective Actions (Includes Federal and State Superfund and Non-Superfund Injunctive Relief, Supplemental Environmental Projects & Environmental Mitigation Projects)

Amount Saved in Defensive and Condemnation Litigation (Excludes USAO Lead Cases)

Appendix B: Timeline of Key DOJ Recommendations

BEFORE DAY 1

- Identify an ENRD point person for the transition team, ideally the person who will be appointed as a political Deputy Assistant Attorney General and then acting Assistant Attorney General on Day 1.
- Identify all pending matters as of Day 1, and create an action plan for coordinating with EPA and other client agencies on actions to take on these matters.

DAY 1

- Appoint a political Deputy Assistant Attorney General for ENRD and then name them Acting Assistant Attorney General.
- Appoint an Associate Attorney General with climate interest and staff that office with personnel who will serve as the DOJ point person for any White House inter-agency climate change initiative or task force. (*Day 1*)
- Exercise funding discretion within DOJ ENRD to support climate litigation.
- Identify and reverse DOJ policies (and client agency policies related to DOJ litigation) that could hamper robust defense of new climate policies or climate-related enforcement actions.

FIRST 100 DAYS

- Hire DOJ personnel with sensitivity to relationships with client agencies.
- Support modest expansion of the ENRD budget and explore use of self-perpetuating funds such as the Three Percent Fund and the Superfund.
- Execute the pending matters action plan (see “before Day 1”), filing motions to stay litigation or taking litigation positions, as determined with client agencies.
- Leverage non-ENRD resources at DOJ to support the climate agenda. The Civil Rights Division might work with ENRD, EPA, and EOP to craft an updated version of President Clinton’s Environmental Justice Executive Order; further down the road, the Tax Division might oversee enforcement of a carbon tax.
- Revive the informal climate group in ENRD and across DOJ Divisions to discuss case strategy, consistent with the “unitary executive” principle.
- Revive the ENRD EJ working group and incorporate climate justice in the discussions. This body could help support a Department-wide process to determine whether a new Environmental and Climate Justice Division would be beneficial.

ONGOING

- Reinvigorate environmental enforcement more generally, in partnership with enforcement offices in client agencies (e.g., EPA’s Office of Enforcement and Compliance Assistance, the Bureau of Safety and Environmental Enforcement at DOI).
- Embed a DOJ detailee in client agency office to assist with 1-3 marquee climate rulemakings (where the client agency welcomes this input).
- Work closely with State Attorneys General and U.S. Attorneys wherever possible and appropriate.