

# The Nation's Environmental Law Firm, ENRD, Hits Reset Button

Soon after President Biden took office, the Department of Justice's Environment and Natural Resources Division rescinded nine enforcement policies issued by Trump appointees as "inconsistent with long-standing division policy and practice." Additionally, the policies "may impede the full exercise of enforcement discretion in the division's cases." With the stroke of a pen, ENRD lifted the prohibition on Supplemental Environmental Projects in civil cases and jettisoned a 2020 memorandum limiting federal overfilling in state enforcement actions.

The move signaled a new chapter at ENRD. Practitioners anticipate renewed activity in three main areas: a funneling of resources to civil and

**The assistant attorney general will inherit a range of institutional and policy issues**

criminal enforcement, particularly under the Clean Air and Clean Water acts; leveraging the division's resources to support the administration's efforts to combat climate change; and a refocusing on underserved and disproportionately impacted communities.

For the division's career attorneys, the last four years have been a roller coaster. Commentators point to data indicating that enforcement activity slowed, while resources shifted to other priorities. ENRD, for example, reported collection of criminal and civil fines declining from an average of \$1.7 billion per year (2015-16) to an average of \$560 million per year (2018-19). And according to some analysts, during Trump's first two years, the country witnessed a significant decrease in federal criminal prosecutions for air and water violations. Meanwhile, ENRD's defensive docket ballooned from 466 cases in 2014 to 648 four years later. But despite this busier case load, the division's roster of attorneys declined.

DOJ is now poised for a reset. For-

mer Judge Merrick Garland has taken the helm as attorney general. As a widely respected jurist on the D.C. Circuit — the second most important court for environmental law — Garland has more familiarity with environmental statutes than any other AG.

Commentators have described him as a centrist among Democratic appointees, with a willingness to defer to agency legal and scientific expertise. Early in his career, for example, he joined a dissent from the denial of rehearing en banc by all the judges on the D.C. Circuit in a case invalidating Clean Air Act regulations under the non-delegation doctrine — his position was later vindicated by the Supreme Court. He later authored an opinion

upholding the constitutionality of the Endangered Species Act, and joined colleagues in upholding Obama-era standards for mercury and air toxics from utilities.

While the AG typically plays a fairly limited role in environmental cases on a day-to-day basis, he is critical for refereeing interagency disputes and managing interactions with the White House. Moreover, Garland will share responsibility for implementing the Biden administration's overarching agenda on climate and environmental justice. A key Biden executive order, for example, requires the AG to consider renaming ENRD the "Environmental Justice and Natural Resources Division"; to direct that division to develop a comprehensive EJ enforcement strategy; and to consider creating a new office (but not necessarily a new litigating division, as had originally been suggested) to coordinate EJ efforts across all DOJ components, especially the Civil Rights Division and U.S. attorneys offices.

In setting ENRD on a new course,



**Ethan Shenkman** is a partner in the environmental practice at Arnold & Porter. Email at [ethan.shenkman@arnoldporter.com](mailto:ethan.shenkman@arnoldporter.com).

the next assistant attorney general for the division will have a full plate. In addition to bolstering ENRD's staff and overseeing a resurgence in enforcement activity, with initiatives expected in multiple sectors, the AAG will be busy guiding agencies in re-considering the prior administration's deregulatory measures, and proactively participating in the design of new agency initiatives to enhance their legal defensibility. The AAG will also be asked to lead the division's efforts in vindicating the rights and resources of Indian tribes, which has historically been an important feature of the division's work.

None of this will come easy. A federal judge, for example, recently denied ENRD's request to stay a case challenging Trump's overhaul of the National Environmental Policy Act's implementing regulations. DOJ requested to put the case on ice until after the new administration's key appointees, including the head of the Council on Environmental Quality, are Senate-confirmed. Environmental groups opposed the stay, and the court agreed to hold ENRD's feet to the fire. The administration may have to make decisions on which aspects of the NEPA regulations to modify or rescind sooner than expected. The uncertainty in the rules will only complicate ENRD's role in defending the decisions of land management agencies under NEPA, particularly as the new administration makes a major push on infrastructure.