

**Responses to Questions for the Record
Submitted by Senator Jeff Sessions
To Ignacia Soledad Moreno**

- 1. Your nomination has been criticized by some environmental groups because of your current position as Counsel for General Electric Company. Last month, the Vice Chairman of General Electric, John Rice, sent an email to colleagues stating in part:**

“The intersection between GE’s interests and government action is clearer than ever... On climate change, we were able to work closely with key authors of the Waxman-Markey climate and energy bill, recently passed by the House of Representatives. If this bill is enacted into law, it would benefit many General Electric businesses. We are continuing our efforts to make certain that a final bill includes provisions to ensure the United States maintains its leading position in renewable energy industry which is an industry sector of vital importance to the future of GE.”

Statements like this and others suggest that General Electric has a significant interest in seeing that legislation passes regarding climate change, and numerous other environmental issues. It also suggests that General Electric has a significant interest in a number of environmental litigation cases that the Environment and Natural Resources Division (ENRD) may be handling.

- a. What steps do you plan to take to ensure that no conflicts arise between your prior work for General Electric and any positions ENRD may take on behalf of the Department of Justice?**

If confirmed as Assistant Attorney General, I will abide by the terms of my May 12, 2009 agreement with the Office of Government Ethics (OGE), the requirements of the Ethics Pledge (Executive Order No. 13490), and my ethical obligations as an official of the Department of Justice and a member of the Virginia State Bar, District of Columbia Bar, and New York State Bar. I will consult with ethics officials at the Department of Justice regarding any conflicts issues arising from my prior work for General Electric, and I will take all necessary steps to comply with their guidance. I will not hesitate to recuse myself when ethical obligations require my recusal. I understand that a copy of my agreement with OGE has been provided to the Committee.

- b. Will you commit to recuse yourself from Division decisions related to litigation or legal advice for the Administration or client agencies on cases or issues that may affect the interests of General Electric, including issues related to climate change?**

If I am confirmed, I will represent the United States as my client and will abide by all applicable ethics commitments and rules. I will consult with ethics officials at the Department of Justice regarding any conflicts issues, and I will take all necessary steps to comply with their guidance. I will not hesitate to recuse myself when ethical obligations require my recusal.

- 2. The Interior Department under the Bush Administration listed the polar bear as a threatened species. The Administration also adopted regulations to clarify that not all CO2 emissions would necessarily cause a reduction in polar sea ice and therefore affect the critical habitat of the polar bear. The Interior Department under the Obama Administration has reaffirmed the basic principle that CO2 emissions outside of the immediate action area affecting the polar sea ice do not have any causal effect on the polar bear. Do you believe that the Endangered Species Act is an appropriate vehicle to address global climate change through litigation?**

I am aware that the Department of Justice is in litigation on the polar bear matter and that the Department is defending the Administration on the decisions made by the Department of the Interior. If I am confirmed, I will ask to be briefed immediately on this important matter. I will work with the Department of the Interior concerning the applicability of the Endangered Species Act to global climate change should the issue arise in future cases.

- 3. The EPA has traditionally viewed itself as the primary agency policy maker on climate change issues, even though many of the studies produced by the agency and positions taken by specific EPA officials lack an objective view of the issue. What roles do you believe each client agency will have in addressing global climate change and do you agree with EPA's assessment that it should be the primary agency responsible for addressing climate change?**

I am not at the Department and have not been involved in any of the agency discussions on climate change, so I do not know the positions of the respective agencies. If I am confirmed, I will ask to be briefed immediately on this important matter and will work with all client agencies on their responses to legal challenges associated with global climate change issues.

4. **In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court significantly restricted federal jurisdiction over wetlands. In the wake of *Rapanos*, the Department of Justice, other federal agencies, and even the lower federal courts have struggled with how to interpret the extent of federal jurisdiction over wetlands. Even within the federal government, there may be conflicting views as to how far federal jurisdiction should extend over wetlands.**

- a. **Do you believe that the Division should attempt to extend federal jurisdiction over wetlands through litigation to protect as much wetlands as possible?**

From my previous tenure in the Department of Justice, I am aware that one of the responsibilities of the Division is to file affirmative cases under Section 404 of the Clean Water Act against corporations or individuals who violate Section 404, which encompasses protection for wetlands. I consider that an important responsibility of the Environment and Natural Resources Division and, if I am confirmed, will ensure that positions taken by the Division on behalf of the United States are strictly in accordance with applicable law and regulations.

- b. **If confirmed, how would you reconcile potentially conflicting opinions within the Division, or amongst various client agencies, regarding the extent of federal jurisdiction over wetlands?**

One of the important roles of the Assistant Attorney General for the Environment and Natural Resources Division is to reconcile the views of applicable federal agencies so that the United States speaks consistently when it files legal briefs. I have had a substantial amount of experience in gaining consensus in such situations, and am confident that I can do so again. When I served in the Division previously, my practice was to listen to all views before making a decision. If I am confirmed, I plan to continue that practice.

5. **In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), the Ninth Circuit invalidated a gold mining company's permit to discharge slurry into a lake under the Clean Water Act. Although the Ninth Circuit ruled against the United States and the federal permittee sought review before the Supreme Court, the United States asked the Supreme Court not to grant *certiorari*. Over the United States' objection, the Supreme Court granted *certiorari* to review the Ninth Circuit's decision and reversed by a vote of 6-3. This is just one of a number of examples in the last few years where the Supreme Court has granted *certiorari* to review an environmental case over the United State's objection. If confirmed, you would be responsible for Division recommendations on whether to appeal adverse decisions from district courts or courts of appeals.**

- a. **Do you believe that in making those appeal recommendations, the Division has a responsibility, particularly in close cases, to defend agency decisions, or that the Division should make an independent determination of what it believes the correct legal interpretation of a statute should be?**

Although I have read the Supreme Court's decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, I was not involved in any of the events that led to that decision. Accordingly, I do not know what appeal recommendation the Environment and Natural Resources Division made regarding that case. I am aware from my prior experience at the Department of Justice that the Division does make recommendations to the Solicitor General on a variety of issues, including positions to be taken by the United States before the Supreme Court. The Supreme Court has well-established criteria defining what types of cases are suitable for its consideration, which include factors such as the existence of disagreement between the United States Courts of Appeals and the importance of the case to the United States. My understanding is that the United States seeks the Supreme Court's review fairly infrequently because the criteria for Supreme Court review are quite stringent.

If confirmed, in making appeal recommendations, I would give great weight to the recommendations of client agencies and the legal analysis of my staff in deciding whether the Division should recommend that the United States appeal or seek *certiorari* in a specific case. Certainly, it also would be my obligation to make an independent legal judgment as to whether the case was an appropriate one for Courts of Appeals or Supreme Court review. Ultimately, the Solicitor General makes the final decision on whether the United States will seek Supreme Court review and each case is decided on its own merit.

- b. **What role should a federal permittee's reliance on a government decision have in the Department of Justice's decision to seek further review?**

The decision of whether to seek appellate or Supreme Court review turns on the recommendations of federal agencies and the application of law to the facts of each case. The fact that a federal permittee has relied on a government decision is relevant to that consideration and would be part of an analysis of the interests that counsel for or against seeking further review.

6. **Former Assistant Attorney General Schiffer has argued that the Bush Administration forced ENRD career lawyers to take “untenable” legal positions.**

- a. **One example of a purported “untenable legal position” was the argument made in *Riverkeeper v. EPA*, 475 F.3d 83 (2d Cir. 2007), in which the Second Circuit, in an opinion authored by then-Judge Sonia Sotomayor, struck down aspects of EPA’s “best technology available” for cooling water intake structures. The Supreme Court granted *certiorari* in that case and earlier this year reversed the Second Circuit in a 6-3 decision in *Entergy Corp. v. EPA*, 129 S. Ct. 1498 (2009). Do you believe that a legal argument that ultimately garners six votes from the Supreme Court, including a vote from Justice Breyer, should be considered “legally untenable” or that such a legal position caused “damage to the Division’s reputation”?**

Although I have read the Supreme Court’s decision in *Entergy Corp. v. Riverkeeper, Inc.*, I was not involved in any way in that litigation and do not know the position of career lawyers in that case. The Supreme Court has decided the *Entergy Corp.* case, and that decision is now binding precedent. As discussed in my response to Question 5.a., there is an established procedure for deciding the position of the United States before the United States Courts of Appeals and the Supreme Court. Whether a particular agency rule is legally defensible will depend on the specific facts of the case and the applicable law.

- b. **Another purported example of an “untenable” legal position that Division attorneys were forced to take was in *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006), in which the D.C. Circuit partially vacated the 2004 rule at issue, but did not strike down the entire rule. Do you believe that an agency rule is legally indefensible when only a specific part of the rule may ultimately be vacated but the rest of the rule is left in place by the courts?**

Although I have reviewed the District of Columbia Circuit’s decision in *South Coast Air Quality Management District v. EPA*, I was not involved in any way in that litigation and do not know the position of career lawyers in that case. As discussed in my response to Question 5.a., there is an established procedure for deciding the position of the United States before the United States Courts of Appeals and the Supreme Court. Whether a particular agency rule is legally defensible will depend on the specific facts of the case and the applicable law. Although a court may partially vacate a rulemaking, the remainder of the rulemaking may remain valid and operable.

- c. **As a general matter, do you believe that the ENRD took “untenable legal positions” under the Bush Administration that were rejected by courts more often than legal positions taken under prior administrations?**

Although I have reviewed many court decisions in which the Environment and Natural Resources Division has represented the United States, I have not reviewed all such decisions nor am I aware of the bases for the positions taken by the Division during the Bush Administration. I do not know whether courts have more often rejected the legal positions taken by the Division on behalf of the United States during the Bush Administration as compared to prior administrations.

7. **Former Assistant Attorney General Schiffer has suggested that the ENRD Appellate Section should not be “singled out for special political oversight” and that the new Assistant Attorney General for ENRD should “reinvigorat[e] the Appellate Section by returning the staffing to appropriate levels.” The Deputy Assistant Attorney General overseeing the Appellate Section for the ENRD has for a number of years been a political appointee, similar to other litigating Divisions at the Department of Justice.**

- a. **Do you agree that Appellate Section staffing should be reduced?**

As I have not been in the Department of Justice for over eight years, I do not know the rationale for the current staffing of the Environment and Natural Resources Division’s Appellate Section. If I am confirmed, I expect to evaluate the entire Division’s workload, resources and budget. Based on this review, I will determine whether the Division’s Appellate Section has the staffing needed to represent the interests of the United States.

- b. **Since the Clinton Administration, the ENRD has had 2 out of 4, or 50 percent, of its Deputy positions filled by career lawyers. By contrast, the Civil Division has just 1 out of 5 Deputy positions filled by career lawyers. Do you believe that ENRD should have a significantly higher percentage of career Deputy positions than any other litigating Division at the Department?**

As I have not been in the Department of Justice for over eight years, I am not familiar with the rationale for the current staffing of Deputy positions at the Department of Justice. If I am confirmed, I expect to evaluate the Division’s staffing as a whole. As a part of this process, I will give careful consideration to the matter that you raise in this question.