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To: The Subcommittee on the Interior, Energy, and Environment of the Committee on Oversight and Government Reform

Re: Testimony at "Restoring Balance to Environmental Litigation" Hearing

It is an honor to provide testimony to this Subcommittee regarding environmental litigation, federal agencies, and fee-shifting statutes such as the Equal Access to Justice Act ("EAJA").

Purpose and Function of Citizen Suits, Fee-Shifting, and Procedural Requirements

As an initial matter, citizen suits against federal agencies, fee-shifting under EAJA, and procedural mandates for major federal actions affecting the environment serve crucial functions in our society. They are – quite literally – the envy of the world when I speak to and teach environmental attorneys in government, public, and private practice around the globe.

Citizen suits are a critical component of our regulatory scheme. They advance goals like human health and ecological protection; they keep agencies effective and honest. Under many environmental statutes, citizen suit provisions empower individuals (and organizations) to enforce the laws as "private attorneys general."[1] In the context of enforcement, this power is carefully circumscribed so that citizen suits supplement, but do not supplant government enforcement. Citizens may also bring suits against government agencies for actions that are arbitrary or unlawful, or for government inaction when an agency fails to perform a mandatory duty.[2]

Where a statute does not specifically provide a citizen right of action, such as the National Environmental Policy Act (NEPA), or where the legal claim is brought pursuant to the Administrative Procedure Act (APA), EAJA becomes the gap-filler. That is, EAJA enables small businesses, individuals, and nonprofit organizations to hold government agencies accountable for unlawful actions and inaction through "fee-shifting." Groups or individuals that otherwise could not afford to bring suit can attempt to recover some fees under EAJA. Because EAJA payments come from the budget of the agency sued, rather than the federal Judgment Fund, it provides a unique agency-specific incentive for lawful conduct.

Finally, of note, our nation's first major federal environmental law, NEPA, remains a key component of our environmental regulatory system. This statute's modest procedural mandates ensure federal agencies consider the environmental impacts of their decisions. NEPA informs

[1] *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251– 1387; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9675; Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328.
[2] *See*, 5 U.S.C. §706.

government decision-makers and the public at large about environmental consequences of federal action.

Empirical Evidence on EAJA Use

Wholesale revision is not necessary to EAJA (or NEPA) at this time. The publically available data do not support the characterization of "abuse" in using these statutes. Specifically, empirical evidence does not support: claims of unjust enrichment of "big green" environmental groups; claims of EAJA acting as an incentive to file frivolous lawsuits; and claims of EAJA burdening agencies financially.

To put this debate in context, EAJA is not even primarily a vehicle for environmental plaintiffs. Environmental EAJA fee awards are miniscule compared to other claims. A 1998 Government Accountability Office ("GAO") report indicated that veteran's disability cases and Social Security disability claims represented 98 percent of EAJA fee applications.[3]

Further, EAJA claims are much rarer than rhetoric suggests. A GAO survey of about 2,500 Environmental Protection Agency ("EPA") cases from 1995-2010 determined that EAJA-awarded payments occurred in merely 8% of environmental cases. [4]

Moreover, fee awards under EAJA and hotly contested provisions of statutes such as the Endangered Species Act ("ESA"), do not burden agencies financially.

- The U.S. Fish & Wildlife Service spent one-half of one percent of the agency's $275 million budget for endangered species work in 2010[5] to "manage, coordinate, track, and support ESA litigation" from industry and environmental groups.[6]
- In fact, the GAO has found that because fees paid out are so small – across 28 agencies – that the payments are of "little value and not needed for internal agency management purposes." [7]

Finally, data indicate that EAJA is not incentivizing frivolous lawsuits or enriching environmental organizations.

- A survey of EAJA cases against the U.S. Forest Service from 1999 to 2005 concluded that there was "insufficient evidence to conclude that the EAJA is a driver for any particular plaintiff to challenge any particular U.S. Forest Service Project."[8]

[3] U.S. GEN ACCOUNTING OFFICE, GAO/HEHS-98-58R, *Equal Access to Justice Act: Its Use in Selected Agencies* 5 (Jan. 14, 1998).
[4] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, *Report to Congressional Requestors: Environmental Litigation Cases Aginst EPA and Associated Costs Over Time* 22 (Aug. 2011).
[5] *See* Press Release, Ctr. For Biological Diversity, Endangered Species Act 99 Percent Effective at Saving Imperiled Species (Dec. 5, 2011).
[6] Letter from Gary Frazer, Assistant Dir. For Endangered Species, U.S. Fish & Wildlife Serv., to Paul Conroy, Chair, Threatened & Endangered Species Policy Comm., Ass'n of Fish & Wildlife Agencies (Sept. 9, 2011).
[7] U.S. GOV'T ACCOUNTABILITY OFFICE, *Report to Congressional Requestors: Limited Data Available on USDA and Interior Attorney Fee Claims and Payments* 9-10 (April 2012).
[8] Michael J. Mortimer & Robert W. Malmsheimer, THE EQUAL ACCESS TO JUSTICE ACT AND US FOREST SERVICE LAND MANAGEMENT: INCENTIVES TO LITIGATE?, 109 J. Forestry 352, 357 (2011).

- The Center for Biological Diversity reports that on average, EAJA fee awards make up only one-half of one percent of its total annual income. [9]
- A U.S. Forest Service study on EAJA revealed that 74.4% of the parties litigating environmental claims against the Service are involved in only one case. [10] Thus, the EAJA is serving the exact community for which it was intended – individuals and small coalitions or businesses. It is not encouraging repeat litigation from large environmental litigation "shops."

The proposition that EAJA encourages frivolous lawsuits also defies logic given the legal safeguards against meritless suits, the difficult substantive hurdles to obtain fee recovery, and the below market recovery rate.

Simply put, to win fees under EAJA a plaintiff must:

- Pass Rule 11 of Civil Procedure;
- Demonstrate standing;
- Overcome highly deferential standards of review of agency action;
- Prevail on the merits and secure court-ordered relief; and
- Defeat the government agency's claim of a "substantially justified" legal position, which is even more exacting than "Chevron deference."[11]

Even then, the fees are well below market rate.[12] Further, in the settlement context the government can – and does – negotiate EAJA fee awards down or away altogether in exchange for more robust injunctive relief for the plaintiff bringing the suit.

In sum, from the perspective of an affirmative environmental attorney, the miniscule recovery under EAJA does not warrant the substantial, and risky, resource expenditure necessary to litigate against a government agency.

Amendments and Risk

As the Subcommittee moves forward in considering potential amendments to various statutes at issue in this hearing, I encourage the members to weigh carefully the risks in significant changes. Painting with too broad a brush in altering EAJA, citizen suit provisions, or even NEPA itself risks devastating consequences: prohibitive reductions in fee awards for veterans and the disabled, and for individuals, small businesses, and groups vindicating rights of the public including health, safety, and the environment. I encourage the members to recommend changes

[9] Press Release, Ctr. For Biological Diversity, Attorney Fees for Landmark Settlement to Save 757 Imperiled Plants and Animals: $168.29 per Species (June 14, 2012).
[10] Mortimer & Malmsheimer, *supra* note 8 at 357.
[11] *See*, *e.g.*, *Hill v. Norton*, 275 F.3d 98, 105-06 (D.C. Cir. 2001) (finding Department of Interior legal position "substantially justified" after holding the agency decision to be arbitrary and capricious on the merits); *see generally Renee v. Duncan*, 686 F.3d 1002 (9th Cir. 2012) (finding the Secretary of Education's legal interpretation of "highly qualified teacher" "substantially justified" despite ruling against the Secretary on step two of *Chevron* framework of judicial review).
[12] To the extent the Subcommittee is concerned with recovery at prevailing market rate (rather than a well-below market rate) for a small subset of EAJA fee awards, I encourage a close examination of the true prevalence of this practice in environmental law suits across the country.

based on careful consideration of data as they relate to specific agencies and agency actions across the entire country – not just one segment of the population.

I look forward to the opportunity to discuss these issues further at the hearing and answer your questions.

Very Respectfully,

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