Written Testimony of Travis Joseph
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before the
Subcommittee on Oversight and Investigations
of the House Committee on Natural Resources
"Abuse of the Equal Access to Justice Act by Environmental NGOs"
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Good morning Chairman Gosar, Ranking Member Dexter, and members of the Subcommittee. Thank you for the opportunity to address the Subcommittee on Oversight and Investigations of the House Committee on Natural Resources on the Equal Access to Justice Act.

Introduction and Background

I am Travis Joseph, the President and CEO of the American Forest Resource Council (AFRC). AFRC is a non-profit trade association representing the forest products sector in the West, including members in Montana, Idaho, Washington, Oregon, California, and Nevada. AFRC works on behalf of the mills, loggers, contractors, truck drivers, and working family businesses that help steward America's federal forests while producing world class wood products every American uses every day. Our members care deeply about the health and sustainability of public forestlands, on which their businesses and communities depend. The forest products sector is the lifeblood of many rural communities throughout the West.

Although AFRC has received Equal Access to Justice (EAJA) awards in the past, I am here to strongly encourage Congress to support surgical reforms to EAJA in the environmental and natural resources space. If you want better conservation outcomes for wildlife, our public lands and forests, and our clean air and water, Congress must reform and modernize EAJA. This can and should be a bipartisan effort.

Throughout this testimony, I draw on the experience of AFRC, including its robust legal program where we regularly intervene in federal administrative proceedings and lawsuits to defend good forest management projects and regulatory decisions. I also draw on my experience as a former Congressional staffer who worked on this committee under former Ranking Member Peter DeFazio of the 4th Congressional District of Oregon.

Litigation on Public Lands: Not In My Back Yard

Here is the uncomfortable truth about environmental litigation on public lands today: it has become less about faithfully and transparently executing federal laws and more about an advocacy tactic used by a small number of well-organized, well-funded nonprofits to stall, delay, or stop public projects that don't align with *their* values.

Most federal forest management projects are subject to the National Environmental Policy Act (NEPA), which has been the predominate legal hook for legal challenges to active forest management on federal lands. NEPA is a procedural statute. NEPA requires agencies to prepare a detailed Environmental Impact Statement for actions "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If an action does not result in "significant" impacts, an Environmental Assessment can be used, which is intended to be a concise

environmental analysis document (but rarely is). The differences between these two types of NEPA documents can be substantial, both from a cost and timing perspective.

According to a 2024 Breakthrough Institute report entitled "Understanding NEPA Litigation, A Systemic Review of Recent NEPA-Related Appellate Court Cases," nonprofits instigated 72% of all NEPA challenges that reached the appellate courts. The report noted:

- Public lands management projects were the most common subject of litigation (37%), the greatest share of which (47%) challenged forest management projects.
- Just 10 groups filed 67% of the challenges to forest management projects nationwide.

Three of the top four anti-forestry litigators are based in Oregon. All of the top 10 anti-forestry litigants are active in the American West where we have a forest health and wildfire crisis impacting tens of millions of acres and putting communities, public health, and public safety at risk.

Collectively, anti-forestry litigants ultimately won just 23% of those cases in the appellate courts. However, many adverse district court decisions are not appealed, so it is difficult to ascertain an overall rate at which these groups are prevailing. We do know that 74% of all district court rulings that found NEPA deficiencies resulted in a pause of proposed projects according to a 2025 Breakthrough Institute Report. Either way, these groups "win" by adding more process, cost, and risk-aversion to public projects. These critical forest health, wildfire reduction, and wildlife improvement projects undergo years of planning and analysis by Democratic and Republican Administrations.

On average, getting a challenge to an appeals court means adding about 3.7 years to the process of implementing critically needed forest management and fuel reduction projects (2024 Breakthrough Institute report). Because NEPA only has procedural requirements, activist litigation by anti-forestry groups is not changing conservation, or even project-level outcomes on the ground. Rather, it is draining limited agency resources and staff time (see below); it undermines morale and expertise; and it frustrates local, collaborative, science-based decision making by creating risk-aversion and analysis paralysis.

Simply put, the Forest Service and Bureau of Land Management cannot meet the nation's restoration and science-based stewardship needs without Congressional review and modernization of the laws and policies that guide federal land management, including EAJA.

Abuses of EAJA: Real World Examples

Unknowingly, taxpayers are helping fund this activist litigation through EAJA attorney fee awards to tax-exempt organizations. Let me give you a few real-world examples of how this impacts the Forest Service, the most litigated federal agency in the Federal Government, mainly through challenges under NEPA.

Walton Lake Project Litigation

Walton Lake on the Ochoco National Forest in Central Oregon is the forest's most heavily used recreation site. For years, the Forest Service warned that large trees infected with laminated root rot were at risk of falling without warning, forcing closure of parts of the recreation area. To protect visitors, in 2015, the agency proposed a simple, science-based project to remove diseased trees and replant more resilient species like ponderosa pine and larch.

Litigation stopped the project multiple times. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Turner et al.*, No. 16-CV-01648 (D. Or.). Opponents convinced a judge to block the work through a preliminary injunction and were awarded about $201,000 in EAJA attorney fees, even though the project addressed an immediate public safety risk. In fact, the EAJA payout was higher than the cost of the service contract needed to complete the work!

The $201,000 EAJA award was based on "specialty" rates for the attorneys ($425/hour) and work performed by law students and legal fellows from Earthrise Law Center, associated with Lewis and Clark Law School, a private school that charges more than $60,000/year in tuition. The court granted the nonprofit's requested rate of $130/hour for the law students' work, who spent 186 hours on the case, for a total of $24,297. The law students, who are non-attorneys, were reimbursed over the maximum hourly rate under EAJA, which is $125/hour before adjustments for cost of living expenses. 28 U.S.C. § 2412(d)(2)(A) (courts may adjust the maximum rate for cost of living increases).

Given the importance of the project the Forest Service completed more paperwork and analysis and proposed the same project again in 2020. They were sued again by the same anti-forestry group. Three more years of uncertainty and litigation. Ultimately, the Forest Service prevailed in the 9th Circuit. The nonprofit was still not satisfied, and tried to go to the Supreme Court. Ultimately, that attempt was unsuccessful.

The Forest Service started moving forward with the project in 2023. The project is still being implemented today in 2025. All of this – a decade of work, years of litigations, hundreds of thousands of dollars of cost to the taxpayer – to protect the public on a high-use recreation site in Central Oregon from diseased, dying, and hazard trees on a tiny fraction of a national forest. Treating 0.001 percent of one national forest.

Meanwhile, this nonprofit made a small fortunate to delay a project that was ultimately implemented anyway, just ten years later.

Eastside Screens Amendment Litigation

In 2021, the Forest Service made modest changes to one standard in a Clinton-era rule, known as the Eastside Screens, which was intended to be an interim rule impacting nine National Forests.

The Eastside Screens prohibited the removal of any trees larger than 21-inches in diameter in certain circumstances. The Eastside Screens Amendment, however, sought to replace this nearly three-decades-old blanket prohibition with a more flexible guideline that requires the retention of old trees over 150-years-old and large trees, identifying diameter limits based on species type. This guideline would have given land managers science-based flexibility to remove larger trees in forest restoration and wildfire mitigation projects.

In June 2022, six anti-forestry groups filed a lawsuit claiming the Eastside Screens Amendment violated several federal environmental laws, including the National Forest Management Act and NEPA. *See Greater Hell Canyon Council, et al. v. Wilkes*, et al., Case No. 2:22-cv-00859 (D. Or. June 14, 2022). The court ultimately struck down the Eastside Screens Amendment. One reason the Eastside Screens Amendment was found to be unlawful was purely about process, because the Forest Service failed to hold an administrative objection period.

Notably, the court rejected Plaintiffs' arguments that the Eastside Screens Amendment was scientifically controversial under NEPA. Dr. James Johnston filed an amicus brief with the court, sharing a letter signed by 14 forest ecologists, who work for public universities and non-profit organizations, disputing the argument that there is any controversy over the historical forest conditions and the effect of the Forest Service's amendment. The court ultimately concluded that "there is not a substantial scientific dispute about the historical conditions of the eastside forests or the fact that hard diameter limits can constrain managers' ability to achieve desired species outcomes and protect eastside forests from changing fire regimes." *See Greater Hell Canyon Council, et al. v. Wilkes*, et al., Case No. 2:22-cv-00859 (D. Or. Aug. 31, 2023). Thus, there was resounding agreement that the Eastside Screens Amendment was necessary and scientifically supported.

Because Plaintiffs ultimately prevailed, they requested $436,945.85 in costs, fees, and other expenses. In support of their EAJA fee request, Plaintiffs requested specialty hourly rates. Higher rates are available based on a "special factor, such as the limited availability of qualified attorneys for the proceedings involved." 28 U.S.C. § 2412(d)(2)(A). Plaintiffs requested rates ranged from $385/hour to $485/hour for work performed from 2020 to 2024.

Unfortunately, these are not isolated or even unusual cases. But it shows how EAJA can subsidize anti-forestry litigation that delays essential work and forces taxpayers to pay *at least twice*: once for the analysis and project planning, again to defend the project in court, and often again for attorney fees awarded to the groups blocking the project, all while forest conditions continue to deteriorate and the public is put at risk.

This makes no sense. Taxpayers would be outraged if they knew this was happening.

Abuse of EAJA: Real World Consequences

EAJA attorney awards are typically paid out by the action agency budget – the Forest Service or the BLM. If the agency does not have the necessary funds legally available to them, the EAJA award comes from the Treasury's Judgement Fund. 31 U.S.C. § 1304.

Instead of putting taxpayer dollars toward urgently needed work on the ground, the Forest Service is paying more than a million dollars a year in EAJA attorney awards. According to its Fiscal Year 2026 Budget Justification, the agency spent $1.5 million on EAJA fees. This included a $450,000 award for the Kettle Range Conservation Group that opposed the Sanpoil Project on the Colville National Forest. *See Kettle Range Conservation Group v. U.S. Forest Serv.*, No. 2:21-CV-00161 (E.D. Wash.). The Sanpoil Project was focused on improving forest health, ecological restoration, and aquatic habitats through active management on 0.5 percent of the forest (8,600 acres) that is adjacent to the Confedered Tribes of the Colville Reservation, who supported the project to reduce fire hazards to their land.

A month before that, the Forest Service paid $165,000 to the Friends of the Clearwater. The year before that, the Forest Service paid out $1 million in EAJA attorney fees, including $650,000 to the Center for Biological Diversity. That is just the Forest Service!

To get the full picture on EAJA attorney awards related to forest management projects, one would need to review awards from the Bureau of Land Management (Interior), National Marine Fisheries Service (Commerce), and Fish and Wildlife Service (Interior)– all of which are engaged in federal forest and public land management, are regularly sued, and regularly pay out EAJA attorney awards based on legal process technicalities. For the latter two federal agencies, Endangered Species Act consultation and biological opinions are the target, not NEPA.

These attorney awards do not include the significant internal costs the agency incurs to prepare for and participate in litigation, including staff time, resources, and Department of Justice involvement, nor the loss of capacity to advance other critical work. There is no recent analysis of these additional internal costs. However, in 2015, the Bureau of Business and Economic Research for the University of Montana conducted a Forest Service Region One case study, "Understanding Costs and Other Impacts of Litigation of Forest Service Projects." This study illustrates how litigation has a significant financial impact on the Region's Congressionally appropriated timber program budget, as well as the economic impacts to local communities. Congress should consider whether those dollars would be better spent supporting firefighters, recreation, and land stewardship rather than providing windfall attorney fees.

EAJA awards and litigation also undermine agency morale and frustrate scientific expertise and deference. I encourage you, Members of this Committee, to ask federal employees – the experts – how getting sued by activist litigants and awarding EAJA attorney awards from agency budgets impacts their daily work and executing the agency mission they have devoted their professional lives to. This is not a partisan issue, and you would hear that from federal employees who are impacted by EAJA attorney awards.

Common Sense, Bipartisan Solutions

The good news is that Congress can work together to make common sense, bipartisan changes. Congress should:

At a minimum, improve reporting of EAJA awards. Some progress has been made legislatively, including EAJA reporting requirements in the John D. Dingell Jr. Conservation, Management, and Recreation Act in 2019. As referenced above, in recent years agencies have

often reported EAJA awards in annual budget justifications. The Administrative Conference of the United States also tracks EAJA awards.

However, clear, consistent, timely, transparent EAJA information is difficult to find. EAJA awards may be awarded by the Court or awarded by the Justice Department through a settlement. When EAJA is awarded through a settlement agreement, the actual paid amount may not be publicly available. For example, in the Eastside Screens Amendment Litigation discussed above, although Plaintiffs' requested amount of $436,945.85 is publicly disclosed, what the Justice Department actually paid in the settlement is not publicly available.

In the Walton Lake Project Litigation example provided above, court documents show one plaintiff received an almost $183,000 EAJA award in 2018, with an additional $18,000 supplemental award, totaling approximately $201,000. In the Forest Service Fiscal Year 2022 Budget Justification, Lewis and Clark College is listed as receiving a $194,000 EAJA award related to the "Walton Lake Restoration Project" in March 2019. The Administrative Conference of the United States EAJA database does not list any award to Lewis and Clark College. Are these different EAJA awards? What was the actual amount? Who received it? When? Who paid it?

Eliminate the "net worth" exemption for NGOs. There are already net worth and financial limits for individuals and businesses receiving EAJA awards. Individuals with a net worth over $2 million, organizations with a net worth over $7 million, or a business/organization with more than 500 employees are not eligible for EAJA awards. However, nonprofits are exempt from the net worth caps.

According to ProPublica, Sierra Club received revenues in excess of $173 million in 2023 and maintains $152 million in assets. In September 2023, Sierra Club was part of a legal coalition that received a $650,000 taxpayer-funded EAJA award. They sued the Department of Agriculture over NEPA and Administrative Procedure Act (APA) violations. *See Save the Scenic Santa Ritas v. U.S. Forest Serv.*, Nos. 17-cv-00576; 4:17-cv-00475-JAS (LEAD); 18-cv-00189 (D. Ariz.).

Congress should level the playing field and apply the same financial rules to NGOs as to individuals, organizations, and businesses.

Eliminate the "expertise" premiums for environmental litigators. EAJA provides another important limit—the rate cap—that is not being uniformly upheld. EAJA fee awards are supposed to be limited to an inflation-adjusted maximum, which in 2024 is $251.84/hour for practitioners within the Ninth Circuit. *See* https://www.ca9.uscourts.gov/attorneys/statutory-maximum-rates/.

As stated above, higher rates are available based on a "special factor, such as the limited availability of qualified attorneys for the proceedings involved." 28 U.S.C. § 2412(d)(2)(A). The Supreme Court has stated that to qualify for compensation at enhanced hourly rates under this standard, an attorney must possess "some distinctive knowledge or specialized skill needful for the litigation in question," which can include "an identifiable practice specialty such as patent

law, or knowledge of foreign law or language." *Pierce v. Underwood*, 487 U.S. 552, 572, 108 S. Ct. 2541, 2554, 101 L. Ed. 2d 490 (1988).

Cases involving the environmental and natural resources arena under the APA do not require special expertise. For example, the D.C. Circuit held that an environmental case reviewed under the APA was not considered to require special expertise. *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005). In the Ninth Circuit, however, the EAJA cap is not applied in environmental cases, and non-profit groups are compensated at the high specialty rates that are equivalent to those in private practice. *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) ("Environmental litigation is an identifiable practice specialty that requires distinctive knowledge."); *see, e.g.*, *NRDC v. Winter*, 543 F.3d 1152 (9th Cir. 2008); *see League of Wilderness Defs./Blue Mountains Biodiversity Project v. Turner*, 305 F.Supp.3d 1156, 1167 (D. Or. 2018) (in the Walton Lake Project litigation, the court awarded a special rate of $475/hour).

EAJA was born out of a desire to help individuals and small businesses by providing plaintiffs with fees that "are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Hensley v. Eckerhart*, 461 U.S. 424, 444 (1983). Sadly, that vision is not how EAJA is being implemented today.

It is unreasonable for anti-forestry groups to claim expert attorney hourly rates in excess of $400/hour. The EAJA cap that is adjusted for cost of living is a reasonable rate that is in line with private practice rates outside elite law firms in large cities. Eliminating the higher rate exception would avoid windfalls and disincentivize obstructionist litigation in the environmental and natural resources space but still provide a potential plaintiff with reasonable compensation.

Require the prevailing party to have a direct and personal monetary interest in adjudication to be eligible for an EAJA attorney award. The most important technical and substantive legislative change to EAJA would be to clarify who is eligible to receive an EAJA award in the first place. EAJA was enacted in 1980 to protect *ordinary citizens and small businesses* from government overreach and wrongdoing and to award attorney fees when the government's position is not substantially justified. Among other things, the stated purpose of EAJA is to "diminish the deterrent effect of seeking review of, or defending against, government action by providing" for the award of certain costs and fees against the United States.

In order to strengthen the credibility of EAJA and restore its true intent, Congress should legislatively clarify the prevailing party must have a direct and personal monetary interest in the adjudication such as personal injury, property damage, or an unpaid agency disbursement (e.g., Social Security, Medicare, Veterans benefits).

<u>Additional Litigation Reform in the Natural Resources Space</u>

Another issue the Committee may wish to examine is the lack of bonding requirements for litigation that delays or blocks critical work on federal lands, from siting renewable energy projects to carrying out wildfire reduction projects.

Past versions of the Resilient Federal Forest Act introduced by Chairman Bruce Westerman required plaintiffs challenging certain federal forest management projects to post a bond equal to

the Government's estimated litigation costs (note: this language is not included in the House-passed Fix Our Forests Act). A similar provision would not only serve as a deterrent to serial litigants that divert and drain land management agency budgets, it would also ensure plaintiffs have financial skin in the game.

This is not unprecedented or even necessarily partisan. In fact, the Federal Rule of Civil Procedure 65(c) already provides courts with the authority and discretion to require a party seeking a preliminary injunction or temporary restraining order to provide security, or a bond, in an amount the court deems appropriate. However, these bonding requirements are often waived in environmental and natural resources cases. Congress could legislate a bonding requirement for temporary restraining orders and preliminary injunctions – which create extraordinary legal and financial risks for project developers – against certain land management activities or emergency actions on federal lands.

AFRC Disclosure on EAJA Awards

It may sound hypocritical for AFRC to be advocating for EAJA reform when AFRC has received EAJA awards in the past. Our accounting shows that AFRC has received six EAJA awards totaling $637,000 over the last 25 years.

Our largest EAJA award was for $475,000 (*Carpenters Industrial Council et al v. Benhardt et al*., 1:13-cv-00361-RJL (D.D.C.)) related to our legal challenge to the 2012 Northern Spotted Owl (NSO) Critical Habitat Rule. We strongly believe, and still maintain, the 2012 NSO Critical Habitat Rule is scientifically flawed and failed to adequately analyze and transparently disclose to the public the economic and social costs of a rule designating more than 9.5 million acres of federal forests for the NSO.

According to a study prepared by the Brattle Group, the economic impacts designating *uninhabited* Matrix and BLM lands alone would lead to losses of up to $1.2 billion with little or no corresponding conservation benefit to the NSO. The same analysis revealed the 2012 NSO Critical Habitat Rule greatly diminished timber harvests levels on *uninhabited* forestlands across California, Oregon, and Washington, reducing local GDP by $100 million, reducing worker earnings by $66 million, and impacting 1,286 jobs annually. Through our settlement, Fish and Wildlife agreed to revisit its NSO critical habitat designation. Our ultimate EAJA award reflects 7 years of litigation both before the district court and the D.C. Circuit.

It is also worth pointing out that AFRC's Legal Program – funded by our members, the forest products sector – has invested millions of dollars **defending** federal projects, processes, and rules developed, designed, analyzed, and implemented by Democratic and Republican Administrations. In fact, most of our legal work is focused on defending the work of federal land management agencies and federal employees.

We stand by the common sense, bipartisan solutions proposed above. Even if that meant that legislative changes made by Congress resulted in AFRC never being eligible for an EAJA attorney award again in the future. We would welcome that outcome if it meant ending the abuse of EAJA attorney awards to nonprofits who have weaponized litigation and EAJA to stall, delay, or stop public projects that don't align with *their* values.

Conclusion

In concluding, I want to recognize the life and passing of Lowell E. Baier, the President Emeritus of the Boone and Crockett Club. He was a conservation hero to many and giant in the community. Mr. Baier literally wrote the book on EAJA reform, "Inside the Equal Access to Justice Act: Environmental Litigation and the Crippling Battle over America's Lands, Endangered Species, and Critical Habitats." While he passed last month, I know Mr. Baier would be thrilled to know this hearing is taking place. In some of our final email exchanges, he encouraged me not to give up on his efforts and legacy to reform EAJA given its huge implications for the future of our public lands and wildlife conservation.

Let's get back to the original intent of EAJA with surgical, bipartisan reforms. At a time when wildfire, smoke, and forest loss affect every region of this country, we cannot afford unnecessary delays or costs to critically needed, science-based, active forest management of our federal lands. EAJA modernization offers a bipartisan path to healthier forests, safer communities, and better conservation outcomes while protecting the true purpose of EAJA.