HOUSE NATURAL RESOURCES COMMITTEE
Subcommittee on Oversight & Investigations

Hearing on "*The Profit Engine Driving Environmental Nonprofits"*
May 20, 2026, 2:00 p.m.
1324 Longworth House Office Building
Washington, DC 20530

TESTIMONY OF LAWSON E. FITE, NATURAL RESOURCES ATTORNEY

Chairman Gosar and Members of the Committee:

Thank you for the opportunity to participate in this hearing. As you are aware, fee-shifting statutes are a major area of discussion in federal environmental law and worthy of this committee's attention. I will discuss the two types of statutes and implementation issues with each. As these statutes have played out in the Courts, the incentives for litigation have been distorted in some ways from the original intent of Congress.

My testimony is informed by over 20 years of practice in federal environmental law. Following law school and a clerkship with the Alaska Supreme Court, I served for five years as a Trial Attorney with the Wildlife and Marine Resources Section, Environment and Natural Resources Division, of the U.S. Department of Justice. During that time I handled many cases that ultimately led to a petition for attorney's fees, gaining familiarity with the intricacies and incentive structures of fee-shifting statutes. In the years since, I have worked both in private practice and as counsel to a trade group for the timber industry, again seeing the real-world implications of the words in the statute book.

There are basically two types of fee-shifting statutes you should be familiar with. The first is the Equal Access to Justice Act, or EAJA. EAJA applies when no specific statute provides for attorney fees. Thus, cases involving the National Environmental Policy Act ("NEPA") or other general statutes are subject to EAJA. However, because there is often substantial overlap between the work on NEPA claims and other claims in a case, a plaintiff bringing, for example, claims under the Endangered Species Act ("ESA") can often rely on the more specific statute. Courts have recognized that the work expended on one claim is also necessary to another claim. *See*, *e.g.*, *Smith v. McDonough*, 995 F.3d 1338, 1345 (Fed. Cir. 2021); *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 581 F. App'x 693 (9th Cir. 2014) (affirming fee award in part where claims were based on ESA and Administrative Procedure Act).

Fee Awards Under EAJA

EAJA provides for an award of attorney fees to a qualified prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2812(d)(1)(A). EAJA continues to result in significant outlays of funds in environmental litigation. A report from Strata Policy around 2017 indicated up to $5.8 million in such payments in a twelve-month period. The FY2025 EAJA report of the Administrative Conference of the United States indicated a total of $5.3 million in

awards from the Departments of Agriculture, the Interior, Commerce, and the E.P.A.[1] Similarly, the FY2024 report indicated $5.1 million awarded by the first three of those (no report from E.P.A.).[2]

EAJA was first enacted in 1981 for a three-year period, then permanently reauthorized in 1985. It was originally titled the "Small Business Equal Access to Justice Act" and was "intended to respond to a chronic problem small business owners have had contesting or challenging the unreasonable exercise of Government authority." When signing the bill, President Carter touted the bill's "direct benefit to millions of small business men and women."

The Small Business Committee cautioned, "It must be noted that the real aim of this legislation is not to spend great sums to pay the costs of fighting unwarranted Federal action." The Supreme Court has relied on Congressional statements that found appropriate fee decisions "have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 893–94 (1984) (quoting S. Rept. No. 94–1011 at 6 (1976)).

The courts are not always following through on these directives. Instead, they are issuing fee awards disproportionate to the market rate for services performed, thus incentivizing environmental litigation. For example, the Oregon district court recently awarded over $180,000 for a case that involved a single motion for preliminary injunction and only one hearing. *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Turner*, 305 F. Supp. 3d 1156 (D. Or. 2018). This is likely more than the amount a private firm would bill, or a private client would pay, for the work.

In the past decade, private law practice has experienced significant disruption from the advent of aggressive billing management, alternative fee arrangements, and outsourcing, and now the use of large language models (also called "AI") to assist with document review and research. Since fee awards are supposed to be based on the market, it makes little sense to insulate them from these facts. But courts have generally persisted in simply adding up the hours spent and multiplying them by a private-practice rate. They do very little to police whether hours were reasonably necessary to the case. As a result, there is little incentive for plaintiffs to accept a reasonable settlement offer on fees; instead, they drive up the ultimate amount either through negotiation or litigation.

Unless special expertise is required, EAJA fee awards are supposed to be limited to an inflation-adjusted maximum, currently about $258 per hour. In the D.C. Circuit, environmental APA cases are 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 cap is routinely lifted and groups compensated at the high rates equivalent to those in private practice. See, e.g., NRDC

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[1] Available at https://www.acus.gov/sites/default/files/documents/ACUS%20EAJA%20Award%20Report%20to%20Congress%20FY2025.pdf.

[2] https://www.acus.gov/sites/default/files/documents/ACUS%20EAJA%20Award%20Report%20FY2024_Final.pdf.

v. Winter, 543 F.3d 1152 (9th Cir. 2008). In *Winter*, incredibly, the court found that the special expertise exception was created during the litigation itself. That is, the attorneys became experts justifying a fee by working on environmental litigation Similarly, the circuits are split as to what locality's rates should apply. The D.C. Circuit is careful to avoid a "windfall" to attorneys just because the case is in an expensive location, *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755 (D.C. Cir. 1999), but the Ninth Circuit has no such rule.

EAJA also can undercut agency priorities by directing fees be paid directly out of the agency budget. 28 U.S.C. § 2412(d)(4). This is in contrast to environmental statutes such as the ESA and Clean Water Act, where fees are paid out of the Judgment Fund. 28 U.S.C. § 2414. As a cost saving move, in 1995 the government stopped keeping track of payouts under EAJA and there is no accountability for how much agencies are spending and environmental groups are reaping from EAJA related cases.

Fee Awards Under Other Statutes

Originally, EAJA provided for government wide reporting on its use and cost. For judicial proceedings, EAJA required the Director of the Administrative Office of the U.S. Courts to report annually to Congress on EAJA court activity, including the number, nature, and amounts of awards; claims involved; and any other relevant information deemed necessary to aid Congress in evaluating the scope and effect of awards under the Act. The reporting requirement was finally reinstated by the Dingell Act in 2019, leading to a great deal more data on where EAJA awards come from and where they go.

EAJA has procedural safeguards and limitations to prevent award of "windfall" fees. Environmental statutes are less onerous for a plaintiff or organization. A number of statutes, including the ESA, Clean Water Act, Clean Air Act, and others, have specific provisions authorizing a court to award fees "whenever … appropriate." 16 U.S.C. § 1540(g)(4); 33 U.S.C. § 1365(d); 42 U.S.C. § 7604(d). These allow for recovery of fees under a "catalyst" theory which is not available under EAJA. *Ass'n of California Water Agencies v. Evans*, 386 F.3d 879, 886 (9th Cir. 2004). That means that a plaintiff need not actually win a suit to obtain fees; it is sufficient if the suit triggered, or "catalyzed," the government to act. And courts are reluctant to reduce fees beyond a small "haircut." For example, in *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 581 F. App'x 693 (9th Cir. 2014), the district court awarded over $1.8 million in a case that did not justify anywhere near that level of effort. The Ninth Circuit summarily rejected the government's appeal.

Unlike EAJA, these provisions were specifically enacted "encourage "citizen participation in the enforcement of standards and regulations" established under relevant statutes. *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999). There is no rate cap like in EAJA. And there is a disparity between parties. Under these statutes, "defendants are not entitled to costs and fees unless the plaintiff's litigation was frivolous." *Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv.*, 382 F.3d 1159, 1161 (9th Cir. 2004).

The reporting requirements of the Dingell Act do not apply to statutes other than EAJA, but the Judgment Fund provides annual reporting pursuant to requests by Congressional

appropriators.[3] The Judgment Fund is an open appropriation, by statute, which enables the Treasury to satisfy judgments against the United States. 31 U.S.C. § 1304.

This reporting shows the following awards for the last five years by statute:

Endangered Species Act	$20,234,306.61
Surface Mining & Control Reclamation Act	$11,957.50
Clean Water Act	$6,473,849.90
Clean Energy Conservation Citizen Suits	$361,500.00
Resource Conservation & Recovery Act	$49,000.00
Clean Air Act	$7,826,294.93
CERCLA (Superfund Law)	$65,988.50
Outer Continental Shelf Lands Act	$350,000.00
Total	*$35,372,897.44*

Thus, specific fee-shifting statutes are significant sources of fee awards in federal cases against administrative agencies, rivaling EAJA in the amount paid to environmental plaintiffs. It is important to note that awards can and are made against private parties and non-federal governments. For example, in litigation relating to wolf and coyote trapping regulations in Montana, plaintiffs alleged that grizzly bears were being caught in the traps, resulting in take violating the ESA. *See Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180 (9th Cir. 2024). The Montana Fish & Wildlife Commission ultimately decided to change its regulations in ways that led the plaintiffs to drop the suit. But because of the catalyst theory, discussed above, the plaintiffs had a viable claim for attorney fees and Montana ultimately paid $210,000. There is no comprehensive reporting of similar cases.

Attorney fees in environmental law are a complex area and constantly changing. I hope this information is helpful to the Committee.

[3] https://fiscaldata.treasury.gov/datasets/judgment-fund-report-to-congress/judgment-fund-annual-report-to-congress#introduction.