Shifting the Debate: In Defense of the Equal Access to Justice Act

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Summary

For three decades, the Equal Access to Justice Act (EAJA) has enhanced parties’ ability to hold government agencies accountable for their actions and inaction. EAJA allows individuals, small businesses, and nonprofit organizations that prevail in court against the government—where the government fails to “substantially justify” its legal position—should be able to recover their reasonable attorney fees and litigation costs. But EAJA’s impact has been profound: its use of “fee-shifting” has deterred government misconduct and encouraged all parties, not just those with resources to hire legal counsel, to enforce their rights. Recognizing this, when EAJA was due to sunset in 1984, Congress instead voted to make it permanent, and President Ronald Reagan signed it into law.

For the past three decades, EAJA has remained an important tool for vindicating federal rights, particularly for those seeking assistance from Veterans Affairs and Social Security disability programs, who historically have collected the majority of EAJA fees. While environmental organizations have been awarded a much smaller portion of total EAJA payments, the Act has supported these groups’ ongoing efforts to ensure that the executive branch properly administers and enforces Congress’ environmental mandates. Together with the Administrative Procedure Act (APA) and the citizen suit provisions contained in key statutes, EAJA ensures that the government complies with and enforces our bedrock environmental laws.

Although there is an absence of definitive data about EAJA’s costs (Congress itself eliminated EAJA reporting requirements in 1995), a recent study by the U.S. Government Accountability Office (GAO) of the approximately 2,500 cases related to the U.S. Environmental Protection Agency (EPA) filed from 1995 to 2010 found that the presiding judge awarded government-paid attorney fees in only about 8% of environmental cases. Within this small subset of cases, the report found that “EPA made a small number of payments for attorney fees and costs under the appropriate provision of EAJA.”

Nevertheless, EAJA has recently been targeted for major amendments by some members of the U.S. House of Representatives who are attempting to limit the Act’s reach. Those seeking to curtail public interest litigation have

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used the federal budget debate as an opportunity to allege widespread abuse by environmental organizations and to endorse dramatic calls for reform. Their principal assertion is that EAJA has become a mechanism for so-called radical groups to enrich themselves by suing federal agencies over “mere technicalities” and recovering attorney fees after they prevail in court.

Proposed legislation, such as the Government Litigation Savings Act (GLSA) (H.R. 3037, 113th Congress), would limit access to the federal court system by severely restricting the class of parties eligible for EAJA fee awards and limiting recoverable attorney fees to a significantly below-market rate. EAJA has also been the target of other, similar attempts at legislative overhaul: in June 2012, the House passed the Domestic Energy and Jobs Act, which would have prevented citizens from applying EAJA's fee-shifting mechanism to any covered civil action.

This Article will show that such efforts to excise public interest environmental litigation from the EAJA are both unnecessary and misguided. After providing a brief introduction to attorney fee awards and EAJA, and canvassing the recent efforts to change the law, the Article examines the justifications being offered by proponents of EAJA reform. Our analysis of EAJA in environmental cases finds, contrary to their claims, that the Act has in fact been cost-effective; that it has been invoked only in meritorious litigation; that existing statutory safeguards and the independent discretion of federal judges will continue to ensure its prudent application; and that most “reform” efforts are actually directed at restricting unwelcome legal challenges or a subset of disfavored plaintiffs. Absent a much clearer basis for amending the Act, the Article concludes that current attempts to exclude environmental litigation from EAJA should be resisted.

I. History and Purpose of Attorney Fee Awards in Public-Interest Cases

A. Fee-Shifting Generally

The default scheme in the United States for payment of attorney fees is the so-called American Rule, under which each party to a lawsuit bears its own litigation expenses; regardless of who prevails. Its rationale is that if courts consistently assessed the prevailing party's fees against the opposing party, the prospect of losing and incurring additional expenses would deter the filing of some meritorious claims. In contrast, most other countries follow what is known as the English Rule, where some meritorious claims. In contrast, most other countries follow what is known as the English Rule, where...
ize the costs of their activities, the laws must be enforced properly. Government regulation can serve to correct market imperfections, but government action cannot address every environmental problem, and government inaction may sometimes exacerbate a problem. Public interest litigation plays an important role by stimulating or supplementing government actions; but absent fee-shifting, transaction costs and the diffuse nature of the benefits produced would cause insufficient resources to be devoted to such litigation.

Congress’ goal in authorizing courts to shift fees in environmental cases was to encourage legitimate citizen suits by treating the litigants as “welcomed participants in the vindication of environmental interests.” The 1970 Clean Air Act contained the first environmental citizen suit provisions, which also allowed for fee awards. Fee-shifting provisions have become a hallmark of federal environmental law, with Congress authorizing awards of attorney fees under almost all subsequent environmental statutes.

Citizen suits and fee-shifting lay dormant for much of environmental law’s early history. Before 1982, citizen litigation was rare, used primarily for the purpose of directly seeking penalties or injunctions against violators of federal environmental laws. Occasionally, litigants used citizen suits to compel the Administrator of EPA to take regulatory action, but most frequently, these suits would supplement other actions seeking judicial review or damages. After around 1982, citizen suits became more numerous as national environmental organizations began to mount private enforcement efforts in the face of executive branch inaction.

A recent example of a citizen enforcement action can be found in American Canoe Ass’n v. City of Louisa, a Clean Water Act (CWA) suit in which nonprofit groups alleged repeated permit violations by the Louisa, Kentucky, Water Treatment Plant and the city of Louisa Water and Sewer Commission. After granting partial summary judgment to the plaintiffs, the court determined plaintiffs were prevailing parties because Louisa paid a civil penalty for its violations and the plaintiffs had held “Louisa accountable for its monitoring and reporting violations in addition to its discharge violations.” The court then awarded the nonprofits attorney fees and costs for their efforts in enforcing federal mandates through the CWA’s citizen suit provision.

Even though Congress expressly authorized fee awards in the vast majority of environmental legislation, certain gaps still exist. For example, administrative agency decisionmaking affecting the environment is governed by the APA, but the APA does not include analogous fee-shifting provisions. The EAJA fills this gap in citizen enforcement of federal environmental law.

C. EAJA

1. Origins and Purposes

Congress enacted EAJA in 1980 for a three-year period beginning on October 1, 1981. Its factual findings demonstrated concern that individuals, small businesses, and nonprofit organizations “may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.” EAJA’s broad approach sought to diminish this deterrent effect.

By providing for recovery of attorney fees and litigation costs through EAJA, one of the general goals Congress hoped to promote was “to refine the administration of federal law—to foster greater precision, efficiency and fairness in the interpretation of statutes and in the formulation and enforcement of governmental regulations.” The Act’s legislative history provides a well-articulated explanation of this objective:

> The bill rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy. An adjudication or civil causation would not be adequate to accomplish the purposes of this Act.

19. EAJA.

20. During litigation over fee awards, EPA has argued that EAJA is inapplicable to any suit brought under a statute containing its own fee provision, even when the provision is not implicated in the claim being litigated. However, courts have found this argument unpersuasive. In one case, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit agreed with prior U.S. Court of Appeals for the Third Circuit precedent, reasoning “where there is no applicable fee-shifting provision in the Clean Water Act, acceptance of EPA’s reading of the EAJA would create a no-man’s-land contrary to clearly expressed Congressional purposes.” Env’tal Def. Fund, Inc. v. Envtl. Prot. Agency, 716 F.2d 915, 918-19 (D.C. Cir. 1983) (citing Natural Res. Def. Council, Inc. v. Envtl. Prot. Agency, 703 F.2d 700, 705-06, 13 ELR 20446 (3d Cir. 1983) (quoting Ocasio v. Schweiker, 540 F. Supp. 1320, 1323 (S.D.N.Y. 1982))).


22. Id. §202(a), 94 Stat. at 2325.

23. Id. §202(b), (c)(1), 94 Stat. at 2325.

action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law. An adjudication, for example, may show that the policy or factual foundation underlying an agency rule is erroneous or inaccurate, or it may provide a vehicle for developing or announcing more precise rules. The bill thus recognizes that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority. Where parties are serving a public purpose, it is unfair to ask them to finance through their tax dollars unreasonable Government action and also bear the costs of vindicating their rights.

With EAJA, Congress also recognized the need to waive federal sovereign immunity under certain circumstances in order to allow citizens to challenge government decisions and receive fees. The Act enabled aggrieved citizens to bring suit to address unreasonable agency action or inaction without confronting “a Hobson’s choice—either to fight unjustified Government enforcement or regulatory actions at great personal or financial cost, or simply to capitulate in the face of meritless action.”

The political surge that led to EAJA’s passage arose out of a highly influential environmental case. In Alyeska Pipeline Service Co. v. Wilderness Society, the U.S. Supreme Court held that federal agencies and courts lacked the ability to award attorney fees and litigation costs in the absence of express statutory authority. Congress immediately responded with, among other actions, the Civil Rights Attorney’s Fee Awards Act of 1976.

A number of bills followed in the wake of the Alyeska decision, eventually leading to EAJA’s enactment. The common motivation for these bills—to remedy and prevent unlawful or unreasonable government conduct—was never the exclusive political territory of either party. Indeed, EAJA has enjoyed widespread bipartisan support for most of its life, beginning with enactment in 1980, and has never been understood to favor or disfavor particular political viewpoints. In 1984, at the three-year sunset date contained within the original legislation, Congress instead voted to make EAJA permanent. President Reagan subsequently signed the reauthorized EAJA into law on August 5, 1985.

## 2. EAJA in Practice

EAJA allows federal courts and agencies to make an award of “fees and other expenses” to parties who have prevailed in court or in adversarial administrative proceedings against the federal government, unless the position of the United States “was substantially justified or special circumstances make an award unjust.” The statute defines “fees and other expenses” to include “reasonable attorney or agent fees.”

Individuals with a net worth exceeding two million dollars and businesses with a net worth exceeding seven million dollars or having more than 500 employees are ineligible for fee awards under the statute. However, qualified educational, scientific, or charitable nonprofit organizations under §501(c)(3) of the Internal Revenue Code are eligible for fee awards regardless of their size.

By design, EAJA applies to many agency cases that vindicate essential federal rights. Suits seeking nonmonetary, injunctive relief that challenge arbitrary or unlawful regulatory actions are an important means of protecting Americans’ health and safety, and many of these also lead to recovery of attorney fees through EAJA.

For example, in 1998, EPA determined that extra precautions were required for the manufacture of rat poisons, including bitter-tasting additives to prevent small children and pets from ingesting the poison—a serious problem that disproportionately affects low-income and minority households. In 2001, the Agency abruptly reversed course and decided not to act. When environmental groups sued, a federal judge found that “EPA lacked even the proverbial ‘scintilla’ of evidence justifying—

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26. Awards of attorney fees against the United States were barred at common law not only under the American Rule, but also under the doctrine of sovereign immunity, which bars suits against the United States or the payment of fees, without the federal government’s consent. See United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926) (“Congress alone has the power to waive or qualify that immunity.”). Prior to EAJA’s enactment, the common-law exceptions to the American Rule were inapplicable against the United States. See, e.g., National Association of Regional Medical Health Programs, Inc. v. Mathews, 51 F.2d 340 (D.C. Cir. 1977), cert. denied, 431 U.S. 954 (1977) (‘common benefit’ exception). Statutory exceptions were also inapplicable against the United States unless a statute specifically authorized fee awards against the federal government.
29. Id. at 269.
32. Wolfman Testimony, supra note 4, at 72-73.
33. H.R. REP. NO. 99-120, pt. 1, at 6 (1985), reprinted in U.S.C.C.A.N. 132, 134. This bill was initially vetoed by President Reagan, who approved of EAJA itself but insisted on a series of technical changes sought by the U.S. Department of Justice. Memorandum of Disapproval of H.R. 5479, 20 Wkly. Comp. Pt. 1, 132, 134 (Nov. 8, 1984) (re Equal Access to Justice Act Amendments). Meanwhile, in a Memorandum for the Heads of Executive Departments and Agencies issued concurrently with the veto, President Reagan instructed agencies to “accept and retain on file any applications for awards of fees and expenses . . . and . . . continue to provide . . . appropriate assistance in making such applications . . . as if the Act were in force . . . such claims shall then be reviewed . . . by the agency in accordance with the terms of the reauthorized Act . . . .” Memorandum from the President, 20 Wkly. Comp. Pt. 1, 132, 134 (Nov. 8, 1984) (re Equal Access to Justice Act).
36. 28 U.S.C. §504(b)(1)(A); see also 28 U.S.C. §2412(d)(2)(A) (defining “fees and other expenses” to include “reasonable attorney fees”). However, courts cannot award the United States attorney fees.
ing its reversal of the requirement it had imposed, after extensive study, only a few years before,” and ordered the Agency to reconsider. For their hundreds of hours of work on this complex case, plaintiffs’ attorneys received an EAJA payment of $72,000, a negotiated amount well below their usual rates.

When a judge grants a party’s EAJA fee petition, the award is paid “by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.” This mechanism serves to directly penalize the specific agency that was found to have acted unlawfully or unreasonably. In contrast, most fee awards assessed against agencies outside of EAJA—including through the citizen suit provisions contained in substantive environmental statutes—do not draw funds from a losing agency’s budget. Instead, those awards are paid through the U.S. Department of Justice’s (DOJ’s) Judgment Fund.

EAJA differs from other fee-shifting statutes in two other vital respects. First, unlike the vast majority of such statutes, EAJA does not allow automatic fee recovery for prevailing parties. After a party succeeds on the merits of its case, it may petition the court for an EAJA fee award. The government may defeat the petition for a fee award if it can show that, despite having lost the case, its regulatory and legal position was “substantially justified.”

The Act additionally precludes government liability for fees where “special circumstances make an award unjust,” which reflects a congressional intent to provide an additional “safety valve . . . to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.”

and more broadly to give “the court discretion to deny awards where equitable considerations dictate an award should not be made.”

 Second, and again unlike the majority of fee-shifting statutes, prevailing parties that do overcome EAJA’s “not substantially justified” hurdle generally do not recover attorney fees at market rates. Most other statutes award fees based on the number of hours reasonably spent on the case, applying a rate the lawyer could command in the relevant market if employed by a private client. EAJA instead limits fees to a flat $125 per hour.

Courts and authorized administrative tribunals may award EAJA fees above the statutory cap when plaintiffs can show that a “special factor,” “such as the limited availability of qualified attorneys for the proceeding involved,” entitles them to an increase. The Supreme Court has interpreted this term as referring to “attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation.”

48. Id.


50. The cost of legal services has greatly outpaced inflation; therefore, EAJA’s current inflation-adjusted cap (about $180 per hour) is far below prevailing market rates in most legal markets. See, e.g., Updated Laffey Matrix, http://laffeymatrix.com/see.html (last visited Feb. 21, 2013) (showing current attorney fee rates in the District of Columbia, ranging from $170 per hour for paralegals and law clerks to $75 per hour for lawyers with 20 or more years of experience). For other parts of the country, DOJ in non-EAJA cases consults with local U.S. Attorneys’ Offices about reasonable rates in specific jurisdictions or reviews relevant court decisions on attorney fee awards. See GAO Report on EPA Cases, supra note 1, at 25. See also, e.g., Gautreaux v. Chicago Hous. Auth., 491 F.3d 649, 660 (7th Cir. 2007) (rates up to $400 per hour). The methodology of calculation and benchmarking for the Updated Laffey Matrix has been approved in a number of cases. See, e.g., McDowell v. Distrixt of Columba, Civ. A. No. 00-594 (RCL), 2001 U.S. Dist. LEXIS 8114 (D.D.C. June 4, 2001); Salazar v. Distrixt of Columba, 123 F. Supp. 2d 8 (D.D.C. 2000).

51. For example, in Blum v. Stenson, 465 U.S. 886, 895 (1984), the Supreme Court addressed the Civil Rights Attorney’s Fees Act of 1976 and held that “[r]easonable fees’ are to be calculated under [42 U.S.C.] $1988 according to the prevailing market rates in the relevant community, regardless of whether the plaintiff is represented by private or nonprofit counsel.”

52. Prior to 1996, the fee cap was $75 per hour, and Congress has adjusted the statutory rate only once, for inflation, since EAJA’s enactment in 1981. See Pub. L. No. 104-121, §§231-233, 110 Stat. 847,862-64 (1996).


II. Calls for “Reform” and Legislative Attempts to Roll Back EAJA

Current proposals to restrict EAJA purport to correct a variety of perceived problems with how the Act has operated over the past 30 years. EAJA opponents have aired generalized grievances against nonprofit environmental groups, claiming, for example, “taxpayers have been on the hook for years while ‘Big Green’ trial lawyers have raked in millions of dollars.” One member of Congress has argued that any public interest environmental litigation resulting in fee payments under EAJA might constitute an identifiable practice specialty, thus eliminating EAJA’s largely below-market fee awards.59

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59. Id. at 1-2.
56. Id. at 1-2.
62. D of citizens to justify an enhanced fee award); Animal Lovers Volunteer Assoc. v. Carlucci, 867 F.2d 1224, 1226 (9th Cir. 1989) (“Environmental litigation may constitute an identifiable practice specialty.”) (quoting Percer, 487 U.S. at 572)).
71. Id. at 7.
72. Id. at 1-2.
73. Id. at 1-2.
74. Id. at 1-2.
75. Id. at 1-2.
76. Id. at 1-2.
77. Id. at 1-2.
ability to collect fees under the Act. None of these proposals have been enacted.

Still other proposals would modify EAJA itself, but address only specific issues such as reporting. For example, the Open EAJA Act of 2010 would have reinstated and expanded the tracking of EAJA payments, which was abolished by the Federal Reports Elimination and Sunset Act of 1995. The bill would have required the GAO to audit awards made since 1995 and DOJ to report EAJA awards provided through agency and court proceedings.

The most sweeping proposals, such as the GLSA of 2013 (H.R. 3037), would overhaul EAJA in multiple ways that drastically limit its availability to environmental and other public interest organizations. If successful, this bill would: (1) restrict EAJA awards to plaintiffs with a “direct and personal” monetary interest in the civil action; (2) increase the statutory cap on hourly attorney rates from $125 to $200, while prohibiting any reimbursements above the cap for special factors or cost-of-living adjustments; and (3) extend EAJA’s eligibility caps on net worth to nonprofit groups. A companion bill, the Open Book on Equal Access to Justice Act (H.R. 2919), would require the Administrative Conference to annually report EAJA fee payments made by all agencies and to establish an online searchable database of EAJA payments.

III. Analysis of Claims

This section reviews each of the main justifications offered for the purported need to amend EAJA—primarily in ways that would limit or eliminate attorney fee awards in most public interest environmental litigation.

A. Claiming “Frivolous and Abusive” Cases Result in EAJA Fee Awards

As seen above, EAJA critics assert, “[Section] 501(c)(3) groups have aggressively used EAJA to take millions of dollars in attorney fees in drawn-out, largely meritless procedural litigation.” Such broad characterizations of environmental litigation as meritless, abusive, frivolous, or “merely procedural” are common in arguments to amend EAJA.

I. The Government’s “Substantially Justified” Defense

As a threshold matter, the Federal Rules of Civil Procedure act as a general barrier to truly “frivolous” litigation, and any cases that result in EAJA fee awards would have surmounted this hurdle very early in the proceedings. Further, only prevailing parties may collect attorney fees under EAJA—meaning that by the time a party has submitted a petition to recover fees, it has already succeeded on the merits of its case. Finally, the Buckhannon case’s rejection of the “catalyst theory” has made it even more difficult for plaintiffs to attain prevailing party status. It is difficult to see how a federal lawsuit that successfully runs this gauntlet can be deemed frivolous or abusive.

But merely prevailing in the case is itself not enough to support an EAJA fee award. As seen above, EAJA’s unique mechanism employs a “substantially justified” standard: if the court finds that the government’s position in the case was substantially justified, no fee payment can be made. This additional hurdle already creates a deterrent against bringing even valid but novel litigation, much less meritless cases. In many reported and many more unreported cases, the government has prevented numerous prevailing parties from recovering attorney fees under EAJA—meaning that by the time a party has submitted a petition to recover fees, it has already succeeded on the merits of its case. Finally, the Buckhannon case’s rejection of the “catalyst theory” has made it even more difficult for plaintiffs to attain prevailing party status. It is difficult to see how a federal lawsuit that successfully runs this gauntlet can be deemed frivolous or abusive.

For example, the government successfully employed the “substantially justified” standard in Hill v. Gould, a citizen’s APA challenge to a U.S. Department of the Interior (DOI) decision denying the mute swan protection...
under the Migratory Bird Treaty Act. At the merits stage, the court found the agency’s decision to be arbitrary and capricious, stating that “the Secretary point[ed] to nothing in the statute, applicable treaties, or administrative record that justifies the exclusion of mute swans.”

Nevertheless, while the plaintiff had prevailed despite the highly deferential *Chevron* standard, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that the district court did not abuse its discretion in denying her fee request.76 Though the government had violated the law, and despite the “thinness of the agency record,” the court found that the government’s position was substantially justified.77 Securing EAJA fees thus is a difficult task under current law.

Moreover, Congress wisely left application of EAJA’s “substantially justified” standard to the independent judgment of the federal judiciary. Judges exercise their expertise on a case-by-case basis to determine whether the standard has been met, and the government is free to appeal an adverse determination. As shown in the example above, the government may even fail to meet the *Chevron* doctrine’s highly deferential standard of judicial review, yet still convince a judge or judges to deny fee recovery under the “substantially justified” standard.

2. Misunderstanding How Environmental Law Works

In many environmental and administrative law cases, plaintiffs are successful in litigating arbitrary government decisions, agency delays, or procedural violations precisely because it is difficult for the government to show that these actions or inactions were substantially justified. These suits are examples of the executive branch violating a command expressly issued by Congress—often where agencies have misread their statutory mandate or missed a clearly stated deadline for taking action.

For example, in *Holy Cross v. U.S. Army Corps of Engineers*,78 a neighborhood association challenged a U.S. Army Corps of Engineers (the Corps) project to modernize part of a nearby canal. The plaintiffs did not seek to cancel the project, but argued that the Corps needed to complete further analysis and planning under the National Environmental Policy Act (NEPA)79 to ensure safe administration of the project. At the merits stage, the court enjoined the Corps from continuing until it had satisfied NEPA’s requirements.80 For accomplishing the primary objective of the lawsuit, “namely the cessation of the lock project pending further environmental study,” the court awarded plaintiffs their attorney fees and costs under EAJA.81

Disparaging such environmental cases as “merely” procedural misses much of the point of environmental law—and of environmental decisionmaking. Procedural requirements contained in environmental laws are paramount to ensuring the protections that Congress has bestowed; in the case of NEPA, the nation’s foundational environmental law, they are the entire point. NEPA functions by mandating federal agencies to implement the Act’s procedural requirements. It requires agencies to take a “hard look” at the environmental consequences of major federal actions and to carefully consider alternatives, but demands no particular substantive outcomes or results. NEPA suits allow reviewing courts to compel agencies to follow the law’s procedures and timetables, which, when satisfied, lead to a more thorough decisionmaking process that properly accounts for environmental considerations. NEPA’s effectiveness stems entirely from its procedural mandate.82

More broadly, both public interest and industry litigants would agree that “procedural” litigation under the APA has proven essential to vindicating federal rights and checking executive power.83 Since the rise of the administrative state, the executive branch of the federal government has grown in order to regulate an increasingly complex and specialized economy. The public and private sectors both participate in the decisionmaking process in a variety of ways prescribed in the law, including through litigation. Combining APA’s private rights of action with EAJA’s fee mechanism ensures that the public is able to sue an agency for action or inaction that violates statutory requirements.

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76. Gould, 555 F.3d at 1009. In reviewing EAJA’s “substantially justified” standard, the court stated that:

A position is substantially justified if the underlying agency action and the legal arguments in defense of the action had “a reasonable basis both in law and fact.” Pierce v. Underwood, 487 U.S. 552, 565 (1988) (citation omitted); see also Halverson v. Slater, 206 F.3d 1205, 1208 (D.C. Cir. 2000). That standard demands more than mere non-frivolousness, but less than a showing that the government’s “decision to litigate was based on a substantial probability of prevailing.” Taucher v. Brown-Hruska, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting Spencer v. Nat’l Labor Relations Bd., 712 F.2d 539, 557 (D.C. Cir. 1983)).

Gould, 555 F.3d at 1006.

77. Id. at 1008-09. The court explained that the “adequacy of an agency’s explanation” is in some cases “logically unrelated to whether the underlying agency action is justified under the organic statute.” Id. (citing Fed. Election Comm’n v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986) (overturning lower court’s determination that a Federal Election Commission position was not “substantially justified”)).

78. 455 F. Supp. 2d 532, 536, 36 ELR 20208 (E.D. La. 2006). “[T]he Plaintiffs claimed that the Environmental Impact Statement (EIS) prepared by the Corps for the lock project was inadequate and that the Corps had not

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80. Id. at *4.

81. Id. at *4.

82. NEPA has had a monumental impact on government decisionmaking, both in the United States and abroad. Originating in NEPA, the environmental impact assessment (EIA) process has been adopted by many countries, eventually leading to the International Court of Justice explicitly recognizing the practice as customary international law. Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, 82-83 (Apr. 20).

3. Alleged Incentive to Sue

Some lawmakers claimed the proposed GLSA would “create a level playing field” for the federal government in litigation brought by “environmental groups seeking to advance their political ideology,” because the bill would “help to reduce the incentive to sue under procedural grounds, for which EAJA has a very low bar, by requiring litigants to have some skin in that game.”

There is no evidence that EAJA leads environmental organizations to sue the government when they would not otherwise have done so. For example, a recent study of EAJA payments and cases against the U.S. Forest Service from 1999 to 2005 cautioned 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.”

The study concluded that “[d]ecisions to litigate are likely driven by multiple factors, and policymakers should realize that EAJA reform might not eliminate or reduce Forest Service land-management litigation.”

Environmental groups make litigation decisions based on myriad factors, including the human health or environmental benefits expected to result, the potential to have a broad impact on national policy decisions, the organizational mission, and whether to invest their efforts in litigation or other types of activities. And, as seen above, even if the potential to recover fees might mitigate in favor of filing a particular suit, whatever added incentive this may provide would still only promote meritorious litigation due to EAJA’s requirements.

Further, the incentive for any party to settle cases is not a result of EAJA; it is the nature of litigation in the United States. Simply put, litigation is uncertain and expensive, and settling claims is often cheaper than pursuing them—and this is no less true when the government is a defendant.

Likewise, any additional motivation for the government to settle particular cases involving “procedural” violations is not created by EAJA. Rather, the motive likely stems from the agency’s knowledge that it has violated a clearly defined legal duty in these instances, and would lose on the merits in protracted litigation; the government would needlessly be wasting taxpayer dollars on both its own costs and plaintiffs’ attorney fees if it were to fully litigate these suits. In these cases, settlement almost certainly saves time and taxpayer money, above and beyond the benefit of ensuring that environmental laws are enforced.

Conversely, when the government believes it is justified in a challenged action, it can take advantage of the “substantially justified” standard for fee awards, even in cases that settle. As seen above, as long as the government has a legitimate argument in support of its position, courts will not award EAJA fees to the prevailing party, regardless of whether the case was settled or adjudicated.

Some critics argue that litigation and settlements that seek to force underfunded agencies to work more diligently are counterproductive because they divert agency resources to defending the suits; but such litigation has in fact been successful both in and out of the courtroom. Following recent settlement agreements that ended years of Endangered Species Act (ESA) litigation brought by WildEarth Guardians and the Center for Biological Diversity, the U.S. Fish & Wildlife Service (FWS) agreed on deadlines to issue final listing determinations for approximately 250 “candidate” species and critical habitat designations concurrently with proposed listings, as the ESA envisioned.


89. Courts have repeatedly held that a lack of adequate staff or funding does not excuse agency inaction or delay when faced with a nondiscretionary duty. See, e.g., Silver v. Babbitt, 924 F. Supp. 976, 26 ELR 21374 (D. Ariz. 1995) (holding that an appropriating bill that temporarily rescinded funding for species listings and critical habitat designations did not excuse the agency’s failure to designate critical habitat for the Mexican spotted owl). In one such case, Marbled Murrelet v. Babbitt, 918 F. Supp. 318 (W.D. Wash. 1996), the court had ordered FWS to fulfill its nondiscretionary duty to designate critical habitat for the threatened marbled murrelet. FWS failed to comply with the order and, in a subsequent suit, alleged that a 1995 law rescinding $1.5 million from FWS’s annual budget for making critical habitat designations had prevented the agency from completing the action. See id. at 320. The appropriations legislation even provided the agency with a potential defense if it failed to meet the deadline—allowing courts to invalidate an order’s deadline if the funding cuts had made it “impracticable” to complete the required action on schedule. Id. Nevertheless, the court held that FWS did not sufficiently demonstrate impracticability and ordered the agency to fulfill its legal mandates under the Endangered Species Act and the prior order. Id. at 321-22.


92. The settlements have brought the added benefits of increasing awareness of and efforts to pursue candidate species conservation, which arguably protects at-risk species without a formal listing determination. See Phil Taylor, Interior Would List Southwest Lizard, GREENWIRE (June 13, 2012), http://
B. Claiming EAJA Was Only Meant to Protect the “Truly Injured”

Early draft versions of EAJA contained language requiring parties to have a direct interest in the litigation, language that was removed from the Act before it was first enacted in 1980.93 Here again, some critics allege that this “created a loophole in EAJA that permitted environmental groups to repeatedly sue agencies and recoup millions in legal fees.”94 The recent proposals to narrow access to EAJA would insert language requiring prevailing parties to have a “direct and personal interest in the adversary adjudication” as a prerequisite to recovering fees.95 If enacted, this amendment would exclude much environmental and other impact litigation, specifically restricting many public interest cases that are not based in a monetary or property claim. The language is at best redundant of existing constitutional “standing” requirements, and at worst would narrow access even further, by ruling out fee awards for entire categories of important cases that seek injunctive relief rather than money damages.

I. Importance of Injunctive Relief

Requiring parties to have a “direct and personal interest” in litigation, if narrowly defined as a financial or property interest, would limit EAJA recoveries mainly to plaintiffs seeking money damages, while preventing fee recoveries in cases for injunctive relief, including cases brought under the APA.

Courts generally provide three different types of remedies to protect legally defined rights: (1) legal remedies, or damages; (2) equitable remedies, which include injunctions; and (3) declaratory remedies. The second category, suits for injunctions, are the most effective at protecting public health and the environment because an agency’s failure to follow a statutory mandate can affect thousands or even millions of citizens. They protect vital public interests, prevent harm before it occurs, and are especially important where individual citizens might lack the incentive to file suit. Without EAJA, disparate individuals would have to bear the costs of litigation, often in complex cases, when attempting to protect broad segments of the population against unlawful government conduct.

For example, one environmental case involved Oregon’s McKenzie River, famous for its trout and salmon fisheries. When the Federal Energy Regulatory Commission (FERC) relicensed two dams that were originally constructed without fish passages, the agency refused to follow DOI’s prescriptions for adding fish ladders—despite the governing statute’s plain language mandating that FERC incorporate them. The U.S. Court of Appeals for the Ninth Circuit heard an environmental group’s appeal and held that FERC had clearly violated the law by failing to follow DOI’s expert guidance for sustaining the fishery.96 The government eventually agreed to pay a modest sum in attorney fees—plaintiffs received less than $50,000 for their efforts to protect the broad public interest in the fishery.

2. Effect on Associational Standing

Limiting EAJA to parties with a “direct and personal” financial or property interest in the case also risks creating a bar to EAJA fee awards for any nonprofit organization bringing suit on behalf of one or more of its members. The existing constitutional standing requirements already only allow actually injured parties to bring suit in federal court. To demonstrate Article III standing, a plaintiff must show that he or she has suffered or imminently would suffer an injury in fact, which is concrete and particularized, as well as actual or imminent.97 This “case or controversy” requirement prevents federal courts from issuing advisory opinions where no tangible issue yet exists, and it ensures that federal courts only exercise power “in the last resort, and as a necessity.”98

Under long-standing law, an organization can, under certain circumstances, bring suit based on injury to one or more of its members under the theory of “associational standing.” The Supreme Court has set out three requirements for an associational plaintiff to have constitutional standing to sue on behalf of its members: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.99

An EAJA amendment that limits recovery to parties with a “direct and personal” financial or property interest in the case would raise the question of whether any organization, including a trade association, representing its members in this fashion can continue to receive fee

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94. Baier, supra note 70, at 29-30.
95. The full text of the provision in the GLSA bill read:

> Fees and other expenses may be awarded under this subsection only to a prevailing party who has a direct and personal interest in the adversary adjudication because of medical costs, property damage, denial of benefits, unpaid disbursement, fees and other expenses incurred in defense of the adjudication, interest in a policy concerning such medical costs, property damage, denial of benefits, unpaid disbursement, or fees and other expenses, or otherwise.

awards. It is unclear whether proponents actually intend the amendment to eliminate the availability of EAJA in cases where any organization—not just an environmental nongovernmental organization—is representing its members. At a minimum, this ambiguity will generate additional litigation.

C. Claiming EAJA Fee Awards in Environmental Cases Result in High Taxpayer Costs

Proponents of overhauling EAJA claim that amending the Act would “relieve[] taxpayers of the burden of paying for the litigation machines of deep-pocketed environmental organizations.” They would attempt to reduce government attorney fee payments by narrowing EAJA with respect to both suits involving environmental and other public interest issues and the eligibility of certain claims that the EAJA awards paid in environmental cases “would not have a significant impact on caseload or awards of attorneys’ fees.” This is because the vast majority of lawsuits in which EAJA payments are made—namely, Social Security Administration and Veterans Affairs cases—would have remained unaffected by the GLSA.

2. Environmental Litigation Against Federal Agencies, by the Numbers

Looking at environmental litigation overall, the GAO study of cases brought against EPA revealed that public interest groups are not filing the majority of these suits: trade associations and private companies brought 48% of the lawsuits, while environmental groups brought 30% (with local environmental and citizens’ groups filing the majority of those). In fact, federal agencies spend only

101. Id. at 3.
104. Id. at 3.

One informal study criticizing environmental suits claimed that from September 1, 2009 to August 31, 2010, environmental litigants collected $5.8 million in EAJA payments. Bax, supra note 70, at 49. Even if every one of these cases had been rendered unable to proceed under the proposed modifications to the Act, the projected costs of the rewrite still would not have been fiscally justified. After the added reporting costs of $10 million are removed from CBO’s cost projections, the costs of implementing GLSA would still have outweighed the “benefits” of ceasing support of environmental litigation by over $55 million over the next five years. See CONG. BUDGET OFFICE, supra note 103, at 3 (cost projections beyond the initial five-year period were unavailable).

106. GAO REPORT ON EPA CASES, supra note 1, at 17. For a discussion of the deliberative process involving DOJ and independent federal judges, see Section IV(d)(2)(A). Infra notes 122-24 and accompanying text.
a small fraction of their overall budgets on mounting defenses to environmental litigation. For example, FWS spent $1.24 million in 2010 to “manage, coordinate, track, and support ESA litigation” brought by both environmental and industry groups. This cost amounted to one-half of 1% of all attorney fees paid from the Treasury Department’s Judgment Fund since 2009. And the Acting Director of the U.S. Department of Agriculture’s Farm Service Agency and the Finance Officer for DOI’s Office of the Secretary—an office that represents 28 agencies—both stated that so few cases are filed and attorney fee payment amounts are so small that information on these payments is of little value and not needed for internal agency management purposes.

Finally, the majority of attorney fee awards resulting from environmental litigation are not paid out under EAJA. GAO reported that only about 8% of environmental cases resulted in fee awards, and of that number, “EPA made a small number of payments for attorney fees and costs under the appropriate provision of EAJA.” Further, DOJ’s Office of Legal Counsel directed that “the ESA fee provision should take precedence over EAJA §2412(d)—i.e., that hours and costs necessary to both successful counts should be allocated to the ESA claim for attorney fees purposes.” Though some agency resources are used to defend ESA cases, virtually all fee awards in cases lost or settled come from the Treasury Department’s Judgment Fund.

D. Claiming EAJA Fee Awards Serve Principally to Make Rich Environmental Organizations Richer

As seen above, frequent allegations that environmental groups use EAJA to generate significant sums of money have fueled efforts to amend the Act. For example, one member of Congress claims that “large environmental organizations” have “hijacked [EAJA] into a means to perpetually fund a cottage industry based on suing the federal government over and over again.” She further asserted that these groups “have been dipping into a bottomless, untraceable money pit to push their political agendas in and grind the work of land management and other federal agencies to a halt.”

1. Available Figures

No empirical studies support the oft-heard rhetorical claim that environmental organizations are reaping significant amounts of money from attorney fees. Most appear to derive a fairly insignificant portion of their overall funding from EAJA or other fee awards, though those fees remain important for their litigation function. For example, the Center for Biological Diversity—one of the most maligned environmental groups on this point—has stated that, on average, it receives only about one-half of 1% of its total annual income from EAJA fee awards.

Nor are large environmental organizations in fact bringing the majority of environmental suits involving EAJA. A recent study evaluating the impact of EAJA on the Forest Service indicates that nearly three-quarters (74.4%) of the parties engaged in environmental litigation against the agency are involved only in a single lawsuit. With respect to all lawsuits filed against EPA from 1995 to 2010, local environmental and citizens’ groups filed 16% of the total cases, while national environmental organizations filed 14%. With respect to EAJA fee awards against EPA, the majority of payments (61%) went for claims filed by local environmental groups, with national environmental groups receiving 23% of payments.

Indeed, the majority of EAJA payments do not stem from environmental litigation at all. To the extent there is historical data, environmental cases receiving EAJA awards have made up only a small fraction of litigation that results.

107. Letter from Gary Frazier, 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) (on file with authors).


109. Davies, supra note 102. Indeed, environmental groups have argued that fee awards in ESA cases represent a bargain for taxpayers in terms of the government compliance obtained: for example, in 2011, the Center for Biological Diversity settled a number of major ESA cases with FWS, some of which had been litigated for five years, and generated attorney fees totaling $128,158. These combined settlements sped up statutorily mandated protection decisions for 757 imperiled species, resulting in a (perhaps tongue-in-cheek) cost calculation of “$168.29 per species listing decision.” See 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), http://www.biologicaldiversity.org/news/press_releases/2012/settlement-fees-06-14-2012.html (last visited Sept. 20, 2013).


111. GAO REPORT ON EPA CASES, supra note 1, at 17.


in EAJA attorney fee awards. A 1998 GAO report found that Social Security disability and veterans’ disability cases represented 98% of EAJA applications and 87% of EAJA fee awards in 1994.120

2. Fee Cap/Special Knowledge Exception

EAJA opponents also claim that litigants routinely “abuse” the Act by collecting attorney fees that surpass the $125-per-hour statutory cap. But because the Act’s purpose is to ensure that citizens can obtain legal representation, some recognition of current market rates is essential. And, as discussed above, the statute itself explicitly directs courts to increase fee awards resulting from cost-of-living adjustments or due to the existence of a “special factor.”121

   a. Adversarial Legal System as Gatekeeper

As an initial matter, DOJ typically negotiates fee awards with prevailing parties before finalizing the amount to be paid, and officials report that the resulting awards are much lower than requested in the majority of cases.122 As counsel for the government, DOJ also has an opportunity to challenge the award of attorney fees.123

Next, when reviewing a fee petition, federal judges simply follow the statute’s plain language by applying their discretion to the case in front of them. And in practice, even though DOJ may conclude that the hours are justified, fees may still be denied because of court precedent.124 As a result, even when a fee award beyond the statutory cap does get granted, it is the product of a deliberative process, presided over by a federal judge and litigated by the budget-conscious DOJ, which can hardly be characterized as “automatic,” or somehow contrary to EAJA’s intent.

   b. Below-Market Rates

No empirical evidence exists to support the proposition that EAJA payments routinely evade the statutory cap, but even if the practice were to become customary, the result—failing to adjust fee awards to accommodate inflation—would still likely undervalue attorneys’ time. Unlike EAJA, under almost all other fee-shifting provisions in federal law, parties’ attorneys receive actual market rates for their time spent working on a case.125

Additionally, since EAJA’s statutory cap is not directly tied to inflation, courts’ discretionary cost-of-living adjustments are necessary to implement a statute that has been amended only once, in 1996, to take the cost of living into account.126

3. Eliminating EAJA’s Size/Net-Worth Exemption for §501(c)(3) Organizations

Proponents of EAJA reform also seek to extend the statute’s size and net-worth eligibility cap to cover nonprofits.127 Through EAJA’s exceptions for nonprofits, Congress specifically sought to support public interest claims filed by groups such as environmental organizations. Even though there may be widespread disagreement over which actions advance the public interest, Congress clearly intended EAJA to be used by parties from across the ideological spectrum to broadly refine and formulate public policy.128

Although for-profit organizations also can engage in public interest activity, organizations primarily devoted to the public interest tend to concentrate in the nonprofit sector. Nonprofits are also fundamentally different from large private businesses, which EAJA envisioned should be expected to cover their own legal costs. In general, a for-profit business would elect to litigate when it possesses a monetary interest in an outcome sufficient to make the suit worthwhile, and it also may be able to write off litigation costs as “ordinary and necessary” business expenses.129 Thus, a rational for-profit business with sufficient resources to support legal action does not require a fee award. Additionally, even though a business is pursuing its own interests through these types of suits, the public still benefits from any effect the litigation may have on effecting public policy changes—without having to pay for litigation that primarily benefits the business.

Public interest litigation, on the other hand, provides more diffuse, often nonmonetary benefits and much weaker economic incentives. Litigation by nonprofits seeks more widely to enforce the law and to protect the public interest. Indeed, before a public interest law firm can even gain §501(c)(3) status and benefit from EAJA’s size exceptions, the Internal Revenue Service must have determined that the firm engages in litigation that:

122. See supra Section II(c)(2).
124. The report recounts that: (1) determine attorney fees for each case, Justice considers, among other things, documentation by the plaintiff, including such factors as (1) the number of hours the plaintiff's attorneys spent on the case, which must be documented by the plaintiff; (2) the job description of the person spending time on the case (e.g., the costs for a paralegal and a lead counsel would be very different); (3) the specific tasks performed; and (4) applicable law in the jurisdiction, such as limits on hourly attorney fees or total amounts that courts have approved in the past.
126. See supra note 1, at 25. Even before courts review fee requests, this deliberative process prevents prevailing parties from collecting unreasonable fee awards.
129. GAO REPORT ON EPA CASES, supra note 1, at 25.
can reasonably be said to be in representation of a broad public interest rather than a private interest. Litigation will be considered to be in representation of a broad public interest if it is designed to present a position on behalf of the public at large on matters of public interest. Typical of such litigation may be class actions in which the resolution of the dispute is in the public interest; suits for injunction against action by government or private interests broadly affecting the public; similar representation before administrative boards and agencies; test suits where the private interest is small, and the like. \[\text{[ ]}\] The litigation activity does not normally extend to direct representation of litigants in actions between private persons where their financial interests at stake would warrant representation from private legal sources.\[130\]

Public interest litigation is especially significant with regard to citizen enforcement of environmental statutes, which by its nature seeks to remedy the diffuse harms caused when the government does not properly follow the law. This type of environmental litigation seeks to advance interests shared by broad segments of the public, and successful suits lead to widespread yet cumulatively significant benefits.

E. Claiming the Need for More Information on EAJA Payments

EAJA critics have seized on the current absence of reporting requirements to advocate for much broader reforms that would affect public interest environmental litigation, alleging that \[“\text{[l]ack of oversight}”\] has led to abuse of the Act.\[131\] But as others have pointed out, Congress abolished the prior reporting requirements and could simply revisit that aspect of EAJA; and obtaining current reporting data should be a prerequisite for any serious discussion about amending the Act, rather than a byproduct of predetermined efforts to narrow its scope.

I. Current Lack of Information

As shown above, most arguments for altering EAJA rely on rhetoric with little factual basis. Before Congress could remotely consider changing EAJA’s substantive aspects, it would first need to collect better information on its implementation. Current data does not provide a clear picture of the Act’s functioning, much less reveal any recurrent issues that would necessitate amendments. For example, a GAO report requested by House members found that \[“\text{[d]ata available from Justice, Treasury, and EPA show that the costs associated with environmental litigation cases against EPA have varied from year to year with no discernible trend.”}\[132\] The same report also found that \[“\text{[the number of environmental litigation cases brought against EPA each year from fiscal year 1995 through fiscal year 2010 varied but showed no discernible trend.”}\[133\] Another study on EAJA payments and cases against the Forest Service cautioned that there was “\text{insufficient evidence to conclude that the EAJA is a driver for any particular plaintiff to challenge any particular U.S. Forest Service project.”}\[134\] Congress currently lacks sufficient information to educate itself on any potential problems within the Act, much less to design effective solutions.

2. Reporting Proposals

As described above, lawmakers originally removed EAJA’s reporting requirements in 1995, and have since requested investigations into fee awards from environmental litigation, investigations that have been inconclusive at best. However, some politicians and environmentalists would support efforts to reinstate EAJA’s original reporting mechanism. In response to the GLSA, one senator submitted a bill calling for no reform other than an annual accounting of court-ordered EAJA awards;\[135\] in promoting the bill, he stated, \[“\text{[w]e don’t know how it’s impacting agency budgets. I thought it would be a good idea to get more information before we take steps to reform it.”}\[136\] According to his spokesperson, the bill’s language “\text{reflect[ed] what was in existence before 1995, so we have a sense what kind of data will be provided, and that reporting gave us a good sense of where the funds were going.”}\[137\] Other proposals have called for more expansive online reporting that would include not only aggregate court and agency data, but also the names of fee award recipients and amounts received.\[138\]

IV. Conclusion: EAJA “Reforms” Are a Solution in Search of a Problem

In summary, our research and analysis revealed no clear economic or policy basis that would support a rewrite of EAJA, much less the specific amendments that have been proposed. In the absence of sound fiscal or other reasons to narrow the reach of EAJA so as to exclude public interest environmental litigation, most current efforts seem directed at restricting unwelcome legal challenges or a subset of disfavored plaintiffs.

\[130\] Rev. Proc. 92-59, 1992-2 C.B. 411. Public interest law firms also generally are barred from accepting client fees for their services by the IRS guidelines.


\[132\] GAO REPORT ON EPA CASES, supra note 1, at 19.

\[133\] Id. at 13.

\[134\] Mortimer & Malmsheimer, supra note 85, at 357.

\[135\] A bill to reinstate the reporting provision relating to fees and expenses awarded to prevailing parties in civil actions involving the United States, S. 2042, 112th Cong. (Sen. Jon Tester, D-Mont., 2012).


\[137\] Id.

Several aspects of EAJA reform purport to curtail the use of taxpayer money to support public interest litigation. Yet, as shown above, the fiscal benefits are negligible at best. In practice, an EAJA rewrite would simply have the indirect effect of watering down the implementation and enforcement of environmental law.

EAJA critics seek to carve out environmental cases from the Act’s reach, but Congress originally created the federal environmental statutes and intended them to be enforced rigorously, including through enforcement actions supported by attorney fee awards. Those whose ultimate goal may be to restrict environmental protection should initiate a public debate on the specific policies and legacy of individual environmental statutes, rather than using arguments for fiscal responsibility and EAJA “reform” to prevent robust enforcement of the nation’s environmental laws.