

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

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I. INTRODUCTION

With enactment of the Equal Access to Justice Act (“EAJA”) in 1980, Congress enhanced the ability of private parties to hold the federal government accountable for unlawful actions and inaction. The basic idea behind EAJA is simple: 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 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 and the citizen-suit provisions contained in key statutes, EAJA ensures that the government complies with and enforces our bedrock environmental laws, such as the National Environmental Policy Act, Clean Air Act, and Clean Water Act.

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 Government Accountability Office of the approximately 2,500 EPA-related cases filed from 1995 to 2010 found that the presiding judge awarded government-paid attorney fees in only about eight percent 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.”¹

Nevertheless, EAJA has recently been targeted for major amendments by some members of the House of Representatives who are attempting to limit the Act’s reach. Those seeking to curtail public-interest litigation have 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 (H.R. 1996, 112th Congress (“GLSA”)), 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

¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-650, REPORT TO CONGRESSIONAL REQUESTORS: ENVIRONMENTAL LITIGATION CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 22 (Aug. 2011) [hereinafter GAO REPORT ON EPA CASES].

Domestic Energy and Jobs Act, which would have prevented citizens from applying EAJA's fee-shifting mechanism to any covered civil action.

This ELI white paper will show that such efforts to excise public-interest environmental litigation from the Equal Access to Justice Act 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 paper 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 paper concludes that current attempts to exclude environmental litigation from EAJA should be resisted.

II. HISTORY AND PURPOSE OF 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 the losing party does pay both parties' fees.² In practice, courts in the U.S. sometimes depart from the American Rule, with a number of state and federal "fee-shifting" statutes allowing the prevailing party to recover its attorney fees (and sometimes associated litigation costs).³

Such fee-shifting provisions have three general purposes. First, they enable citizens to hire lawyers in order to vindicate certain rights, often rights that have been expressly granted by the legislative branch. Second, they give the government, and specifically executive agencies, a financial incentive to obey the law. Finally, these provisions help ensure that parties whose rights have been violated are made whole through the court system.⁴ Congress has enacted over a hundred federal fee-shifting provisions that serve

² The rationale for the English Rule is that all litigants are entitled to legal representation and should not have to personally pay for the associated attorney fees when their claim or defense is successful.

³ Fee-shifting statutes come in two forms: procedural statutes like EAJA, with the primary function of shifting fees for many different types of cases; and substantive statutes that contain their own specific fee-shifting provisions, like many civil rights laws or pollution control laws such as the Clean Air Act.

⁴ *Government Litigation Savings Act: Hearing on H.R. 1996 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 68–69 (Oct. 11, 2011) (testimony of Prof. Brian Wolfman, Georgetown University Law Center) [hereinafter Wolfman Testimony].

one or more of these purposes, including those in the Freedom of Information Act and Title VII of the Civil Rights Act of 1964.⁵

b. Environmental fee-shifting provisions

Citizen-suit provisions in many federal environmental statutes enable citizens to enforce the laws as “private attorneys general.”⁶ These suits fall into three major categories: (1) cases against other citizens, corporations, or government bodies to remedy statutory violations;⁷ (2) suits against government agencies for arbitrary or unlawful agency action or for failing to perform non-discretionary duties; and (3) suits seeking injunctions to abate an “imminent and substantial endangerment,” regardless of whether the conduct directly violates a statutory provision.⁸ Fee-shifting provisions often accompany citizen-suit provisions in federal environmental statutes, and further facilitate these suits because citizens do not have to bear their litigation costs in successful actions.

Fee-shifting serves an especially important purpose in the context of public-interest litigation.⁹ By design, environmental laws address externalities caused by harms that are widely inflicted across large populations or even future generations. To be effective at making parties internalize 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’s 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.”¹⁰ The 1970 Clean Air Act contained the first environmental citizen-suit provisions, which also allowed for fee awards.¹¹ Fee-shifting provisions have become a hallmark of federal environmental law, with Congress

⁵ *Id.* at 70, 75.

⁶ *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387; Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992; Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–9675; Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328.

⁷ *See, e.g.*, *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987).

⁸ *See, e.g.*, *Middlesex City Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 721–22 (D.N.J. 1986).

⁹ *See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 *LAW & CONTEMP. PROBS.* 233 (1984).

¹⁰ *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

¹¹ Clean Air Act, §§ 304(d), 307(f), 42 U.S.C. §§ 7604(d), 7607(f).

authorizing awards of attorney fees under almost all subsequent environmental statutes.¹²

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.¹³ Occasionally litigants used citizen suits to compel the Administrator of the Environmental Protection Agency ("EPA") to take regulatory action, but most frequently, these suits would supplement other actions seeking judicial review or damages.¹⁴ After around 1982, citizen suits became more frequent as national environmental organizations began to mount private enforcement efforts in the face of executive-branch inaction.¹⁵

A recent example of a citizen enforcement action can be found in *American Canoe Ass'n v. City of Louisa*,¹⁶ a Clean Water Act 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.¹⁷ 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."¹⁸ The court then awarded the nonprofits attorney fees and costs for their efforts in enforcing federal mandates through the Clean Water Act's citizen suit provision.¹⁹

Even though Congress expressly authorized fee awards in the vast majority of environmental legislation, certain gaps still exist. For example, administrative agency decision-making affecting the environment is governed by the Administrative Procedure Act ("APA"), but the APA does not include analogous fee-shifting provisions. The Equal Access to Justice Act fills this gap in citizen enforcement of federal environmental law.²⁰

¹² See, e.g., Clean Air Act, § 304(d), 42 U.S.C. § 7604(d); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4); Resource Conservation and Recovery Act of 1976, § 7002(e), 42 U.S.C. § 6972(e); Safe Drinking Water Act, § 1449(d), 42 U.S.C. § 300j-8(d); Emergency Planning and Community Right-To-Know Act, § 326(f), 42 U.S.C. § 11046(f).

¹³ Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 852 (1985) (summarizing litigation patterns of all reported cases involving the citizen suit provisions of the Clean Air and Clean Water Acts).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 683 F. Supp. 2d 480 (E.D. Ky. 2010).

¹⁷ *Id.* at 483.

¹⁸ *Id.* at 482–85.

¹⁹ *Id.*

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 D.C. Circuit agreed with prior Third Circuit precedent, reasoning "where there is no applicable fee-shifting provision in the

c. *Equal Access to Justice Act*

1. *Origins and purposes*

Congress enacted EAJA in 1980 for a three-year period beginning on October 1, 1981.²¹ Its factual findings demonstrated concern that individuals, small businesses, and non-profit 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.”²² EAJA’s broad approach sought to diminish this deterrent effect.²³

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.”²⁴ 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 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.²⁵

Clean Water Act, acceptance of EPA’s reading of the EAJA would create ‘a no-man’s land contrary to clearly expressed Congressional purposes.’” *Envtl. Def. Fund, Inc. v. Env’tl. Prot. Agency*, 716 F.2d 915, 918–19 (D.C. Cir. 1983) (citing *Natural Res. Def. Council, Inc. v. Env’tl. Prot. Agency*, 703 F.2d 700, 705–06 (3d Cir. 1983) (quoting *Ocasio v. Schweiker*, 540 F. Supp. 1320, 1323 (S.D.N.Y. 1982))).

²¹ The original Act contained a sunset provision that repealed Section 2412(d) effective September 30, 1984. Pub. L. No. 96-481, § 204(c), 94 Stat. 2321, 2329 (1980).

²² *Id.* § 202(a), 94 Stat. at 2325.

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

²⁴ *Spencer v. Nat’l Labor Relations Bd.*, 712 F.2d 539, 550 (D.C. Cir. 1983) (citing H.R. REP. NO. 96-1418, at 10 (1980); S. REP. NO. 253, at 5–6 (1980)). The other two of the “three more general goals” that the D.C. Circuit asserted in *Spencer* were: (1) “to provide relief to the victims of abusive governmental conduct, to enable them to vindicate their rights without assuming enormous financial burdens;” and (2) “to reduce the incidence of such abuse.” *Id.* (citing 126 CONG. REC. H10,226–30 (daily ed. Oct. 1, 1980); 125 CONG. REC. 21,436–44 (1979); H.R. REP. NO. 1418, at 12, 20; S. REP. NO. 253, at 13).

²⁵ H.R. REP. NO. 1418, at 10; S. REP. NO. 253, at 5–6.

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.²⁶ 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.”²⁷

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*,²⁸ the Supreme Court held that federal agencies and courts lacked the authority to award attorney fees and litigation costs in the absence of express statutory authority.²⁹ Congress immediately responded with, among other actions, the Civil Rights Attorney’s Fee Awards Act of 1976.³⁰

A number of bills followed in the wake of the *Alyeska* decision, eventually leading to EAJA’s enactment.³¹ 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.³² At the three-year sunset date contained within the original legislation, Congress voted to make EAJA permanent in 1984.³³ President Reagan subsequently signed the reauthorized EAJA into law on August 5, 1985.³⁴

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 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., Nat’l Ass’n of Reg’l Med. Health Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977) (“common benefit” exception). Statutory exceptions were also inapplicable against the U.S. unless a statute specifically authorized fee awards against the federal government.

²⁷ 131 CONG. REC. S6248-01 (May 15, 1985) (Statement of Sen. Charles Grassley, R-Iowa).

²⁸ 421 U.S. 240 (1975).

²⁹ *Id.* at 269.

³⁰ 42 U.S.C. § 1988(b). Civil rights was an area of the law where awarding attorney fees had been traditionally regarded as especially appropriate. *See* S. REP. NO. 94-1011 (1976).

³¹ *See, e.g., Public Participation in Federal Agency Proceedings, S. 2715: Hearing on S. 2715 Before the Subcomm. On Admin. Practice & Procedure of the S. Judiciary Comm.*, 94th Cong. (1976) (proposing to amend the APA).

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 Department of Justice. Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOCS. 1814, 1814 (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, Reagan instructed agencies to “accept and retain on file any applications for awards of fees and expenses . . . and .

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.”³⁵ The statute defines “fees and other expenses” to include “reasonable attorney or agent fees.”³⁶

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.³⁷ However, qualified educational, scientific, or charitable nonprofit organizations under Section 501(c)(3) of the Internal Revenue Code are eligible for fee awards regardless of their size.³⁸

By design, EAJA applies to many agency cases that vindicate essential federal rights. Suits seeking non-monetary, 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 U.S. 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 its reversal of the requirement it had imposed, after extensive study, only a few years before,” and ordered the agency to reconsider.³⁹ 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.⁴⁰

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.”⁴¹ This mechanism serves to directly penalize the specific agency that was

. . . 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 WEEKLY COMP. PRES. DOCS. 1815, 1816(Nov. 8, 1984) (Re: Equal Access to Justice Act).

³⁴ Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183 (1985).

³⁵ 5 U.S.C. § 504 (a)(1); 28 U.S.C. § 2412(d)(1)(A).

³⁶ 5 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.

³⁷ 5 U.S.C. § 504 (b)(1)(B); 28 U.S.C. § 2412(d)(2)(B). The current eligibility limits were set in 1985, over 25 years ago. *See* Pub. L. No. 99-80, §§ 1–2, 99 Stat. at 185.

³⁸ 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

³⁹ *West Harlem Env'tl. Action v. Env'tl. Prot. Agency*, 380 F. Supp. 2d 289, 295–96 (S.D.N.Y. 2005).

⁴⁰ GAO REPORT ON EPA CASES, *supra* note 1, at 49.

⁴¹ 5 U.S.C. § 504(d); 28 U.S.C. § 2412(d)(4).

found to have acted unlawfully or unreasonably.⁴² 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 Department of Justice’s Judgment Fund.⁴³

EAJA differs from other fee-shifting statutes in two other vital respects.⁴⁴ *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.”⁴⁵

The Act additionally precludes government liability where “special circumstances make an award unjust,”⁴⁶ 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,”⁴⁷ and more broadly to give “the court discretion to deny awards where equitable considerations dictate an award should not be made.”⁴⁸ Taken together, these provisions—and specifically the substantially justified standard—provide the government a powerful defense that has prevented numerous successful plaintiffs from recovering fees.⁴⁹

⁴² EAJA also originally contained an annual reporting requirement, which tracked all payments made under the Act and provided a simple way for the public and government officials to identify agencies that repeatedly do not follow the law. In 1995, Congress ended the reporting of EAJA payments. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 1091(b), 109 Stat. 707, 722 (1995).

⁴³ The Judgment Fund is a permanent, indefinite congressional appropriation from which the federal government pays for monetary judgments and awards against itself. The Fund is also made available to pay for settlements by the Department of Justice related to actual or imminent litigation, but only if a judgment on the merits in the litigation would be payable from the Fund. *See* 31 U.S.C. § 1304.

⁴⁴ *See* *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) (appendix including list of over 100 federal fee-shifting statutes).

⁴⁵ 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). Through these provisions, Congress sought to prevent over-deterrence of the federal government, recognizing that some litigation efforts may be reasonable even though they ultimately fail. *See* H.R. REP. NO. 96-1418, at 11 (1980). EAJA does not specify which party has the burden of proof as to whether the federal government’s position was “substantially justified” or “special circumstances make an award unjust.” However, in *Scarborough v. Principi*, 541 U.S. 401, 405 (2004), the Supreme Court stated, “the Government may defeat this entitlement [to a fee award] by showing that its position in the underlying litigation ‘was substantially justified.’”

⁴⁶ 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

⁴⁷ H.R. REP. NO. 96-1418, at 11 (1980).

⁴⁸ *Id.*

⁴⁹ *See, e.g.*, *Cody v. Caterisano*, 631 F.3d 136 (4th Cir. 2011); *Fruitt v. Astrue*, 418 Fed. Appx. 707 (10th Cir. 2011); *Hardesty v. Astrue*, 435 Fed. Appx. 537 (7th Cir. 2011); *Cruz v. Comm’r Social Sec.*, 630 F.3d 321 (3rd Cir. 2010); *Hill v. Gould*, 555 F.3d 1003 (D.C. Cir. 2009); *Lord v. Napolitano*, 324 Fed. Appx. 115 (2d Cir. 2009); *Senville v. Madison*, 331 Fed. Appx. 848 (2d Cir. 2009); *Sardo v. Dep’t Homeland Sec.*, 284 Fed. Appx. 262 (6th Cir. 2008); *Beeks v. Comm’r Social Sec.*, 424 Fed. Appx. 163 (3d Cir. 2007); *Taucher*

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.⁵⁰ 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.⁵¹ EAJA instead limits fees to a flat \$125 per hour.⁵²

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.⁵³ 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.”⁵⁴ To receive the adjustment, a fee applicant must also show that legal services could not have been obtained at the statutorily capped rate.⁵⁵

v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005); Davidson v. Veneman, 317 F.3d 503 (5th Cir. 2003); Oro Vaca, Inc. v. Norton, 55 Fed. Appx. 433 (9th Cir. 2003) (alternative holding).

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 \$753 per hour for lawyers with 20 or more years of experience). For other parts of the country, the Department of Justice 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. District of Columbia, Civ. A. No. 00-594 (RCL), 2001 U.S. Dist. LEXIS 8114 (D.D.C. June 4, 2001); Salazar v. District of Columbia, 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 “reasonable 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).

⁵³ 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

⁵⁴ *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). Lower courts generally have followed the Supreme Court’s lead. *See* *Scarborough v. Nicholson*, 19 Vet. App. 253 (2005) (reviewing case law). The Ninth Circuit has held that environmental litigation may constitute an identifiable practice specialty. *See, e.g.*, *Natural Resources Defense Council, Inc. v. Winter*, 543 F.3d 1152, 1159–60 (9th Cir. 2008) (“Although environmental litigation may constitute an identifiable practice specialty, Plaintiffs must first establish that their counsel had such a specialty.” (citations omitted)) (holding that certain junior attorneys did not have the requisite experience in environmental law to justify an enhanced fee award); *Animal Lovers Volunteer Assoc. v. Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989) (“Environmental litigation may indeed require ‘distinctive knowledge or specialized skill’ and constitute ‘an identifiable practice specialty.’” (quoting *Pierce*, 487 U.S. at 572)).

⁵⁵ *See, e.g.*, *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991).

EAJA's largely below-market fee awards may already deter some meritorious claims that are uniquely complex or would require significant up-front expenditures of resources to litigate. In addition, the Supreme Court created a final hurdle to recovering attorney fees under EAJA in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, which narrowly defined the term "prevailing party" for the purposes of federal fee-shifting statutes.⁵⁶ Prior to this decision, plaintiffs could recover fees utilizing the "catalyst theory," which provides that if plaintiff's lawsuit brings about a voluntary change in defendant's conduct, then plaintiff may be entitled to a fee award as the prevailing party even after the case is dismissed as moot. In rejecting the "catalyst theory" as a basis of attorney fee awards, the Court held that a party must obtain either an actual judgment or a court-ordered consent decree in order to recover fees.⁵⁷

III. 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 thirty years. EAJA opponents have aired generalized grievances against non-profit environmental groups, claiming, for example, that "taxpayers have been on the hook for years while 'Big Green' trial lawyers have raked in millions of dollars."⁵⁸ One member of Congress has argued that any public-interest environmental litigation resulting in fee payments under EAJA or other statutes amounts to "the fleecing of Americans by some big, so-called environmentalist groups."⁵⁹ Others have focused attention on EAJA's exception to the net-worth cap for Section 501(c)(3) nonprofits, for example stating that "it benefits certain well-heeled environmental groups who use litigation as a strategy to advance their ideological agenda."⁶⁰

⁵⁶ 532 U.S. 598, 598 (2001). Although *Buckhannon* did not concern a fee award under EAJA, its holding has been uniformly applied to EAJA cases. *See, e.g.*, *Aronov v. Napolitano*, 562 F.3d 84, 88-89 (1st Cir. 2009); *Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir. 2008); *Perez-Arellano v. Smith*, 279 F.3d 791, 794-95 (9th Cir. 2002).

⁵⁷ *Buckhannon*, 532 U.S. at 605 ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."). Regarding settlement agreements, under a subsequent Supreme Court ruling, plaintiffs may recover fees as the "prevailing party" if the settlement is incorporated into the order of dismissal. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (recognizing that a settlement agreement may be "made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order").

⁵⁸ *See* Lawrence Hurley, *GAO Audit Sparks Battle Over Attorneys' Fees in Environmental Cases*, N.Y. TIMES (Sept. 7, 2011), <http://www.nytimes.com/gwire/2011/09/07/07greenwire-gao-audit-sparks-battle-over-attorneys-fees-in-35436.html> (statement of Sen. David Vitter, R-La.).

⁵⁹ *Id.* (statement of Rep. Cynthia Lummis, R-Wyo.).

⁶⁰ *Government Litigation Savings Act: Hearing on H.R. 1996 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 2 (Oct. 11, 2011) (statement of Rep. Howard Coble, R-N.C., Chairman, H. Subcomm. on Courts, Commercial and Administrative Law).

A second line of attack attempts to distinguish between “substantive” lawsuits and the “procedural” issues, such as federal agencies’ congressionally-imposed statutory consultation requirements and deadlines, that characterize most administrative law. In promoting her Government Litigation Savings Act proposal, the primary sponsor said, “[i]f my bill becomes law, the litigious environmentalists can still litigate over procedures and paperwork, they simply cannot expect the tax-payer to pay them to do it any longer. Instead, they can only be reimbursed for substantive suits they win under [Endangered Species Act provisions].”⁶¹ She further asserted that “[a]t its core, EAJA is a social safety net program—not an environmental one.”⁶²

Along these lines, both the House and Senate have introduced a number of bills that would directly or indirectly alter EAJA’s existing fee recovery mechanism in public-interest litigation.⁶³ Some bills are narrow, such as those proposing to exempt specific types of subject matter or cases from being covered by EAJA; these would prevent EAJA fee awards in suits that challenge, for example, certain kinds of extractive activities.⁶⁴ Others succinctly and candidly attempt to eliminate environmental non-profits’ ability to collect fees under the Act.⁶⁵ None of these proposals have been enacted.

⁶¹ *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Hearing on H.R. 1996 Before the H. Comm. on Natural Resources*, 112th Cong. 2 (2012) (statement of Rep. Cynthia Lummis, R-Wyo.).

⁶² *Id.* at 1–2.

⁶³ Not all of these proposals were restrictive. Two failed bills would have made fee recovery automatic for prevailing parties in cases against the National Labor Relations Board or the Occupational Safety and Health Administration. *See* Fair Access to Indemnity and Reimbursement Act of 1997, H.R. 2449, 105th Cong. § 2 (1997); Fair Access to Indemnity and Reimbursement Act of 1997, S. 1684, 105th Cong. § 2 (1997); Occupational Safety and Health Fairness Act of 2003, H.R. 1583, 108th Cong. (2003). Another failed attempt at reforming EAJA would have eliminated the government’s substantial justification defense, raised the net-worth cap to \$10 million for organizations, and expanded the definition of prevailing party to include “catalyst” cases. *See* Equal Access to Justice Reform Act of 2003, H.R. 2282, 108th Cong. (2003). The bill was reintroduced without significant changes in 2005. *See* Equal Access to Justice Reform Act of 2005, H.R. 435, S. 2017, 109th Cong. (2005).

⁶⁴ *See, e.g.*, Domestic Energy and Jobs Act, H.R. 4480, 112th Cong. (2012) (increasing domestic oil and gas development on federal lands, and including Section 547 stating that EAJA “do[es] not apply to a covered civil action, nor shall any party in such a covered civil action receive payment from the Federal Government for their attorneys’ fees, expenses, and other court costs”); National Strategic and Critical Minerals Production Act of 2012, H.R. 4402, 112th Cong. (2012) (requiring Departments of Interior and Agriculture to more expeditiously develop some domestic minerals, and including Section 205 stating that EAJA “do[es] not apply to a covered civil action, nor shall any party in such a covered civil action receive payment from the Federal Government for their attorneys’ fees, expenses, and other court costs”).

⁶⁵ *See, e.g.*, Senator Vitter’s Energy Production and Project Delivery Act or Senator McCain’s Jobs Through Growth Act. These bills contain identical language that would amend EAJA to add the following:

(g) Environmental Legal Fees- Notwithstanding section 1304 of title 31, no award may be made under this section and no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay any legal fees of an environmental nongovernmental organization related to an action that (with respect to the United States)—

- (1) prevents, terminates, or reduces access to or the production of—
 - (A) energy;
 - (B) a mineral resource;

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 1995.⁶⁶ The bill would have required the Government Accountability Office to audit awards made since 1995 and the Department of Justice to report EAJA awards provided through agency and court proceedings.⁶⁷

The most sweeping proposals, such as the Government Litigation Savings Act of 2011 (H.R. 1996), would overhaul EAJA in multiple ways that drastically limit its availability to environmental and other public-interest organizations.⁶⁸ Had it been successful, this bill as originally introduced would have: (1) restricted EAJA awards to plaintiffs with a “direct and personal” monetary interest in the civil action; (2) barred the recovery of EAJA fees for pro bono representation; (3) increased 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; (4) capped the amount of EAJA fee awards to a single entity per action and per year; (5) extended EAJA’s eligibility caps on net worth to non-profit groups; (6) required the Administrative Conference to annually report EAJA fee payments made by all agencies and to establish an online searchable database of EAJA payments; and (7) required GAO to audit all EAJA payments made since 1995. Even though the 112th Congress did not ultimately enact the GLSA, the proposed reporting requirements were passed by the House,⁶⁹ and other aspects of it continue to appear in other proposed legislation.⁷⁰

IV. ANALYSIS OF CLAIMS

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

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- (C) water by agricultural producers;
 - (D) a resource by commercial or recreational fishermen; or
 - (E) grazing or timber production on Federal land;
 - (2) diminishes the private property value of a property owner; or
 - (3) eliminates or prevents 1 or more jobs.

Energy Production and Project Delivery Act, S. 17 § 302, 113th Cong. (2013); Jobs Through Growth Act, S. 1720 § 4140, 112th Cong. (2011).

⁶⁶ Open EAJA Act of 2010, H.R. 4717, 111th Cong. (2010); Open EAJA Act of 2010, S. 3122, 111th Cong. (2010).

⁶⁷ H.R. 4717 §§ 3–4; S. 3122 §§ 3–4.

⁶⁸ Government Litigation Savings Act, H.R. 1996, 112th Cong. (2012); Government Litigation Savings Act, S. 1061, 112th Cong. (2011).

⁶⁹ See Red Tape Reduction and Small Business Job Creation Act, H.R. 4078, 112th Cong. (2012).

⁷⁰ For example, in November 2012, Senator Barrasso submitted the GLSA bill as a proposed amendment to Senator Tester’s Sportsmen’s Act of 2012 (S. 3525). 158 CONG. REC. S6748–49 (daily ed. Nov. 13, 2012).

a. *Claiming “frivolous and abusive” cases result in EAJA fee awards*

As seen above, EAJA critics assert that “[Section] 501(c)(3) groups have aggressively used EAJA to take millions of dollars in attorney fees in drawn-out, largely meritless procedural litigation.”⁷¹ Such broad characterizations of environmental litigation as meritless, abusive, frivolous, or “merely procedural” are common in arguments to amend EAJA.

1. *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,⁷² 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.⁷³ 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 the Act simply by showing that the government’s position was justifiable—even if unsuccessful.⁷⁴

For example, the government successfully employed the “substantially justified” standard in *Hill v. Gould*, a citizen’s APA challenge to a Department of the Interior decision denying the mute swan protection under the Migratory Bird Treaty Act.⁷⁵ 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.”⁷⁶ Nevertheless, while

⁷¹ Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 NOTRE DAME J. LEG. 1, 36 (2012).

⁷² FED. R. CIV. P. 11. In civil cases brought in a United States district court, Rule 11 requires litigants and attorneys who present any pleading, written motion, or other document to the court to certify that, to the best of the presenter’s knowledge and belief, the legal claims “are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” FED. R. CIV. P. 11(b)(2). Attorneys must also exercise due diligence in investigating the factual basis for any claim or defense. In addition to dismissing cases for violating Rule 11, courts may impose professional sanctions against parties who present frivolous claims or defenses, and in some instances, courts may even impose monetary civil penalties on litigants or attorneys who violate these rules. FED. R. CIV. P. 11(c).

⁷³ See *supra* notes 56–57 and accompanying text.

⁷⁴ See, e.g., *supra* note 49.

⁷⁵ *Hill v. Gould*, 555 F.3d 1003, 1004–05 (D.C. Cir. 2009).

⁷⁶ *Hill v. Norton*, 275 F.3d 98, 105–06 (D.C. Cir. 2001).

the plaintiff had prevailed despite the highly deferential *Chevron* standard, the D.C. Circuit held that the district court did not abuse its discretion in denying her fee request.⁷⁷ 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.⁷⁸ 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*, a neighborhood association challenged an Army Corps project to modernize part of a nearby canal.⁷⁹ 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

⁷⁷ *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.

⁷⁸ *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.* at 1008 (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”)).

⁷⁹ 455 F. Supp. 2d 532, 536 (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 complied with the requirements of [the National Environmental Policy Act] pursuant to the Administrative Procedure Act” *Holy Cross v. U.S. Army Corps of Eng’rs*, No. 03-370, 2008 WL 2278112, at *1 (E.D. La. May 30, 2008).

“NEPA”) to ensure safe administration of the project.⁸⁰ At the merits stage, the court enjoined the Corps from continuing until it had satisfied NEPA’s requirements.⁸¹ 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.⁸²

Disparaging such environmental cases as “merely” procedural misses much of the point of environmental law—and of environmental decision-making. 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 decision-making process that properly accounts for environmental considerations. NEPA’s effectiveness stems entirely from its procedural mandate.⁸³

More broadly, both public-interest and industry litigants would agree that “procedural” litigation under the Administrative Procedure Act has proven essential to vindicating federal rights and checking executive power.⁸⁴ 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 sector both participate in the decision-making process in a variety of ways prescribed in the law, including through litigation. Combining the 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.

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

⁸⁰ *Holy Cross*, 455 F. Supp. 2d at 536. The plaintiffs “sought a declaratory judgment and injunctive relief to enjoin the Corps from dredging, stirring up, releasing, and disposing of the allegedly hazardous waste-contaminated sediments of the canal.” *Holy Cross*, 2008 WL 2278112, at *1.

⁸¹ *Holy Cross*, 2008 WL 2278112, at *2 (holding that “the Corps failed to take a ‘hard look’ at the environmental impacts and consequences of dredging and disposing of the canal’s contaminated sediment” (quoting *Holy Cross*, 455 F. Supp. 2d at 540)).

⁸² *Id.* at *4.

⁸³ NEPA has had a monumental impact on government decision-making 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).

⁸⁴ Administrative Procedure Act, 5 U.S.C. §§ 701–706.

under procedural grounds, for which EAJA has a very low bar, by requiring litigants to have some skin in that game.”⁸⁵

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.”⁸⁶ 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 US Forest Service land-management litigation.”⁸⁷

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—this is no less true when the government is a defendant.⁸⁸ 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.

⁸⁵ *Government Litigation Savings Act: Hearing on H.R. 1996 Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Judiciary Comm.*, 112th Cong. 23–24 (Oct. 11, 2011) (statement of Rep. Cynthia Lummis, R-Wyo.).

⁸⁶ Michael J. Mortimer & Robert W. Malmshiemer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 J. FORESTRY 352, 357 (2011).

⁸⁷ *Id.*

⁸⁸ Courts often express the “public policy” that favors settlements and consent decrees over full-blown litigation. *See, e.g.*, *United States v. Hooker Chem. & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir. 1985); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980).

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;⁸⁹ but such litigation has in fact been successful both in and out of the courtroom.⁹⁰ 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 initial findings for approximately 500 additional species.⁹¹ The settlements have resulted in both protections for 54 species and an agreement with the environmental groups to limit the number of listing petitions and “deadline lawsuits” filed.⁹² The assistant director of FWS commented that the settlements have helped balance the agency’s portfolio and allowed FWS to propose critical habitat designations concurrently with proposed listings, as the ESA envisioned.⁹³

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

⁸⁹ This claim is repeated by many House Republicans who support restricting EAJA. See Press Release, Office of Representative Cynthia Lummis, *Lummis, Barrasso Fight Activist Lawsuits* (May 25, 2011), <http://lummis.house.gov/news/documentsingle.aspx?DocumentID=243017> (“Lack of oversight has fueled the fire for these groups to grind the work of land management and other federal agencies to a halt -- and it does so on the taxpayer’s dime.”). But at least in the context of the ESA, this criticism rings somewhat hollow, as House Republicans also have proposed cutting all funding for new species listings. Press Release, WildEarth Guardians, *House Appropriations Subcommittee Attempts to Gut the Endangered Species Act* (July 8, 2011), <http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=7031>.

⁹⁰ Courts have repeatedly held that a lack of adequate staff or funding does not excuse agency inaction or delay when faced with a non-discretionary duty. See, e.g., *Silver v. Babbitt*, 924 F. Supp. 972 (D. Ariz. 1995) (holding that an appropriations 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 non-discretionary 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.

⁹¹ Allison Winter, *Judge OKs settlement to address candidate backlog*, E&E NEWS PM (Sept. 9, 2011), <http://www.eenews.net/eenewspm/2011/09/09/archive/3>.

⁹² Phil Taylor, *Obama settlement with green groups spurred major change in listing decisions*, GREENWIRE (Jan. 11, 2013), <http://www.eenews.net/public/Greenwire/2013/01/11/3>.

⁹³ *Id.* 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 won’t list Southwest lizard*, GREENWIRE (June 13, 2012), <http://www.eenews.net/Greenwire/2012/06/13/archive/1>.

enacted in 1980.⁹⁴ 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.”⁹⁵ 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.⁹⁶ 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.

1. *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 Administrative Procedure Act.

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 the Department of the Interior’s prescriptions for adding fish ladders—despite the governing statute’s plain language mandating that FERC incorporate them.

⁹⁴ See H.R. REP. NO. 96-1005, pt. 1, at 9 (1980).

⁹⁵ Baier, *supra* note 71, at 29–30.

⁹⁶ 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.

Government Litigation Savings Act, H.R. 1996, 112th Cong. § 2(a)(1) (2012) (as referred to H. Comm. of the Whole H. on the State of the Union, July 11, 2012). The previous version contained language requiring a “direct and personal *monetary* interest in the adjudication.” *Id.* (as referred to H. Comm. on the Judiciary, May 25, 2011) (emphasis added). Even though the later version removed this express monetary requirement, the revised language would have similarly restrictive effects.

The Ninth Circuit heard an environmental group’s appeal and held that FERC had clearly violated the law by failing to follow Interior’s expert guidance for sustaining the fishery.⁹⁷ 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 non-profit 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.⁹⁸ 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.”⁹⁹

Under longstanding 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.¹⁰⁰

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 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 NGO—is representing its members.¹⁰¹ At a minimum, this ambiguity will generate additional litigation.

⁹⁷ See *American Rivers v. Fed. Energy Regulatory Comm’n*, 187 F.3d 1007 (9th Cir. 1999).

⁹⁸ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁹⁹ *Allen v. Wright*, 468 U.S. 737, 752 (1984).

¹⁰⁰ *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 333 (1977) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)).

¹⁰¹ See *Taxpayer-Funded Litigation Benefitting Lawyers and Harming Species, Jobs and Schools: Hearing on H.R. 1996 Before the H. Comm. on Natural Resources*, 112th Cong. 2 (June 19, 2012) (“If [GLSA] becomes law, the litigious environmentalists can still litigate over procedures and paperwork, they simply cannot expect the tax-payer to pay them to do it any longer. Instead, they can only be reimbursed for substantive suits they win under the terms laid out for them in the [ESA].”).

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.”¹⁰² 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 classes of parties. This budgetary argument ignores EAJA’s congressionally established policy of ensuring that federal agencies follow the law, and fails to explain why any fiscal savings should specifically come at the expense of attorney fee payments. Instead, proponents simply assert, without data, that their modifications to the Act would save taxpayer money.

1. *Agency compliance with law is a congressional policy that provides benefits, while EAJA “reform” entails costs of its own*

Paying fee awards to any EAJA claimant, including environmental NGOs, of course involves some expenditure of government funds. On examination, however, claims that the EAJA awards paid in environmental cases are somehow wasteful, or that they cost the government disproportionately large sums of money, are unjustified. On balance, determining whether the proposed amendments to EAJA would save taxpayer dollars also depends on assessing the Act’s current benefits, and on whether taxpayers are getting positive value with respect to enforcement of environmental laws – or more generally, agency compliance with the rule of law.

Even without accounting for these benefits, the total amount spent on fee awards in all environmental suits is insignificant when viewed against the backdrop of federal government spending on other types of litigation. For example, the cost of attorney fees paid by the government in losing ESA litigation amounts to two-tenths of one percent of the \$8.7 billion in fees awarded from the Treasury Department’s Judgment Fund since 2009.¹⁰³

Ironically, the proposed “Government Litigation Savings Act” was *itself* expected to impose significant new costs on taxpayers. According to the Congressional Budget Office (“CBO”) report that scored the GLSA, enacting the bill would have cost approximately an additional \$95 million over the next five years.¹⁰⁴ CBO meanwhile found that the

¹⁰² Press Release, Office of Representative Lummis, *Lummis Announces EAJA Bill Hearing* (Oct. 6, 2011), <http://lummis.house.gov/news/documentsingle.aspx?DocumentID=263439>.

¹⁰³ Steve Davies, *Hasting, Gohmert preside over roast of ESA attorney fees*, ENDANGERED SPECIES & WETLANDS REPORT (June 19, 2012, 6:24 PM), <http://www.eswr.com/2012/06/hastings-gohmert-preside-over-roast-of-esa-attorney-fees> (statement of Rep. Edward Markey, D-Mass.). The Bush Administration paid out \$18.7 million in fees for a single lost telecommunications case in 2006. *Id.* In contrast, one environmental case often criticized for the size of its award, *Natural Resources Defense Council, Inc. v. Salazar*, resulted in an attorney fee award totaling \$1.9 million for over six years of litigation, a fraction of the amount collected in the telecommunications case. *Natural Res. Def. Council, Inc. v. Salazar*, No. 1:05-cv-01207-OWW-GSA (E.D. Cal. Sept. 23, 2009).

¹⁰⁴ CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 1996 GOVERNMENT LITIGATION SAVINGS ACT 2 (June 26, 2012).

bill's proposed restrictions on eligibility for EAJA awards "would not have a significant impact on caseload or awards of attorneys' fees."¹⁰⁵ 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.¹⁰⁶

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 percent of the lawsuits, while environmental groups brought 30 percent (with local environmental and citizens' groups filing the majority of those).¹⁰⁷ In fact, federal agencies spend only a small fraction of their overall budgets on mounting defenses to environmental litigation. For example, the Fish and Wildlife Service spent \$1.24 million in 2010 to "manage, coordinate, track, and support ESA litigation" brought by *both* environmental and industry groups.¹⁰⁸ This cost amounted to one-half of one percent of the agency's \$275 million budget that year for endangered species work.¹⁰⁹

Similarly, even though the ESA is one of the most-litigated environmental statutes, the government's cost of (non-EAJA) fee awards in ESA cases represents only two-tenths of one percent of all attorney fees paid from the Treasury Department's Judgment Fund

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.* For Social Security cases, the volume in the final three years of EAJA reporting was as follows: in 1992, 252 applications (92.3% of all EAJA applications); in 1993, 227 applications (86.3% of all EAJA applications); and in 1994, 2,206 applications (92% of all EAJA applications). See Admin. Conf. of the U.S., Rep. of Chairman of Admin. Conf. on Agency Activities Under the Equal Access to Justice Act (1982); Admin. Office of the U.S. Courts, Annual Report of the Director of the Administrative Office of the U.S. Courts, Report by the Director on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, in 1982 Jud. Conf. Rep. (1982); U.S. Dep't of Justice, Equal Access to Justice Act: 1993 Annual Report; U.S. Dep't of Justice, Equal Access to Justice Act: 1993 Annual Report.

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. Baier, *supra* note 71, 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 104, at 3 (cost projections beyond the initial five-year period were unavailable).

¹⁰⁷ GAO REPORT ON EPA CASES, *supra* note 1, at 17. For a discussion of the deliberative process involving the Department of Justice and independent federal judges, see Section IV(d)(2)(A). *Infra* notes 123–126 and accompanying text.

¹⁰⁸ Letter from Gary Frazer, Assistant Dir. for Endangered Species, U.S. Fish & Wildlife Serv., to Paul Conroy, Chair, Threatened & Endangered Species Policy Comm., Ass'n of Fish & Wildlife Agencies (Sept. 9, 2011) (on file with authors).

¹⁰⁹ See Press Release, Ctr. for Biological Diversity, *Endangered Species Act 99 Percent Effective at Saving Imperiled Species: House Republicans Offer Empty Rhetoric Attacking Act* (Dec. 5, 2011), http://www.biologicaldiversity.org/news/press_releases/2011/endangered-species-act-12-05-2011.html.

since 2009.¹¹⁰ And the Acting Director of the U.S. Department of Agriculture’s Farm Service Agency and the Finance Officer for the Department of the Interior’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.¹¹¹

Finally, the majority of attorney fee awards resulting from environmental litigation are not paid out under EAJA. GAO reported that only about eight percent 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.”¹¹² Further, the Department of Justice’s Office of Legal Counsel directed that “the ESA fee provision should take precedence over EAJA section 2412(d)—*i.e.*, that hours and costs necessary to both successful counts should be allocated to the ESA claim for attorney’s fees purposes.”¹¹³ 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.¹¹⁴

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.”¹¹⁵ She further asserted that these groups “have been

¹¹⁰ Steve Davies, *Hastings, Gohmert preside over roast of ESA attorney fees*, ENDANGERED SPECIES & WETLANDS REPORT (June 19, 2012, 6:24 PM), <http://www.eswr.com/2012/06/hastings-gohmert-preside-over-roast-of-esa-attorney-fees> (statement of Rep. Edward Markey, D-Mass.). Indeed, environmental groups have argued that fee awards in Endangered Species Act 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.

¹¹¹ U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: LIMITED DATA AVAILABLE ON USDA AND INTERIOR ATTORNEY FEE CLAIMS AND PAYMENTS 9–10 (Apr. 2012) [hereinafter GAO REPORT ON USDA AND DOI CASES].

¹¹² GAO REPORT ON EPA CASES, *supra* note 1, at 17.

¹¹³ Payment of Attorney’s Fees in Litigation Involving Successful Challenges to Federal Agency Action Arising Under the Administrative Procedure Act and the Citizen Suit Provisions of the Endangered Species Act, Op. Off. Legal Counsel (Nov. 27, 2000), <http://www.justice.gov/olc/opn5.htm>.

¹¹⁴ Steve Davies, *Hastings calls another hearing on costs, impacts of ESA litigation*, ENDANGERED SPECIES & WETLANDS REPORT (June 8, 2012, 7:07 PM), <http://www.eswr.com/2012/06/hastings-calls-another-hearing-on-costs-impacts-of-esa-litigation> (citing GAO REPORT ON USDA AND DOI CASES, *supra* note 111).

¹¹⁵ Press Release, Office of Representative Cynthia Lummis, *Exposing Big Green Environmentalist’s Best-Kept Secret* (Sept. 8, 2011), <http://lummis.house.gov/news/documentsingle.aspx?DocumentID=264878>.

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.”¹¹⁶

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 one percent of its total annual income from EAJA fee awards.¹¹⁷

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 U.S. Forest Service indicates that nearly three-quarters (74.4 percent) of the parties engaged in environmental litigation against the agency are involved only in a single lawsuit.¹¹⁸ With respect to all lawsuits filed against U.S. EPA from 1995 to 2010, local environmental and citizens’ groups filed 16 percent of the total cases, while national environmental organizations filed 14 percent.¹¹⁹ With respect to EAJA fee awards against EPA, the majority of payments (61 percent) went for claims filed by local environmental groups, with national environmental groups receiving 23 percent of payments.¹²⁰

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 in EAJA attorney fee awards. A 1998 GAO report found that Social Security disability and veterans’ disability cases represented 98 percent of EAJA applications and 87 percent of EAJA fee awards in 1994.¹²¹

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 since 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

¹¹⁶ *Id.*

¹¹⁷ 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.

¹¹⁸ Mortimer & Malmshemer, *supra* note 86, at 357.

¹¹⁹ GAO REPORT ON EPA CASES, *supra* note 1, at 17.

¹²⁰ *Id.* at 25 (data collected from 2006—the first year for which EPA specifically tracked the payments by type of claim—to 2010).

¹²¹ U.S. GEN ACCOUNTING OFFICE, GAO/HEHS-98-58R, EQUAL ACCESS TO JUSTICE ACT: ITS USE IN SELECTED AGENCIES 5 (Jan. 14, 1998).

increase fee awards resulting from cost-of-living adjustments or due to the existence of a “special factor.”¹²²

A. *Adversarial legal system as gatekeeper*

As an initial matter, the Department of Justice (“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.¹²³ As counsel for the government, DOJ also has an opportunity to challenge the award of attorney fees.¹²⁴

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 determine that the hours are justified, fees may still be denied due to court precedent.¹²⁵ 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 resulting fee awards 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.¹²⁶ 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.¹²⁷

¹²² See *supra* Section II(c)(2).

¹²³ The report recounts that:

[t]o 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.

GAO REPORT ON EPA CASES, *supra* note 1, at 25. Even before courts review fee requests, this deliberative process prevents prevailing parties from collecting unreasonable fee awards.

¹²⁴ See, e.g., *Hill v. Gould*, 555 F.3d 1003, 1004 (D.C. Cir. 2009); *Fed. Election Comm’n v. Rose*, 806 F.2d 1081 (D.C. Cir. 1986).

¹²⁵ GAO REPORT ON EPA CASES, *supra* note 1, at 25.

¹²⁶ See *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhard*, 461 U.S. 424 (1983). The market rate can be calculated by multiplying the number of hours reasonably spent on the case by the hourly rate a lawyer could command in the market when working for a private, fee-paying client.

¹²⁷ See Pub. L. No. 104-121, §§ 231–233, 110 Stat. 847, 862–64 (1996).

3. *Eliminating EAJA's size/net-worth exemption for Section 501(c)(3) organizations*

Proponents of EAJA reform also seek to extend the statute's size and net-worth eligibility cap to cover nonprofits.¹²⁸ 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.¹²⁹

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.¹³⁰ 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 non-monetary 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 Section 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:

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. [] The litigation activity does not normally extend to direct representation of litigants in actions between

¹²⁸ Baier, *supra* note 71, at 68–70.

¹²⁹ H.R. REP. NO. 96-1418, at 10 (1980) ("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").

¹³⁰ 26 U.S.C. § 162(a).

private persons where the financial interests at stake would warrant representation from private legal sources.¹³¹

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 “[l]ack of oversight” has led to abuse of the Act.¹³² 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.

1. 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 “[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.”¹³³ The same report also found that “[t]he number of environmental litigation cases brought against EPA each year from fiscal year 1995 through fiscal year 2010 varied but showed no discernible trend.”¹³⁴ Another study on EAJA payments and cases against the U.S. Forest Service 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.”¹³⁵ Congress currently lacks sufficient information to educate itself on any potential problems within the Act, much less to design effective solutions.

¹³¹ 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 Press Release, Office of Representative Cynthia Lummis, *Lummis, Barrasso Fight Activist Lawsuits* (May 25, 2011), <http://lummis.house.gov/news/documentsingle.aspx?DocumentID=243017>.

¹³³ GAO REPORT ON EPA CASES, *supra* note 1, at 19.

¹³⁴ *Id.* at 13.

¹³⁵ Mortimer & Malmshemer, *supra* note 86, at 357.

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 which 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;¹³⁶ in promoting the bill, he stated, "[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."¹³⁷ According to his spokesperson, the bill's language "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."¹³⁸ 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.¹³⁹

V. CONCLUSION: EAJA "REFORMS" ARE A SOLUTION IN SEARCH OF A PROBLEM

In summary, ELI's 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.

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.

¹³⁶ 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-MT, 2012).

¹³⁷ Rob Chaney, *Tester wants accounting of groups reimbursed for suing government*, MISSOULIAN (Jan. 31, 2012), http://missoulian.com/news/local/tester-wants-accounting-of-groups-reimbursed-for-suing-government/article_ce40742a-4bba-11e1-baec-0019bb2963f4.html.

¹³⁸ *Id.*

¹³⁹ *E.g.*, Open EAJA Act of 2010, H.R. 4717, 111th Cong. (2010); Government Litigation Savings Act, H.R. 1996, 112th Cong. §§ 2(a)(4), 2(b)(4) (2012).

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