Testimony of Professor Daniel J. Rohlf
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Oversight and Investigations Subcommittee

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"The bill [which became the Equal Access to Justice Act] rests on the premise that a party who chooses to litigate an issued against the government is not only representing his or her own vested interest but is also refining and formulating public policy. . . 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."[1]

Thank you, Chair Gosar, Ranking Member Huffman, and members of the Subcommittee and full House Natural Resources Committee for your invitation to speak to you today.

My name is Daniel Rohlf. I am a Professor of Law at Lewis and Clark Law School in Portland, Oregon, where I teach in our nationally regarded Environmental, Natural Resources, and Energy Law Program. I have taught a variety of courses in these areas over my 35-year career at the law school, including courses focusing on the management and protection of wildlife and public lands. Additionally, with a colleague on our faculty I co-founded Lewis and Clark's domestic environmental law clinic, Earthrise Law Center, nearly 30 years ago. First and foremost, our clinic provides Lewis and Clark students with valuable real-world training in practicing environmental law. The clinic works on behalf of clients seeking to protect the environment, and provides a variety of legal services ranging from litigation in federal court to legal analysis and advice. Earthrise must itself raise a significant portion of the clinic's expenses, which it secures from a combination of heavily discounted client fees, foundation grants, individual donations, and attorney fee awards when the clinic prevails in court; these fee awards include attorney's fees under the Equal Access to Justice Act (EAJA). In sum, I have decades of experience dealing with both the substance of environmental and natural resources laws, as well as participating in the enforcement of those laws.

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[1] H.R. Rep. No. 96-1418, 96th Congress, 2d Sess., reprinted in 1980 U.S.C.C.A.N., 4984, 4988-89 (1980).

The Equal Access to Justice Act

I have taught and traveled in many countries throughout the world, which has led me to appreciate a quality that sets the United States apart from most other nations – we back up our commitment to the rule of law by not only encouraging American citizens to hold their government to account in complying with its legal obligations. However, even the promise of allowing people to challenge potentially unlawful government actions rings hollow if a lack of financial resources creates an insurmountable barrier to courthouse door. The esteemed jurist Learned Hand recognized this risk of providing legal recourse for only a monied subset of citizens when he emphasized that "[i]f we are able to keep our democracy, there must be one commandment: Thou shalt not ration justice."[2]

Congress passed the Equal Access to Justice Act (EAJA) in 1980 to address this precise problem. The law allows a party or parties that prevail in litigation against the federal government to recover their attorney's fees, provided that the litigation position of the federal defendant was not "substantially justified." This means that even people and organizations that otherwise could not otherwise afford legal counsel may be able to find attorneys willing to represent those parties in court actions against the government since there is a possibility of recovering fees from a federal defendant if the case is successful.

However, a plaintiff faces challenging hurdles to gain compensation for such fees. Court decision have substantially narrowed the definition of what constitutes a "prevailing party" eligible for a fee award. In *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health and Human Resources*,[3] the Supreme Court rejected the so-called "catalyst theory" that an agency's change of position after a lawsuit was filed could make the plaintiff a prevailing party for purposes of a fee award. Even if there is a direct connection between the lawsuit and the federal government's change of position, the Court held that a litigant must obtain a "judicially sanctioned change in the legal relationship of the parties" in order to be eligible for fees under EAJA.[4] This year, the Court further narrowed the definition of a prevailing party that governs EAJA fee awards. It determined that even a court's favorable decision on a motion for preliminary injunction, followed by a change of position by the federal defendant, did not provide the basis for a fee award because "both the change in relationship and its permanence must result from a judicial order."[5] In addition to this narrow definition of what it means to be a prevailing party, before awarding attorney's fees to a successful litigant against the federal government, a court must find that the government's position had "no reasonable basis in law and fact."[6] Together, these requirements can make it difficult for a plaintiff to recover attorney's

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[2] Address at the 75th anniversary celebration of the Legal Aid Society of New York, Feb. 16, 1951.

[3] *Buckhannon Bd. & Care Home v. West Virginia Dep't of Health and Human Resources*,[3] 532 U.S. 598 (2001).
[4] *Id*. at 605.
[5] *Lackey v. Stinnie*, 604 U.S. 192, 207 (2025).
[6] See Administrative Conference of the United States, EAJA Basics, https://www.acus.gov/sites/default/files/documents/13%20EAJA%20Basics.pdf.

fees under EAJA even when its legal action forces a federal defendant to alter an action or decision.

While EAJA potentially allows any prevailing litigant that successfully sues the federal government and meets the standards above to receive attorney's fees, the overwhelming number of fee awards under the statute stem from cases involving benefits for veterans and Social Security recipients. In 2024, over 99% of EAJA fee award cases involved such parties.[7] In the relatively small number of environmental cases that result in fee awards under EAJA, non-governmental organizations (NGOs) that align with industry and resource users as well as NGOs seeking stronger protections for the environment commonly employ the Administrative Procedure Act and related provisions that provide for judicial review of federal agency actions, and both types of plaintiffs routinely seek attorney fee awards under EAJA when they achieve favorable orders from a court that make them eligible.

Environmental NGOs' use of EAJA advances Congress' goals by ensuring the federal government's compliance with laws designed to manage and protect the environment

Important federal statutes such as the National Environmental Policy Act, Clean Air Act, Clean Water Act, and Endangered Species Act have provided the American people with enormous benefits – our rivers no longer catch fire and we drink clean water, the air we breathe does not imperil our health, and we've made progress in protecting and restoring the species and ecosystems that both inspire and support us. However, lawmakers did not create a comprehensive means to ensure that federal agencies faithfully implement and enforce these basic environmental safeguards. Instead, Congress wisely recognized that citizens themselves, play an important role as essential partners in ensuring that the government lives up to its legal responsibilities.

This reliance on citizen enforcement of environmental laws is not some accident of legislative drafting; it reflects a deliberate congressional judgment about how environmental protection actually works in practice. Unlike disputes over money and benefits, citizens collectively benefit from a healthy environment and intact ecosystems, and court actions compelling compliance with laws to protect these resources result in injunctive relief rather than financial awards. As a result, individuals rarely assume the responsibilities and expenses required to vindicate the public's interest in federal agencies' compliance with environmental law.

Not-for-profit organizations that step into this void and pursue non-monetary actions to support this public interest thus play a crucial role in law enforcement. When environmental organizations successfully challenge an agency's failure to comply with the Endangered Species Act for example, they are not profiting from litigation – they are vindicating Congress's

[7] See Administrative Conference of the United States, EAJA Awards Report to Congress, Fiscal Year 2024, https://www.acus.gov/sites/default/files/documents/ACUS%20EAJA%20Award%20Report%20FY2024_Final.pdf

judgment that species conservation matters and that agencies must follow the law. When they prevail in NEPA cases, they are ensuring that federal decision-makers have the environmental information Congress required them to consider. These organizations serve as private attorneys general, supplementing limited agency enforcement resources and ensuring that environmental laws function as Congress intended.

Courts routinely recognize not only the importance of organizations' role in taking on cases that seek compliance with the law rather than financial rewards, but also highlight the importance of potentially recovering the expenses required to take on this role. For example, the Ninth Circuit Court of Appeals observed that "Congress emphasized the importance of attorneys' fees in cases seeking injunctive relief, where there is no monetary light at the end of the litigation tunnel: 'If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts.'"[8]

Therefore, without the possibility that litigants who successfully compel federal agencies to follow the law could recover their expenses under statutes such as EAJA, the promise of environmental law would ring hollow. Citizens would have a theoretical right to enforce environmental statutes through the courts, but practical barriers would render that right illusory for all but the most committed individuals and wealthiest organizations. EAJA levels the playing field, ensuring that meritorious challenges to unlawful agency action can proceed regardless of the plaintiffs' financial resources. This is not a subsidy or a handout—it is a crucial tool for ensuring that even the government complies with its legal responsibilities, precisely as Congress intended.

The public pays a very reasonable price for the benefits to all citizens provided by enforcement actions to ensure federal agencies comply with environmental laws. For example, in a court opinion supporting an EAJA fee award to an environmental organization that had prevailed in a legal action forcing the federal government to comply with laws protecting habitat in Oregon's high desert, the court noted that "[t]his is not a case where multiple senior partners at a high-priced firm are driving up fees unnecessarily. This was an environmental case and justified the use of attorneys learned in environmental law. All in all, the fees are not particularly high given the size and duration of this case. It is safe to say that if a large firm had handled this case, the fees would have been an order of magnitude larger."[9] This sort of cost-effective justice to benefit the public is typical in cases where courts award fees under EAJA, particularly because judges must ensure the reasonableness of fee awards to successful plaintiffs.

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[8] *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 n.1 (9th Cir. 2008) (quoting S.Rep. No. 94–1011, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910).

[9] *Or. Nat. Desert Ass'n v. Vilsack*, No. 2:07-cv-1871-HA, 2013 WL 3348428 (D. Or. July 2, 2013).

Compliance with legal deadlines and required procedures is crucial to realize lawmakers' goals

Interests opposed to legal and financial tools that facilitate citizens' ability to enforce environmental laws seldom argue that it is acceptable for the federal government to simply ignore laws that protect our air, water, and ecosystems. Instead, they complain that environmental organizations often focus on ensuring compliance with deadlines, procedural obligations, and similar "bureaucratic" mandates – implying that such requirements are unimportant and that failing to comply with them is more of a technicality. However, this perspective blithely ignores both the common sense of our everyday experience and the nature of environmental law itself.

In the real world, deadlines and procedures are a routine and important element of our lives. Students must turn in assignments on time or risk a grade penalty; our bills have very clear due dates, and missing them triggers late fees and interest; the milk bottle carries an expiration date. Some deadlines can be matters of life and death; we're tempted to put off making the appointment for that unpleasant cancer-screening procedure, but those who do so increase the risk that they will not live to enjoy future life milestones. We can safely enjoy a dinner out on the town because the restaurant complied with the required health inspections.

Deadlines and procedures set forth in environmental laws are no less important. For example, studies show that when a species is listed as threatened or endangered its chances of becoming extinct decrease significantly, and the status of many listed species begins to gradually improve toward recovery. However, the U.S. Fish and Wildlife Service argued that it could simply ignore petitions to add species to the protected lists, thus putting off indefinitely the task of making a decision that could generate controversy. The Ninth Circuit Court of Appeals conclusively disagreed, holding that the agency must meet the Endangered Species Act's one year deadline for deciding on a petitioned action.[10] The court's opinion succinctly summed up the common-sense idea that in environmental law, agency compliance deadlines and required procedures is central to realizing the central goals of the law itself: "Congress has established procedures to further its policy of protecting endangered species. The substantive and procedural provisions of the ESA are the means determined by Congress to assure adequate protection. Only by requiring substantial compliance with the act's procedures can we effectuate the intent of the legislature."[11]

When a government agency wants to flout the will of Congress and break the law for political reasons, its most common tactic is not to do the required action badly – it is to not do the action at all. Ignoring implementation deadlines or required procedures are among the most effective, and the most common way agencies fail to comply with the law. That is precisely why lawmakers put both deadlines *and the ability to enforce them* into so many statutes that protect human health and the environment.

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[10] *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1159 (9th Cir. 2002).

[11] Id., quoting Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir.1987).

Therefore, the notion that “deadline” or "procedural" cases are somehow less worthy of fee awards under EAJA protection betrays a fundamental misunderstanding of administrative law and environmental protection. Congress designed vital components of many environmental laws in terms of prescribed timeframes and required procedural frameworks, and they are no less important to protecting the resources and ecosystems we depend on than the substantive standards set forth in those legal schemes.

Settlements are an important element of resolving environmental disputes, and typically save rather than increase fee awards

Another common criticism of EAJA in the environmental context involves so-called "sue and settle" arrangements, where environmental groups allegedly collude with sympathetic agencies to produce predetermined outcomes while extracting attorney fee payments. This narrative, while politically expedient, bears little relationship to reality and reveals a fundamental misunderstanding of how environmental litigation and settlements actually function.

Settlements in environmental cases typically *reduce* rather than increase attorney fee awards. For example, deadline cases typically settle early in the litigation because the federal defendant recognizes that it will not prevail in the case. When parties settle a case early, they dramatically reduce litigation costs since EAJA awards are based on actual attorney time spent; settling early means fewer compensable hours. And with significant legal resources at its disposal, the federal government does not enter into settlements because it is intimidated; it settles when it recognizes that the defendant’s position lacks merit. When an agency recognizes it has violated a statutory deadline and negotiates a reasonable compliance schedule, or admits that an agency’s decision was arbitrary, that represents responsible government—not collusion.

Additionally, criticisms implied by the "sue and settle" narrative ignores the significant judicial oversight involved in environmental settlements. Proposed consent decrees in environmental cases must be approved by federal judges who independently assess whether settlements are fair, reasonable, and serve the public interest.[12] The suggestion that agencies and environmental groups conspire to produce preordained outcomes presumes federal judges are either complicit or incompetent—a claim that completely lacks support or merit.

In my decades of experience, I have never been involved with or learned of a case where settlement with a federal defendant even approached improper conduct. Instead, settlements are open, meticulously crafted to conform to the law, and based on the Department of Justice’s determination that a federal party is unlikely to prevail in court. On the other hand, I have repeatedly seen agencies recognizing that they violated clear statutory mandates and federal attorneys prudently agreeing to remedy those violations and awarding reasonable attorney’s fees

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[12] *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995) (discussing judicial role in reviewing consent decrees).

through settlement rather than protracted litigation. This is not a flaw in citizen enforcement of environmental laws; it is pragmatic dispute resolution that serves taxpayer interests by avoiding unnecessary litigation costs.

Finally, the transparency requirements Congress enacted in the 2019 Dingell Act now provide complete public visibility into EAJA payments.[13] This database confirms what objective observers have long understood: EAJA payments to environmental plaintiffs are modest, infrequent, and awarded only in cases where the government's position was not substantially justified. The notion that environmental groups are getting rich from EAJA fees—or that settlements somehow represent collusion rather than practical problem-solving—does not withstand scrutiny.

Calls to amend or limit EAJA awards would harm the environment and undermine the rule of law

Proposals to modify EAJA, particularly in the environmental context, seldom arise from genuine concerns about procedural fairness or fiscal responsibility. Instead, they represent a sophisticated strategy by those whose economic interests depend on avoiding the full costs of environmental protection; when economic interests cannot convince lawmakers on the merits of their arguments to weaken environmental laws, they often attack the mechanisms that make those laws enforceable. If opponents of sensible environmental protections can prevent citizens from effectively enforcing the laws – by making litigation prohibitively expensive, by limiting attorney fee awards to below-market rates, and by creating artificial obstacles to fee recovery – they can hollow out environmental protection without having to persuade Congress to amend or repeal environmental statutes.

The economics of enforcement reveal the true purpose of calls to modify EAJA. When industry groups challenge environmental regulations, they typically represent clients with substantial economic interests at stake; These clients can afford to pay attorneys market rates regardless of EAJA eligibility. Environmental organizations, by contrast, work on behalf of the public interest in environmental protection—an interest that is diffuse, lacks concentrated economic benefits to particular parties, and cannot afford market-rate attorney compensation without fee-shifting statutes.

Limiting EAJA would thus limit access to justice itself; industry could continue challenging environmental protections it dislikes, while citizens would face prohibitive barriers to enforcing environmental laws. It its core, this is the intended purpose of EAJA "reforms." Those who profit from externalizing environmental costs to society understand that direct

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[13] John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 1301, 133 Stat. 580 (2019) (codified at 28 U.S.C. § 2412); see database at https://www.acus.gov/eaja/statistics.

assaults on environmental laws are likely to face strong public and political opposition. Attacking enforcement mechanisms provides a less visible route to the same end.

At a time when the rule of law faces unprecedented erosion, citizen enforcement of environmental laws is more important than ever

Today in the United States we face an era of unprecedented challenges to the rule of law itself. Executive branch agencies increasingly ignore statutory mandates and are even edging to ignoring the courts. A firehose of executive orders has reversed longstanding statutory interpretations without adequate justification, ignoring the best available science in favor of political considerations, and systematically weakening environmental protections that Congress established. Federal agencies have literally invited some industries to delay compliance with deadlines to reduce deadly pollution by simply sending an email.

In this context, citizen enforcement becomes not merely useful but essential. When the president and his political appointees direct agencies to violate environmental laws – whether by missing statutory deadlines, disregarding scientific findings, or implementing policies contrary to legislative mandates – citizens and environmental organizations represent the last line of defense for the environmental. Federal courts, through judicial review of agency actions, serve as the ultimate check on executive overreach and administrative lawlessness. But judicial review is only meaningful if citizens can access courts, and access requires the ability to afford competent legal representation.

This is where EAJA's significance becomes clear. True separation of government powers depends on checks and balances. When the executive branch violates laws enacted by Congress, the judiciary must be able to provide redress. But if potential plaintiffs cannot afford to enforce the law, judicial review becomes theoretical rather than actually available. We must view calls to modify EAJA must be understood in this context. Weakening citizen enforcement does not simply disadvantage environmental organizations – it disrupts our basic system of government by insulating executive action from judicial review. The stakes of such action would extend beyond any particular environmental dispute. If Congress enacts laws that agencies can ignore without consequence, in part because citizens cannot afford legal representation, then democracy itself is on the ropes.

Conclusion

The Equal Access to Justice Act serves essential functions in our system of environmental law and democratic governance. It enables citizens to vindicate the public interest in environmental protection by holding federal agencies accountable to statutory mandates. It ensures that procedural requirements and deadlines – which are far from mere technicalities – are actually observed. It facilitates settlements that serve environmental protection while reducing litigation costs. And it protects our basic system of government by preserving meaningful judicial review of executive action.

Proposals to weaken thus EAJA must be recognized for what they are – attempts to hollow out protection for our air, water, and ecosystems without having to persuade both the public and Congress to weaken environmental laws. At a time when federal agencies face increasing political pressure to ignore scientific evidence and violate statutory requirements, citizen enforcement through EAJA is more important than ever. The governance structure advocated by those calling for EAJA "reform" – a system where agencies can violate environmental laws with impunity because citizens cannot afford to participate in enforcement as Congress intended – is unacceptable in any society that claims to value both environmental protection and the rule of law.