



Statement of the American Farm Bureau Federation

**To the United States House of Representatives
Committee on Oversight and Government Reform,
Subcommittee on The Interior, Energy and Environment**

Hearing on:

“Restoring Balance to Environmental Litigation”

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Chairman Gianforte, Ranking Member Plaskett, and Members of the Subcommittee, my name is Ryan Yates and I am Director of Congressional Relations at the American Farm Bureau Federation. I am pleased to be here today to offer testimony on restoring balance to environmental litigation, an issue of great importance to farmers and ranchers across the country.

On behalf of the nearly 6 million Farm Bureau member families across the United States, I commend your leadership in providing oversight of federal environmental regulations, policies, and litigation, and appreciate the Subcommittee's desire to learn more about the ways in which environmental organizations take advantage of the system. Such a review is timely and, in our judgment, will permit policymakers to gain a greater appreciation for the impact of environmental litigation not only on agricultural producers in their efforts to produce food, fiber and fuel but also on all hard-working taxpayers.

I would like to devote my time today primarily to explaining how the use of federal fee-shifting statutes has deviated from Congress's intent. I would be more than happy to discuss any additional issues with you at a later time, in person or in writing, on which the Farm Bureau may have pertinent policies.

The Equal Access to Justice Act ("EAJA") and other fee-shifting statutes were intended to rebalance the scales and restore equity to the David-vs-Goliath task individuals and small businesses and organizations take on when suing the federal government to vindicate their rights and hold government accountable. Congress knew that the traditional "American Rule," by which each litigant pays his or her own way, could unfairly favor the government with its vastly greater resources to litigate regardless of the merits. Congress wanted to make it possible to challenge an unjust cost or penalty, or an unjust denial of hard-earned benefits, without paying more in attorneys' fees than what an individual would stand to lose or gain in litigation. But almost forty years on, the result is anything but equitable.

In the testimony that follows, I discuss three ways in which attorneys' fee awards in environmental litigation have gone off the rails —(1) transparency, (2) fairness, and (3) cost—and targeted solutions to help restore integrity to the process. These suggestions are primarily focused on EAJA, but could be applied to other fee-shifting statutes as well, through appropriate legislation.

Many solutions similar to those below have already been proposed in legislation; indeed, as recently as last year the House passed legislation that would enact some of these ideas into law.¹ Nothing should stop Congress from finishing what it started.

I. Transparency

- A. Problem: EAJA allows activist groups to hide how much money they make from litigation with the federal government.

When EAJA was first enacted, Congress required tracking of attorneys' fees paid out of agency budgets for both litigation and administrative proceedings. That requirement ended in

¹ <https://www.congress.gov/bill/115th-congress/house-bill/1033>

1995. Over a decade later, when the Open Book on Equal Access to Justice Act was first introduced to restore some transparency, the Administrative Conference of the United States voluntarily compiled for Congress what little agency information it could gather. The result painted a picture of utter haplessness—often agencies simply had no mechanism for tracking how much they were paying, and in at least one case the agency pointed the finger at the Department of Justice, who pointed it right back at the agency.²

Other fee-shifting statutes are not meaningfully different in terms of transparency. Citizen-suit provisions in many environmental laws allow for fee shifting, though those fees come out of the Judgment Fund, an unlimited pool of money used for all kinds of judgments against the United States, instead of agency budgets. Only recently has the Judgment Fund begun posting information regarding how much money it pays out each year, including attorneys' fees.³ This is a first step, and has provided important information—including, for example, that in fiscal year 2016 alone the Judgment Fund paid out over \$3.8 million in attorneys' fees just for environmental litigation—but does not go far enough. The information provided does not include any indication about the outcome or merits of the litigation, or whether the plaintiff was an individual seeking justice or an advocacy organization with a policy agenda.

B. Solution: Restore reporting requirements.

This one is simple. Congress can restore requirements to track and report attorneys' fees paid in litigation, as it has previously attempted to do in the Open Book on EAJA Act and the Government Litigation Savings Act. Reporting should be easily available online, and should include information regarding the outcome of the litigation and who was deemed the prevailing party, and why. To fully understand what is necessary to reform fee-shifting statutes, taxpayers need to know where their money is going.

II. Fairness

Both the terms of EAJA itself and the way courts have interpreted it have overwhelmingly favored environmental groups in terms of their ability to recover attorneys' fees—and recover handsomely, even without prevailing on the merits of their claims. The items below are of particular concern to farmers and ranchers.

A. The 501(c)(3) Exception

1. Problem: EAJA preferences 501(c)(3) organizations over other non-profits.

Currently EAJA allows only entities with a net worth of up to \$7 million and with fewer than 500 employees to recover attorneys' fees, with one key caveat: 501(c)(3) organizations—and only 501(c)(3) organizations, not all non-profits—can recover regardless of net worth.⁴ This exception was added as a “technical change” to EAJA at the eleventh hour before its original

² <https://www.acus.gov/sites/default/files/documents/FY%202010%20EAJA%20Report.pdf>

³ <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/congress-reports.htm>

⁴ 28 U.S.C. § 2412(d)(2)(B).

passage. This exception never appeared in any report issued by Congress regarding the reconciliation of the House- and Senate-passed bills. And yet it has cost taxpayers millions of dollars. The exception means that environmental groups funded by millionaires can get taxpayer dollars to sue the government, whereas those millionaires would have to pay if suing on their own. Non-profit groups such as Farm Bureau, however, do not qualify for this treatment.

2. Solution: Remove the exception.

This problem could be easily solved: remove the exception. Small environmental and other organizations that truly cannot otherwise bring suit could recover if successful on the merits; but others, such as the Center for Biological Diversity, which ended 2016 with net assets of over \$19 million—and in the span of 10 years filed over 400 district court cases—rightfully could not.⁵

Of course, this solution would only apply to EAJA; other fee-shifting provisions within the citizen-suit sections of environmental laws have no such limits on net worth or number of employees. But net worth and entity size limits could be imposed that would force large environmental organizations to use their own capital, perhaps making them think twice before filing suit.

B. The “Prevailing Party” Requirement

1. Problem: The definition of “prevailing party” exceeds reasonable bounds.

EAJA allows attorneys’ fees to be paid to “the prevailing party in any civil action brought by or against the United States.”⁶ What qualifies as a “prevailing party” has devolved over time to essentially include anyone who gets the government to do something it wants, whether or not a judge has actually determined that the agency made an error. An agency that withdraws a decision, without admitting fault, can still have to pay attorneys’ fees to a plaintiff that never proved its claims. This does not serve the purpose of EAJA, which is only supposed to recompense litigants for holding the government accountable for misdeeds.

2. Solution: Tighten the definition.

Congress could address this issue in several ways, but one approach would be to redefine “prevailing party” to only include those cases where a judge has determined that the government has made a legal error or where the government has admitted fault. Allowing agencies to settle without admitting any fault allows them to perpetuate the sue-and-settle cycle without actually addressing an underlying legal deficiency. If taxpayers are going to be forced to pay attorneys’ fees when the government settles a case, it should only be where the government actually acknowledges it is in the wrong and thus cannot continue to behave in an illegal manner.

⁵ Karen Budd Falen, Memorandum re: Attorneys Fees Facts and Legislation (Mar. 22, 2010).

⁶ 28 U.S.C. § 2412(d)(1)(A).

C. State/Federal Parity

1. Problem: EAJA is unavailable in some state courts.

EAJA allows “any court having jurisdiction” over an action involving the United States to award attorneys’ fees.⁷ Notwithstanding this broad grant of authority, which should extend to any case where the United States is a party, some state courts erroneously believe that they do not have jurisdiction to award attorneys’ fees in cases where individuals prevail against the federal government. This unfairly prejudices individuals who prefer to litigate in their own state’s court (as opposed to environmental groups that tend to file in federal court).

For example, in a stockwater rights dispute between the U.S. Department of the Interior’s Bureau of Land Management (“BLM”) and two Idaho ranches filed in Idaho state court, BLM’s position was wrong, but they appealed all the way up to the Idaho Supreme Court—where they lost. Again. Nevertheless, the Idaho Supreme Court—despite ruling for the ranchers on every issue—did not award the ranchers attorneys’ fees under EAJA, believing the statute not to apply to state-court litigation. This issue was raised to the U.S. Supreme Court, but the Court did not take up the case.

2. Solution: Clarify waiver of sovereign immunity.

Congress should explicitly waive sovereign immunity for attorneys’ fees against the government in both federal and state litigation. With just a few words, Congress could restore parity to federal and state litigation.

III. Cost

A. The Statutory Hourly Rate of \$125

1. Problem: The statutory rate has become meaningless in environmental litigation.

EAJA provides a fixed hourly rate of \$125, but only “unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”⁸ These exceptions have swallowed the rule. The statutory amount means nothing. Courts uniformly recognize that environmental law requires “special skill” allowing attorneys to recover above the statutory amount; often, attorneys end up making the prevailing rate in their community, which might not actually reflect the merits of the litigation or skill necessary to litigate.

2. Solution: Remove courts’ discretion to adjust the rate and set a fixed, higher rate.

⁷ *Id.* § 2412.

⁸ 28 U.S.C. § 2412(d)(2)(A)

Admittedly, the cost of living today is higher than when Congress drafted EAJA, and the cost of living varies widely across the country. Deserving litigants should be able to recover reasonable attorneys' fees, and the law should not discourage attorneys from taking meritorious cases. But courts must not be given free rein to set rates at their discretion. Congress should apply a reasonable statutory rate, but eliminate any discretion to alter that rate. Alternatively, Congress could set a cap on the total dollar amount litigants can recover in attorneys' fees, which would discourage undue delay and scorched-earth litigation tactics.

These changes could be applied to all fee-shifting statutes, not just EAJA.

B. Deadline Suits

1. Problem: Taxpayers are paying environmental groups for the government's routine failure to meet arbitrary deadlines.

For too long, environmental groups have made a cottage industry out of suing agencies like the U.S. Fish and Wildlife Service when it misses a deadline to act—deadlines it cannot possibly meet given the short statutory period and current level of funding. The government has no defense to liability in these suits; it missed a deadline it was required by law to meet. And given the low bar courts have set for plaintiffs to establish standing to bring environmental suits, virtually any citizen could wait for deadlines to come due, sue, and win attorneys' fees, without regard to the practical merit of the agency's reasons for missing the deadline. Furthermore, particularly as regards the Endangered Species Act, environmental groups use these suits as a vehicle to hijack an agency's policy agenda, selectively using deadlines as a means to impose the groups' own priorities.

2. Solution: Bar attorneys' fees for deadline suits.

No environmental organization should be able to profit from this situation, and agencies should set policy based on Congress's directives, not private litigants' interests. Congress can, and should, bar the recovery of attorneys' fees for deadline suits—at least where the government presents a reasonable explanation for the delay. And certainly, if attorneys' fees are still allowed for deadline suits, no attorney should receive above the statutory hourly rate (if exceptions are retained, which we advocate changing above). Proving the government missed a deadline requires no special skill.

C. Bonds

Although the issue of posting bond is not a traditional fee-shifting issue, it is another way in which groups are abusing the system to the detriment of farmers and ranchers. As such, we provide suggestions for reform below.

1. Problem: Environmental groups are exempted from having to post bond to obtain a preliminary injunction.

Ordinarily, to obtain a preliminary injunction a plaintiff must post a bond in the event that it is unsuccessful on the merits and has thus unwarrantedly cost the defendant money.⁹ Although the federal rules only expressly exempt the United States from this bond requirement, courts have effectively eliminated the requirement for environmental groups. As such, plaintiffs can wait until a project is about to begin, file suit and manufacture an emergency situation to obtain a preliminary injunction, and even if they ultimately lose, they are not required to compensate the company whose business operations have been stalled for months or even years. This is untenable, and has cost farmers and ranchers untold amounts of money, sometimes to the extent that businesses are threatened with financial collapse.

2. Solution: Require a bond.

Environmental groups should have some skin in the game if they seek to halt action that the government has deemed reasonable. Right now, there is effectively no cost to environmental groups if they lose: most are so well-funded that they can cover attorneys' fees regardless of fee-shifting statutes, and they are not required to compensate defendants who have lost valuable time and money defending against frivolous litigation. Congress can through legislation overrule courts that have allowed environmental groups to abuse the preliminary injunction system and hold them to the same standards as any other litigant.

IV. Recent Example: *League of Wilderness Defenders/Blue Mountains Diversity Project v. Turner*

Earlier this year, the U.S. District Court for the District of Oregon issued a decision on attorneys' fees that exemplifies many of the issues raised in my testimony. In this case, plaintiffs challenged a U.S. Forest Service decision memorandum authorizing commercial sanitation logging and thinning within a recreation area that included a campground—not undeveloped wilderness. Suit was filed on the eve of the project's start date, and plaintiffs secured a preliminary injunction to halt it. In fact, the judge acknowledged that plaintiffs may have gamed the system by delaying filing suit so that the project could not go forward, and essentially let them do it. Plaintiffs were not required to post bond.

After the preliminary injunction was granted, the Forest Service voluntarily withdrew the decision document, effectively ending the project, and depriving the contractor of valuable work. Plaintiffs succeeded in obtaining attorneys' fees, despite the agency having withdrawn the decision voluntarily. There was *no decision on the merits*—the Forest Service admitted no fault, and the court made no finding that the agency's position was not substantially justified. Indeed, the government did not even make an argument that its position was substantially justified in contesting the fee award; rather, the government only argued that the rate was wrong. So (1) there was no actual ruling that the agency did anything wrong, (2) plaintiffs received attorneys' fees anyway, and (3) they received fees at enhanced rates because of the Ninth Circuit's presumption that environmental litigation requires special skills.

This case is but one example of how the system is abused. Congress can, and should, put a stop to it.

⁹ See Fed. R. Civ. P. 65(c).

V. Conclusion

The American Farm Bureau Federation appreciates the Committee's willingness to listen to these concerns. The need for continued oversight and reform of environmental litigation cannot be overstated. Farmers, ranchers, and small businesses suffer when environmental groups make them pay on both sides of the litigation. We look forward to continuing to work with you in pursuing solutions to the problems I have highlighted today.