TESTIMONY OF LOWELL E. BAIER, PRESIDENT EMERITUS, BOONE & CROCKETT CLUB ON H.R. 1996, "THE GOVERNMENT LITIGATION SAVINGS ACT". BEFORE THE SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW OF THE HOUSE JUDICIARY COMMITTEE

Chairman Coble, Vice Chairman Gowdy, Representative Cohen, members of the committee, thank you for your invitation to testify this afternoon on H.R. 1996. My name is Lowell E. Baier, and I'm here today on behalf of the Boone and Crockett Club, America's oldest conservation organization founded in 1887, 124 years ago, by Theodore Roosevelt, and I followed him as the Club's 28th President, and now serve as President Emeritus, the first in our 124 year history.

The proposed improvements to the Equal Access to Justice Act ("EAJA") in the Government Litigations Savings Act ("GLSA"), H.R. 1996, are true to the historical purposes of EAJA and carefully designed to improve it. EAJA was meant to help resolve unjustified or illegal demands by federal agencies by reimbursing affected citizens for the cost of hiring lawyers. Congress realized that the same transactional costs that had justified establishing fee-shifting statutes for specific causes, such as civil rights legislation, applied more generally if the party was too small or impecunious to afford to resist government demands. EAJA as drafted in 1979 and 1980 thus had two parties clearly in mind: the individual and the small business. This was borne out in numerous hearings, as well as in EAJA's net-worth eligibility requirement, which prevents large companies or wealthy individuals from utilizing EAJA. EAJA was not meant to be a general entitlement to reimbursement of litigation costs against the federal government, but rather a mechanism to check errors and over-zealous enforcement by government agencies against the most vulnerable.

The record shows that four days before the legislation was finalized, a provision was inserted exempting 501(c)(3) non-profit organizations from having to meet the net worth eligibility requirements that had been placed on all other EAJA users. EAJA's non-profit exception was unprecedented in American law, and remains an anomaly in fee-shifting legislation. According to Henry Cohen's study for the Congressional Research Service, as of 2009 the United States Code contained 205 statutory exceptions to the American Rule – individual provisions for the shifting of attorneys' fees from one party to another.[1] Out of all of these statutes, only EAJA contains a provision that prescribes special treatment for 501(c)(3) and other tax-exempt organizations. GLSA would eliminate this extraordinary provision in the interest of fairness. EAJA should be available to non-profit organizations on the same terms it is available to corporations, local governments, and all other organizations, viz. that the organization not have a net worth exceeding $7 million.

We are concerned – and our research supports this concern – that the unlimited availability of EAJA fees to interest groups has particularly degraded the effectiveness of land management, wildlife, and environmental agencies. We support a reasoned, moderate response to this concern. GLSA only removes a needless incentive for interest group litigation without removing any existing causes of action. This is especially pertinent in APA cases because the APA's stringent requirements are often subject to litigation. An APA suit can be brought simply to make the agency acknowledge missing a deadline, or force it to re-do its rulemaking (without changing the substance of the rule), or issue a longer, more comprehensive explanation in an environmental impact statement, or a biological opinion, etc. This is especially the case when an

[1] Henry Cohen, Cong. Research Ser., 94-970, Award of Attorneys' Fees by Federal Courts and Federal Agencies 1-2 (2009).

agency is tasked with inflexible statutory deadlines, or has complex and open-ended analytical duties, as land management, wildlife, and environmental agencies usually do. Although these procedural rulings often can play an important role in keeping agencies accountable, in many cases agencies are made to reissue their determinations – at considerable expense – while the substance of their decisions is upheld. When a group repeatedly brings essentially similar procedural suits without having grounds to challenge the merit of the agency's decisions, this litigation becomes a distraction from the agency's mission.

Generally, groups contemplating using the APA in this manner have to factor in the considerable costs of hiring counsel. The litigation cost of bringing an APA suit is a large part of what has historically prevented the courts from being flooded with administrative litigation. The 501(c)(3) exemption in EAJA disrupts this balance, since an interest group that wants to simply obstruct the agency now has its efforts repeatedly subsidized. For this reason, among other changes we support both the removal of the 501(c)(3) exemption as well as the proposed limit of 3 EAJA claims per year. Additionally, we suggest a further improvement to the bill in this regard. In calculating the net worth of the litigant the net worth of all parent entities and wholly owned subsidiaries should be included, in order to prevent the use of small ephemeral or shell organizations to circumvent the net worth eligibility requirement.

None of the above is to suggest that various groups' legal engagement with agencies is to be radically curtailed or prevented. The issue is rather whether these groups, unlike private individuals or small businesses, need government funding to do so. The late Judge George MacKinnon of the D.C. Circuit noted in objection to the idea that interest groups needed government subsidy, that in "practically every case I have seen where agency action is attacked by public interest protestants or litigants, they are usually very well funded by voluntary

organizations that enjoy tax-free status."[2] Though we sympathize considerably with Judge MacKinnon's view, and the witnesses at various EAJA hearings who espoused similar views, GLSA's goal (which we support) is much more modest. Instead of giving 501(c)(3) groups a most-favored-party status equivalent to a double-subsidy, the GLSA seeks only to treat those groups as if they were themselves small business and to apply the means test it applies to everyone else to them. If they have the means to litigate on their own, they should, just as every other private citizen or business is expected to. Moreover, it should be recalled that nothing that the GLSA does will affect non-profit groups' access to any other fee-shifting statutes. And it will not explicitly block non-profit groups from using EAJA; it merely applies the same net worth standards that apply to every other applicant for funds under the law.

While it places non-profit organizations on the same footing as other litigants, GLSA protects the small business and individuals that EAJA was intended for. We recognize that the current cap on hourly rates of $125 an hour is impractically small in today's legal market, and we support GLSA's increase of that figure to $175. Furthermore, we are pleased that for the first time GLSA pegs the hourly cap to inflation. This will improve public perception of EAJA and create more uniform fee calculations across different jurisdictions.

GLSA also proposes to restore the reporting requirements that were removed from EAJA by the Federal Reports Elimination and Sunset Act of 1995. An examination of the EAJA reports generated through 1994 illustrate why Congress may have thought it appropriate to end reporting. Discounting an unusual but well-explained number of Social Security applications in 1994, total EAJA expenditures, including awards under both 5 U.S.C. § 504 and 28 U.S.C. §

[2] Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary, 95th Cong. (1977)

2412, had been under $4 million in every year.[3] Presumably confident that the trend would continue, Congress eliminated the reporting. Without reporting, it is impossible to know precisely how much EAJA is costing the nation's taxpayers, but there are many signs that it is much more than $4 million a year. Only through restoring reporting can we restore transparency and accountability to EAJA.

We support the reporting provisions in GLSA, which take three forms. First, GLSA requires the Administrative Conference of the United States to resume issuing annual reports. These reports should be made public through a searchable online database, accessible without cost, so that the American people know how their money is being spent. Second, the reports and database should include not just financial information but also information about the nature and outcome of each case: the parties involved, the agency or court involved, the presiding officer or judge, the amount of fees, the hourly rates the fees represent, and the basis on which the government's position was found to be not substantially justified. Such information will promote accountability throughout the application of EAJA, and so ought to be publically available and easily accessed. When an EAJA award is pursuant to an undisclosed settlement, it would be proper to advance the goal of accountability by disclosing the EAJA award even though the rest of the settlement remains confidential. Finally, GLSA requires the Government Accountability Office to conduct and publish an audit of EAJA expenses during the period from 1995 to the present, when there has been no reporting.

[3] Figures calculated from the following: Administrative Conference of the U.S., Report of the Chairman of Administrative Conference on Agency Activities Under the Equal Access to Justice Act (1982) *et seq.*; Administrative 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 (1982) *et seq., located in* 1982 Judicial Conference Report *et seq.*; Department of Justice, Equal Access to Justice Act: 1993 Annual Report.

Although the exact costs of EAJA in the last decade and a half are unknown, we have undertaken to learn as much about them as possible. Our findings are disturbing, to say the least. By focusing on a small group of twenty environmental organizations we were able to conduct two investigations into contemporary EAJA awards. In the first, we examined cases marked as "closed" by the United States Courts' Public Access to Court Electronic Systems (PACER) in a one-year span from September 1, 2009 to August 31, 2010. Because PACER only tracks court cases, our study covered EAJA payments under 28 U.S.C. § 2412 but not EAJA payments in administrative proceedings under 5 § U.S.C. 504. We found that EAJA payments to these twenty groups alone had at least equaled $5.8 million in that period, with most of those awards directed against the Department of Interior, specifically the Fish and Wildlife Service and the Bureau of Reclamation. To put this in context, accounting for inflation, this sum is roughly equal to the entire cost of EAJA in 1993.

In the second study, we examined tax returns filed by the same twenty organizations. In the years 2003-2009, we found that the organizations combined to claim an average of $9.1 million dollars per year in attorneys' fees. This figure exceeds the PACER figure because it includes not only EAJA awards under 28 U.S.C. § 2412 but also EAJA awards under 5 U.S.C. § 504, as well as awards pursuant to other statutes – both state and federal – and awards against private parties. It is regrettably impossible to get a more precise breakdown, but clearly EAJA payments have exploded, at least to this group of litigants.

The findings of other researchers corroborate our own. For example, a study by Michael J. Mortimer and Robert W. Malmsheimer of litigation against the Forest Service from 1999 to 2005 found that the Forest Service had paid out a total of at least $6,137,583 in EAJA awards, at

an average payout per year of $876,798.[4] This is a modest sum, but it is for a single agency in a single Department, whereas the reported pre-1994 figures were for the entire federal government.

The attorneys' fees awarded under EAJA represent only one part of the total costs of EAJA to the American taxpayer. The Department of Justice incurs substantial costs in litigation. A recent GAO report calculated that in representing the EPA, Justice spent approximately $1.83 on its own litigation costs per dollar of attorneys' fees paid out, and that number is likely to be similar, if not higher, for other agencies.[5] Individual agencies also incur substantial litigation costs, which include preparing for litigation through pleadings and discovery, submitting evidence to administrative or judicial proceedings, allowing employees to be deposed, and reanalyzing and rewriting environmental impact statements and biological opinions found inadequate by the courts. These expenses are difficult to quantify but are undoubtedly substantial, as is the accompanying drain on agency morale. We believe that our land management, wildlife, and environmental agencies, which are already underfunded and struggling to meet deadlines, are being negatively impacted by this litigation, which is funded by EAJA and possible in part because of EAJA's unique provisions. We don't yet know how much other agencies are being affected by similar litigation, but the same principles apply to them as well. Likewise, though we do not know what other groups may be receiving excessive attorneys' fees, we categorically oppose special treatment for any non-profit organization, regardless of its politics or goals.

[4] Michael J. Mortimer and Robert W. Malmsheimer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 Journal of Forestry 352, 354 (September, 2011).

[5] U.S. Government Accountability Office, GAO 11-650, *Environmental Litigation Cases Against EPA and Associated Costs Over Time* (2011).

GLSA seeks to amend EAJA to make these repeated lawsuits less profitable, and hopefully less frequent. This will allow our agencies to better fulfill their missions, while keeping the courthouse – and the agency – doors open for millions of less wealthy litigants. It will provide savings not only in EAJA awards but also in litigation costs, at a time when government is anxious to save as much money as possible.

Thank you.