Department of Justice

STATEMENT OF

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"RESTORING BALANCE TO ENVIRONMENTAL LITIGATION"

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INTRODUCTION

Chairman Gianforte, Representative Plaskett, and distinguished Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss this important topic, with its emphasis on environmental litigation against federal agencies and potential reforms to fee-shifting statutes such as the Equal Access to Justice Act.

I joined the Environment and Natural Resources Division (ENRD or the Division) of the U.S. Department of Justice (the Department) more than a year ago. Prior to that, I worked as an attorney in private practice for over 15 years. I am grateful for the opportunity to serve as Deputy Assistant Attorney General and to have the privilege of serving in this Administration. ENRD is one of the core litigating components of the Department. The Division has broad responsibilities: enforcing the nation's civil and criminal pollution control laws; representing the United States in matters concerning the stewardship of the nation's environment and natural resources, wildlife, and public lands; and litigating cases concerning the resources and rights of Indian tribes and their members. In the Division, I supervise the Environmental Defense Section, which represents the United States in complex civil litigation arising under a broad range of pollution control statutes and defends environmental rulemakings and policies. I also supervise the Land Acquisition Section, which acquires property for the government and implements the solemn constitutional duty to ensure just compensation for any taking. Over the course of my career, I have never worked with a more dedicated and professional group of attorneys and staff.

Each year, ENRD lawyers represent a vast number of federal agencies in courts across the United States. In FY 2017, the Division worked on nearly 4,000 cases and matters, while maintaining a robust docket of nearly 7,000 cases and matters. We obtained over $4.8 billion in civil and criminal fines, penalties, and costs recovered. The estimated value of federal injunctive relief obtained—clean-up and pollution-prevention actions funded by private parties—exceeded $18.7 billion. ENRD also estimates that in FY 2017, it saved the government over $360 million through the successful defense of claims brought against the federal government. We have also defended numerous agency programs and Administration priorities. The focus in such cases is on vigorously defending the lawful regulations and actions of our client agencies taken under the laws as enacted by Congress. In our defensive litigation, the Division seeks to avoid

unnecessary litigation and support the integrity of the administrative process, while also defending the Administration's prerogative to develop and implement its priorities.

ATTORNEY'S FEE CLAIMS IN ENRD LITIGATION

In general, the United States has immunity from lawsuits unless sovereign immunity has been waived by Congress. Congress has authorized three types of private suits particularly relevant to federal administration of environmental protection and natural resources laws. First, many of our nation's environmental laws authorize adversely affected citizens (through "citizen suits") to sue where an agency fails to perform an action mandated by law. Second, those same laws typically include provisions under which citizens may seek judicial review of certain actions, such as promulgating a regulation or issuing permits. Third, where there is no authority allowing a citizen suit or judicial review claim, final agency actions may also be challenged through the judicial review provision of the Administrative Procedure Act, 5 U.S.C. §§ 702, 704.

Congress made the policy judgment to subsidize and finance this private-party litigation against federal agencies. Where the Division does not prevail in its litigation, Congress has established two avenues by which opposing parties may seek payment of attorney's fees through taxpayer dollars.

First, the citizen suit and judicial review provisions in most environmental protection and some natural resources laws expressly provide for the recovery of attorney's fees against the United States (collectively referred to as "statute-specific fee-shifting" provisions). These include, for example, the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1365(d), 1369(b)(3); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f); Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. § 9659(f); Endangered Species Act, 16 U.S.C. § 1540(g)(4); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5). The Uniform Relocation Assistance and Real Property Acquisition Policy Act, 42 U.S.C. § 4654(c), also provides for payment of attorney's fees in the case of Fifth Amendment taking claims handled by the Division. The Judgment Fund established by Congress in 31 U.S.C. § 1304 typically pays such fee awards. The Judgment Fund is a permanent, indefinite appropriation available to pay final money judgments and awards against the United States.

Second, attorney's fees may be payable under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. EAJA operates as a default statute. If a statute-specific fee-shifting provision is available, EAJA is not. In Division cases, opposing parties can recover attorney's fees under EAJA for National Environmental Policy Act, many natural resources claims, and those pollution control statutes that lack statute-specific fee-shifting provisions. The Administrative Procedure Act contains no provision for the award of attorney's fees, so EAJA is the sole avenue for recovery of fees for claims brought under it. EAJA fees may be paid from the Judgment Fund, or directly from client agency appropriations, depending on the circumstances of the case. In ENRD cases EAJA fees are typically paid from client agency appropriations.

The language of the applicable fee provision determines the eligibility for fees. Under the statute-specific fee-shifting provisions, a party is typically eligible for "appropriate"

attorney's fees where they are "prevailing" or "substantially prevailing"; or where a court determines fees are "appropriate." In general, a party is considered to be "prevailing" or "substantially prevailing" where it achieves the benefit it sought on a significant issue in the litigation, and where it obtains a court-ordered material alteration of the legal relationship with other parties. In allowing courts to award attorney's fees under these statutes, Congress expressed concerns that such fees be "reasonable" and "in the public interest." *See, e.g.,* Senate Report 91-1196, 91st Cong., 2d Sess. (1970), *as reprinted in Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692 app. B. at 725 (D.C. Cir. 1975), discussing section 304 of the Clean Air Act, 42 U.S.C. § 7604.

Under EAJA, a "prevailing party" is eligible for fees from the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Unlike statute-specific fee-shifting provisions, EAJA also imposes threshold eligibility requirements. Generally, to be awarded fees under EAJA, an individual or corporation must have less than $2 or $7 million in assets respectively. In the case of 501(c)(3) organizations, it must simply have fewer than 500 employees. 28 U.S.C. § 2412(d)(2)(B).

In *Hensley v. Eckerhart*, 461 U.S. 424, 433–37 (1983), the Supreme Court articulated a step-by-step process by which courts should consider making an attorney's fee award. That process involves a court determination that plaintiffs are properly considered a "prevailing party" as required by the underlying statute. It also requires a determination that both the number of hours expended and the lodestar rate were reasonable. The lodestar, which constitutes the hypothetical market value of legal counsel's services, is derived by multiplying the number of billable hours by the hourly rate. The lodestar rate is the rate that the legal community would charge for similar work. *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (*en banc*). Typically, the party seeking fees is required to provide evidence of the appropriate rate. It can do so by providing declarations regarding the prevailing community rate for similar services in the jurisdiction in which the case was litigated.

Judicial interpretation and application of attorney's fee provisions has had a substantial impact on how these statutes now work in reality. They have not been interpreted and applied consistently across the regional appellate circuits. For example, in *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court explained that "substantially justified" does not mean "'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." In practice, however, courts infrequently deny an attorney's fee claim in ENRD cases on the basis that the United States asserted a position in the defense of the case that would merely "satisfy a reasonable person."

ENRD POLICIES FOR HANDLING ATTORNEY'S FEE CLAIMS

The Division takes seriously its obligation to protect the public fisc and taxpayers. It has long sought to limit payments of attorney's fees to the extent possible under applicable law. The present Administration has significant concerns about the costs and burdens associated with payments of attorney's fees. Under our leadership, the Division is taking proactive measures to prevent or minimize, wherever appropriate, the payment of attorney's fees that we believe are unjustified, unsupported, or otherwise excessive. We are closely scrutinizing demands for

attorney's fees to make certain that they are lawful, justified, and reasonable. This is one element of our review of the Division's litigation and settlements to ensure that they are fully consistent with applicable legal requirements. We are always mindful of the restrictions on the Department of Justice's legal authorities, such as the requirements of Attorney General Meese's 1986 memorandum entitled "Department Policy Regarding Consent Decrees and Settlement Agreements," which bars conversion of discretionary authorities into mandatory duties, among other limitations.

We have had a number of successes in controlling attorney's fee costs. For example, in FY 2017, the Division paid a total of approximately $661,000 in attorney's fees under the fee-shifting provisions of the Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Resource Conservation and Recovery Act; by contrast, in FY 2016 the comparable total was $3.1 million, and in FY 2015 it was $1.1 million.

The Division does not, and cannot, challenge the payment of attorney's fees in all cases. First, applications may be substantially justified and reasonable. Second, contesting fee applications is not without cost to the Division. Our attorneys must commit time and attention to such collateral litigation. More critically, if the Division does not succeed in all respects of a challenge to an attorney's fee application, many courts will award a litigant "fees on fees." In other words, courts award litigants attorney's fees for litigating, even only partially successfully, the amount of the attorney's fees they argue claim to be entitled—even when the United States' grounds for opposing those fees is "substantially justified." The following are a few recent examples of cases in which the Division countered requests for attorney's fees—most of these examples are successes, but I also include an example of a case in which we did not prevail.

- *Baker v. United States*, No. 1:14-cv-548 (Fed. Cl. June 29, 2018); *Bratcher v. United States*, No. 1:15-cv-986 (Fed. Cl. Mar. 9, 2018); *Whispell Foreign Cars v. United States*, No. 1:09-cv-315 (Fed. Cl. Aug. 1, 2018). In these three cases, all involving plaintiffs claiming that the government had taken their property without just compensation, counsel sought an award of attorney's fees at Washington, D.C., rates under the Uniform Relocation Assistance and Real Property Acquisition Policy Act. The government successfully argued that counsel was based in St. Louis, so the court should award rates at the substantially lower rates prevailing in that legal market. In *Campbell v. United States*, No. 1:13-cv-324 (Fed. Cl. May 17, 2018), however, a different district judge found that Washington, D.C., rates applied for the same law firm.

- *Center for Biological Diversity v. EPA*, No. 17-00720 (N.D. Cal.). After a suit challenging a missed deadline for agency action was mooted shortly after the filing of the complaint, plaintiffs sought over $63,000 in attorney's fees. The Division opposed and argued that an award of $5,787 was more appropriate. Following litigation, and including an award of fees for the costs of the attorney's fee litigation itself, the district court ordered a fee award of over $70,000. The Division elected not to appeal that award in light of litigation risk.

- *Natural Resources Defense Council v. EPA*, No. 15-72308 (9th Cir.), consolidated with *Center for Food Safety v. EPA*, No. 15-72312 (9th Cir.). After prevailing on the merits,

the Natural Resources Defense Council (NRDC) and two other petitioner groups sought $273,237.32 in attorney's fees under EAJA. ENRD questioned NRDC's eligibility for fees, and in November 2017, NRDC dropped its fee claim, conceding that it is ineligible under EAJA here because it had more than 500 employees on the relevant date. The remaining petitioner groups later filed an amended fee motion seeking $79,362.40, which we were able to settle for $45,000.

- *United States v. 1003.58 Acres of Land*, No. 5:16-cv-01014 (C.D. Cal.). After the United States acquired land for expansion of a Marine Corps training facility, the property owners sought an award of $1.68 million in attorney's fees under EAJA. The United States successfully argued that, because five individual property owners each had a net worth over the $2 million cap in EAJA, the two corporations that they controlled should not be entitled to an award of fees even though it could be argued that they met EAJA's net worth requirements.

- *Center for Biological Diversity v. EPA*, Nos. 14-1036 and 15-5168 (D.C. Cir.). After the Center for Biological Diversity (CBD) prevailed in an Endangered Species Act suit against the Environmental Protection Agency, CBD filed an application for nearly $85,000 in attorney's fees in the D.C. Circuit, which we opposed on a number of grounds, including that it was not filed within EAJA's thirty-day limitations period. Three days after we filed our opposition, CBD withdrew their fee application.

SOME RECURRENT CHALLENGES IN ATTORNEY'S FEE LITIGATION

From its handling of a substantial number of attorney's fee claims, there are six recurrent challenges of potential interest to this subcommittee that ENRD would like to highlight. In some areas, it can be argued that fee litigation and recoveries may have moved beyond Congress's original intentions when providing for taxpayer subsidy of litigation against the United States. At a minimum, the Division sees certain inconsistencies in standards and application across the circuit courts.

(1) Litigation Regarding Attorney's Fee Rates

EAJA sets a maximum hourly rate of $125 an hour (with inflation adjustment) unless the court determines that a higher rate is justified due to "the cost of living or a special factor . . . ." 28 U.S.C. § 2412(d)(2)(A). This helps reduce the scope of fee dispute litigation. However, statute-specific fee-shifting provisions do not contain a similar set of hourly rates. As a result, we frequently must contest requested attorney's fee rates that we view to be excessive. It is inherently difficult to prove prevailing market rates. Engaging in discovery or retaining experts can quickly eliminate any benefit that might be obtained by disputing fee rates. Additionally, attorneys representing large nonprofit organizations are often salaried, and do not maintain normal billing rates. The Supreme Court has recognized this difficulty, observing that in private practice "the fee usually is discussed with the client, may be negotiated . . . ," but fees set by a court are "entirely different . . . there is no negotiation or even discussion with the prevailing client, as the fee—found to be reasonable by the court—is paid by the losing party." *Blum v. Stenson*, 465 U.S. 886, 895, 896 n.11 (1984).

One area of regional variation is in the use of specific fee matrices. These tables of estimated rates are persuasive in some areas of the country. Most notable of these is the *Laffey* Matrix—a fee matrix applicable in the Washington D.C., market that was derived from prevailing rates compiled in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds, Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984). Courts in many jurisdictions have not, however, recognized an applicable fee matrix. This means outcomes are more varied, time consuming, and expensive.

Where there is no statutory rate or presumptive fee matrix, litigants establish market rates in various ways. These include (1) affidavits stating the fee petitioners' current billing rates; (2) affidavits from other attorneys or experts establishing rates, including by citation to prior case law showing reasonable rate adjudications in comparable cases; (3) references to fee award studies or surveys; (4) testimony from experts or other attorneys; (5) discovery of rates charged by opposing counsel; or (6) relying on the court's presumed knowledge of legal rates. Courts can be inconsistent in their consideration of the range of potential evidence, and often award large law firm rates even to entities that are based in smaller legal markets, that have much lower overhead costs, or that litigate comparatively simple matters. Additionally, we sometimes find that in cases involving large firms, the market rate for highly experienced attorneys is sought for all hours billed. That can be unfair because the bulk of the attorney hours expended on any given case by a large firm may typically be attributable to lower-billing associates.

Even once the prevailing market rate is established by statute or local practice, an attorney may seek an enhanced rate. This adds to contests over attorney's fee rates. Attorneys under some statute-specific fee-shifting provisions may also seek an enhanced lodestar rate based on claimed superior attorney performance or specialized expertise. As noted, EAJA imposes an hourly cap on attorney's fee payments. But EAJA allows judges to take into account special factors. Case law in the Ninth Circuit has treated expertise in environmental law *per se* as specialized expertise that justifies disregarding this rate cap. *National Wildlife Fed'n v. FERC*, 870 F.2d 542, 547 (9th Cir. 1989); *Animal Lovers Volunteer Ass'n, Inc. v. Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989). Given that the practice of environmental law has become widespread, it is not clear that such an automatic rule is justified. The multiple legal uncertainties surrounding applicable hourly rates tend to generate unnecessary litigation and disputes, complicate resolution of fee issues both by the courts and in settlement, and result in higher federal subsidies to litigants against the United States.

(2) No Statutory Limit on Attorney's Fees

The statutes under which ENRD litigates do not contain *per se* limits on the maximum amount of fees the United States will pay on a matter. Because that is the case, attorney's fee awards can be in the hundreds of thousands of dollars with some frequency, even against well-financed litigants, and despite the Division's best efforts to contain those costs. In one instance since 2010, in the case of *Natural Resources Defense Council v. Houston*, No. 88-1658 (E.D. Cal.) (Friant Dam litigation), the Division paid an attorney's fee of $7 million. It paid out $500,000 or more on attorney's fees in more than a dozen cases over that same time.

(3) EAJA Net Worth Eligibility Carve Out

EAJA requires that a party seeking attorney's fees and expenses under § 2412(d) must submit an application that "shows that the party is . . . eligible to receive an award under [the] subsection . . . ." 28 U.S.C. § 2412(d)(1)(B). The eligibility requirement refers to EAJA's definition of "party," which, the statute says, means "an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or . . . any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed . . . ." *Id.* at § 2412(d)(2)(B). EAJA provides that tax-exempt organizations are not subject to the net worth limitation. *Id.* at § 2412(d)(2)(B)(ii). As a result, large tax-exempt organizations whose net worth exceed $200 million can be eligible and have received taxpayer-funded EAJA fees. The attorney's fee provisions are intended to allow access to courts to those who would not otherwise be able to have such access. But many well-funded organizations nevertheless have their litigation subsidized by the federal treasury.

(4) Recovery of Fees in Mandatory Deadline Litigation

ENRD represents various federal agencies engaging in rulemaking, including the Environmental Protection Agency and the Department of the Interior. We often defend actions brought to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State or local governments. The volume of this type of litigation is a direct function of the number of deadlines for nondiscretionary duties established by Congress in the environmental statutes, limitations in agency appropriations that make lawful compliance with these deadlines impossible, and the right to sue to enforce those deadlines. The Division moves to dismiss many such cases asserting that an agency has failed to carry out a duty that we conclude is, in fact, discretionary or has been fulfilled. There nevertheless are instances in which agencies are not able to meet statutory deadlines. Although a lawsuit in such a case is legally straightforward, plaintiffs often claim and are awarded attorney's fees in such cases at high market rates.

(5) Recovery of Attorney's Fees on Attorney's Fees

As noted earlier, the attorney's fee provisions also permit a successful claimant to seek compensation for the time spent litigating attorney's fee issues. The availability of such awards of "fees on fees" adds to the costs and burdens of attorney's fee claims. There are many aspects of these claims, like hourly rates, that are legally complex and uncertain. A fee claimant thus has incentive to litigate these complex issues, knowing that time spent in such litigation may itself be compensated with a fee award, so long as they are partially successful. In deciding whether to challenge a claim for attorney's fees, the Division must consider whether the collateral litigation will generate an attorney's fee claim that may exceed the potential savings to the taxpayer from a reduced payment of fees for the merits.

(6) Fees to the United States

A final issue is that, when Congress first adopted these provisions, "[c]oncern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The

Committee has added a key element in providing that courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest." *Natural Res. Def. Council, Inc. v. Train, supra*, 510 F.2d 692 app. B. at 725 (showing legislative history for Clean Air Act section 304). Yet the facially party-neutral language of the statute-specific attorney's fee provisions have been interpreted to more permissively allow awards of attorney's fees to plaintiffs, but then disfavor attorney's fee payments to defendants such as the United States. If courts applied the same standards for review of applications for fees from both plaintiffs and the United States (for example, when the United States prevails on a motion to dismiss), this could reduce the overall volume of litigation, avoid burdens to the courts and to federal agencies, and reduce taxpayer subsidies of litigation through the Judgment Fund or agency appropriations.

CONCLUSION

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Subcommittee may have.