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With over 20 attorneys in Alabama, Florida, Georgia and Mississippi focused exclusively on environmental law, and another dozen extensively engaged in environmental litigation, the [Environmental and Natural Resources Section](#) of **BALCH & BINGHAM** is one of the largest environmental practice groups in the country.

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District Court Denies National Association of Home Builders' Challenge to Endangered Species Act "Sue and Settle" Agreements

On March 31, 2014, the District Court for the District of Columbia dismissed the National Association of Home Builders suit to set aside two "sue and settle" agreements between U.S. Fish and Wildlife Service (USFWS) and environmental groups Wild Earth Guardians and Center for Biological Diversity that would require USFWS to list as many as 251 new species by September 2016 as threatened or endangered under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (ESA). The settlement agreements at issue are part of a national environmental group initiative in which environmental groups have successfully petitioned to have USFWS and the National Oceanic and Atmospheric Administration-Fisheries (NOAA-Fisheries) list over 750 species, a doubling or greater of the number of listed species in many parts of the United States. In finding that the settlements "seek to clear the backlog of species...They do not dictate that the service reach any particular substantive outcome on any petition or listing determination" the District Court found no injury to National Association of Home Builders traceable to the settlements and dismissed the suit for lack of standing. National Association of Home Builders, et al. v. U.S. Fish and Wildlife Service, et al., Civ. Action No. 12-2013 (D.D.C. Mar. 31, 2014). This decision marks the fourth time in a row that federal courts have determined groups have no basis for challenging the settlements.

Illustrating the impact of these environmental group petitions, USFWS petitions were received to list an average of 20 species per year from 1994 to 2006. From 2007 until the 2011 settlements, petitions for more than 1,250 species were received, a number close to as many species were listed in the previous 30 years. Despite this staggering number of species under petition, the recent string of court cases leaves industry groups and private individuals facing an uphill standing battle in future challenges to the settlements, including the recent suit by the State of Oklahoma and the Domestic Energy Producers Alliance on March 17, 2014 in the U.S. District Court for the Northern District of Oklahoma challenging these settlements for violating the Constitution and Administrative Procedure Act.

Some in Congress have raised concerns that the citizen petition provisions in the ESA such as that used in the Southeast Mega-Petition have resulted in a "cottage industry for filing lawsuits," that attorneys' fees provisions have been abused and promote litigation, and that the approach overall impedes true species recovery while wreaking havoc on USFWS resources and economic and social interests. The Government Accounting Office determined that attorney fees and costs paid by the Department of Interior from the United States Judgment Fund for ESA cases was \$ 21,298,971 from March 2001 to September 2010. By comparison, the entire listing budget for USFWS for FY2013 is \$ 22,431,000, just above the attorneys' fees amount.