COMMENT on **Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, FR No. 2019-24940**

The undersigned are three retired members of the Senior Executive Service (SES) who served on the Environmental Appeals Board (EAB or Board) as judges from varying times between 1992 and 2019. We are writing to comment on the December 3, 2019 EPA proposed rule, which if adopted, would amend the procedures for EAB review of EPA permits issued under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act UIC program, and the Resources Conservation and Recovery Act. The stated reason for these amendments is to "streamline and modernize" the review process. As proposed, the rule's inclusion of a new mandatory step of alternative dispute resolution (ADR) and exclusion of interested parties make a more streamlined process highly unlikely. Fundamentally, the proposal is at odds with the statutes and cited rationale upon which it relies.

First, the proposed rule cites as authority the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 574, before proposing terms squarely at odds with that statute. According to 5 U.S.C. 574 (a), "an agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." Similarly, 5 U.S.C. 574(c) states that "alternative means of dispute resolution authorized under this subchapter are *voluntary* procedures which supplement rather than limit other available agency dispute resolution techniques" (emphasis added). EPA has a published policy on Agency alternative dispute resolution, which states: "The U.S. Environmental Protection Agency (EPA or the Agency) strongly supports the use of alternative dispute resolution (ADR) to deal with disputes and potential conflicts. ADR refers to *voluntary* techniques for preventing and resolving conflict with the help of neutral third parties" (emphasis added). 65 Fed Reg 81,81858-59, Vol. 65, No. 249 (December 27, 2000). Neither the ADR statute nor EPA's ADR policy envisions alternative dispute resolution that is mandatory.

The proposed rule changes the Board's current ADR process, which is consistent with the ADR statute, from an opt-in to a purportedly opt-out ADR. Under the proposed rule, however, parties disputing a permit's terms cannot opt-out without participating in a mandatory multi-step ADR program, regardless of whether the parties believe that ADR is viable. This is a significant departure from the current EAB ADR program, which the proposed rule's preamble accurately describes as being highly successful. The EAB's current ADR program is successful because it is perceived as a fair and neutral mechanism for resolution of permit challenges, is voluntary, is inclusive of multiple challengers, and achieves final resolution in a short time frame.

In contrast to current EAB ADR procedures, the proposed ADR process also mandates a filing of dispute of permit terms within 30 days of issuance of the permit, followed by a 21-day timeframe for response from the EPA Region. The parties then meet with an EAB settlement judge to assess the strength and weaknesses of the parties' arguments. Within 30 days of this

"convening meeting," or no later than 30 days after the Region's response is filed, the parties may unanimously consent to continue ADR, drop the dispute, seek EAB review, or seek federal court review. In other words, if unsuccessful, at the close of an 81-day process that the parties may not have wanted in the first place, neither the EAB review process, nor a federal court review process, has begun.

The proposal is highly likely to take longer than current EAB review procedures. While the preamble does not cite the current average time between filing for review and final resolution, in our experience, the average timeframe historically has been six months or less. This recollection is consistent with the testimony of Regina McCarthy, then Assistant Administrator for Air and Radiation, before the U.S. House of Representatives Subcommittee on Energy and Power. Ms. McCarthy testified that "On average, the Board decides PSD appeals in just over five months from the filing of the appeal, much faster than judicial cases are resolved." She further stated that "Because the Board's decisions currently may be challenged in court, the Board may seem like it adds an extra step that prolongs the permit process. The actual experience is quite different. Rather than adding a step, the Board usually serves as a cheaper, faster, more expert substitute for judicial review."[1]

Equally important, as noted in the article cited in the preamble, "The EPA's Environmental Appeals Board at Twenty-five," the significant majority of the cases subject to EAB review are resolved by the EAB decision, as only a small percentage of parties choose to appeal to federal court. "Overall, less than 1% of the Board's final decisions have been reversed" by federal courts.[2]

Further, if EAB review is bypassed under this rule, a final disposition of the permit can be expected to be delayed by seeking initial permit review in federal courts. For example, according to the Office of Administration for U.S. Courts, the median duration of administrative agency appeals to circuit courts in the fiscal year ending September 30, 2018 was 14.2 months. The majority of federal circuits reported durations of 10 to 18.7 months.[3] Thus, initial review in federal courts is far longer than EAB review, even if the appeal is successful. If the permit is remanded by a federal circuit court, the permit returns to the Region for further consideration.

The rule is at odds with federal court practice by proposing to eliminate *amicus curiae* participation in permit appeals before the EAB. This could result in the exclusion of interested citizens, and downwind or downstream States and Tribes who are affected by and have commented on the permit at issue. As noted in an article on *amici* participation in state

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[1] Written Statement of Regina McCarthy, Subcommittee on Energy and Power of the Committee on Energy and Commerce, May 13, 2011. https://www.epa.gov/sites/production/files/2013-10/documents/2011_0513_rm.pdf

[2] The EPA's Environmental Appeals Board at Twenty-five at 6.

[3] Table B-4C. U.S. Courts of Appeals-Median Time Intervals in Months for Administrative Agency Appeals Terminated on the Merits, by Circuit for the fiscal year ending September 30, 2018. https://www.uscourts.gov/sites/default/files/data_tables/jb_b4c_0930

appellate court review, "amicus briefs can affect the perspective from which an appellate court views a case by showing how the decision is important to others not party to the case, by providing additional information and expertise that parties may not have, and by developing legal arguments that parties sometimes cannot."[4] Raising obstacles to participation by interested persons, some of whom may not even live in the state where the permitted facility is located, limits information that can better inform a fair and just outcome. The preamble makes clear that if an interested person cannot file the requisite papers and "attend and participate in the convening meeting," that person or entity is barred from seeking judicial review. The stated rationale for excluding this long-held ability of *amici* from participating in permit appeals is that it would shorten review by a mere 15 days. This proposed change is at odds with federal court practice, which allows *amicus curiae* participation in permit decisions appealed to federal court. Thus, under the proposed rule, a party could seek review in federal court and have *amicus curiae* provide input to the judges' final decision, but the EAB would not have the same benefit of having those views before it when rendering a decision on behalf of the EPA Administrator. One of the goals in establishing the Environmental Appeals Board was to have the Board act on behalf of the Administrator in rendering decisions on permit decisions, which is intended to affirm the Region's permit as being properly issued, or to allow the Region to correct any identified errors prior to federal judicial review. Curtailing the information that the Board can consider does not serve those purposes.

The rule generally states that the Administrator, through the General Counsel, at any time can issue a legal interpretation that would constitute the Agency's position on that provision. Like many aspects of the proposed rule, it is completely unclear what problem the proposal is attempting to fix, particularly in this context. The General Counsel has from time to time issued formal General Counsel Opinions. The EAB has acknowledged and followed those formal opinions in its review. *See In re* Harmon Electronics, Inc., 7 E.A.D. 1, at 9, n.7 (1997), *In re* Teck Cominco Alaska, Inc., 11 E.A.D. 457, at 488 (2004).[5]

Finally, the rule proposes to impose term limits on EAB judges, who serve in Senior Executive Service (SES) career-reserved positions. The statute governing career-reserved positions, 5 U.S.C. 3132, vests implementation of regulations regarding Senior Executive Service to the Office of Personnel Management (OPM), not to EPA. 5 U.S.C. 3136. OPM's Guide to the Senior Executive Service, at p. 7, describing SES career appointment and appointment methods states that "SES career appointments are made without time limitation and provide certain job protections and benefits."[6] Thus, OPM, not EPA, is the entity charged with determining

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[4] Victor E. Flango, Donald C. Bross & Sarah Corbally (2006) Amicus Curiae Briefs: The Court's Perspective, Justice System Journal, 27:2, 180-190, DOI: 10.1080/0098261X.2006.10767799

[5] It is unclear whether the Agency is saying that during the pendency of a preceding the General Counsel could change the rules of the game by re-interpreting a rule or policy at issue in the case. If so, that would be inappropriate as the General Counsel, as counsel to the Regional Administrators and Regional Counsels as well as to the Administrator, is a party to the pending permit or enforcement appeal.

[6] https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf

conditions of service for SES employees. Most important, the proposed term limits are completely unnecessary given that all career-reserved SES employees are subject to OPM's general mobility clause, which allows an SES employee to be assigned by the head of the Agency/Department to another SES position within that agency.[7] Further, the proposed rule provides no rationale as to why SES career-reserved persons serving as EAB judges should be treated differently than any other EPA career-reserved SES employee including those within the Office of General Counsel, or those serving in career-reserved SES positions across the federal government.

In summary, the terms of the proposed rule are contrary to the rule's stated purpose and rationale, as well as to the authority upon which it relies. Neither adding additional steps to review through a mandatory ADR process, nor providing for the possibility of initial review in federal courts of appeal will arrive at a final disposition of a contested permit more quickly than the current EAB review procedures. For all the reasons stated above, we urge reconsideration of this proposal.

Anna Wolgast (SES retired)
Leslye Miller Fraser (SES retired)
Edward Reich (SES retired)

[7] Also, EAB judges who joined the Board since January 1, 2012, served on average four years before moving to another SES position within EPA or another agency, or retiring.