As a former staff attorney to the Environmental Appeals Board, I write in strong opposition to most of the changes this proposed rule seeks to make to the EAB permit appeal process. Unfortunately, the proposal shows ignorance of the important functions the EAB provides in ensuring that EPA-issued permits are legally sound and are technically well-explained. The proposal should not be finalized, save perhaps for a few of the more minor proposals detailed below.

1. New Time-Limited ADR Process

"EPA is seeking to leverage the success of the EAB's current ADR program" by destroying the very things that make it so successful. Despite proudly stating the 90% success rate of the current voluntary ADR program, it is clear that the Administrator did not consider why those cases were successfully settled through ADR. Instead, the proposal appears aimed to use ADR as an expedited shortcut around EAB review of federally-issued permits – if not all parties agree on a path forward (ADR or EAB review) then the EAB automatically loses jurisdiction and the permit goes into effect, with the only recourse for the aggrieved party to sue in federal court. Under this approach, all the permittee has to do is feign interest in the ADR process, attend a meeting with the Settlement Judge, unceremoniously block consensus on any path forward, and its new permit goes into effect. If the permittee likes the permit conditions, then it can use the slow and expensive federal court system to its advantage to stymie any challenge to the permit conditions. And, if it doesn't like the permit conditions (or if the Settlement Judge agrees that it actually has a decent case), it can immediately go to federal court and proceed in an action against EPA without the benefit of any further consideration by Agency decisionmakers that may be able to bolster the Agency's reasons for putting those permit conditions in place or reconsider them.

The Agency's proposal to make this process issue-specific creates a further incentive to stonewall on the most complex and important issues in the notice of dispute. A permittee could agree to have a small, insignificant part of the challenge to the permit go forward with ADR, while forcing the rest of the issues into federal court on a very different, slower timeline, forcing the challenger into two markedly different processes to gain the requested changes to the permit. For this reason, if the Agency moves ahead with forced ADR, the decision to move ahead with ADR or EAB review should be an all-or-nothing decision.

Beyond creating an incentive to stymie agreement, the time-limited process as proposed would stifle any meaningful attempts to resolve disputes out of court – the exact opposite goal of the Administrative Dispute Resolution Act of 1996. First, the proposal says nothing about what happens when several different parties challenge the same permit (or similar permits) at different times. In fact, due to the swift deadlines involved, it is very likely that each permit challenge would need to proceed on its own without the benefit of consolidation that would allow the parties to creatively and constructively work toward an agreement that resolved all issues in dispute. Two of the Board's more successful recent settlements in *Wind River Oil and Gas Permits* and *Deseret Power Electric Cooperative Bonanza Power Plant* involved multiple parties and disputes. Instead of creating efficiencies, the proposal would inundate the EAB settlement process with individual disputes that could not be handled in a constructive or efficient way. If not settled, the courts would then also be inundated with petitions for review.

Second, the proposal ignores the fact that in many instances the Region itself requests additional time to consider and respond to the issues in the petition for review, including time to consult with appropriate Headquarters offices (the *Wind River* docket shows no less than three instances where Region 8 requested time extensions to respond). While the proposal attempts to rebrand the current petitions for review as "notices of dispute," it is unclear what, in practice, is different from the current petition filing requirements. However, the proposed 40 CFR 124.19 does not contain any ability for a time extension request/grant for the Region's response like the appeal procedure in 124.20 does. Thus, as proposed, the rule serves to cut out any reasoned reconsideration by the Agency in light of the issues raised in the (up to 20 page) notice of dispute, and instead encourages the Regions to rubber stamp potentially flawed permit decisions without Headquarters being any the wiser. This is a recipe for disaster. Consider the Board's remand order in *In re West Bay Exploration Co*., 17 E.A.D. 204, where the Board found discrepancies between geologic maps in the permit record and the Region's conclusions that a geological formation would confine injected waste, and thus remanded the permit for further consideration. Sometimes mistakes happen, and some oversight and discussion within the Agency is imperative to ensure EPA lives up to its mission to protect human health and the environment.

Third, the proposed time limits unnecessarily rush the settlement process. As an example, the stay to allow ADR to proceed in *Wind River* lasted from June 2015 until January 2016. The proposed rule would compress that timeline to just 30 days. While the timeline would admittedly not require final agreement within that period, there is very little time allowed (just 10 days) for the Settlement Judge to go through the issue papers and identify potential areas for agreement, research the strengths and weaknesses of each party's case, and prepare for the conference – in other words, the Settlement Judge cannot be expected to successfully provide mediation services under the proposed timelines. It is clear that what really matters to the Administrator is speed, not the successful settlement of cases.

Which begs a final point on why the proposed forced-ADR process is fundamentally and fatally flawed. The success of the Board's current process has hinged on the ability of the Settlement Judge to give candid advice to the parties on their cases and how the Board would likely rule if ADR failed. Allowing for a party to get that advice and then completely evade Board review by failing to agree to it heightens the incentive to be disagreeable. In other words, the proposal turns ADR on its head as a weapon for permittees to wield against potential challengers (and the Agency, too, for that matter). Indeed, Congress foresaw this possibility when passing the Administrative Dispute Resolution Act of 1996, stating only that an Agency "may" use an ADR proceeding to resolve an issue in controversy "if the parties agree to such proceeding." 5 U.S.C. § 572(a). The Agency "*shall* consider *not* using" ADR in certain circumstances posed in individual cases. *Id*. § 572(b) (compare with 28 U.S.C. § 652(a) on the use of ADR in federal court proceedings, stating that "[a]ny district court that elects to require the use of alternative dispute resolution in certain cases…"). Not only is the Agency's forced-ADR proposal unwise, it is also contrary to any plain reading of the Administrative Dispute Resolution Act of 1996.

2. Clarifying the EAB's Scope and Standard of Review in Permit Appeals

Without saying so, this provision seems clearly designed to overturn the Board's 2019 decision in *In re Muskegon Development Co.*, 17 E.A.D. 740, that remanded a UIC permit to Region 5 for not following or explaining environmental justice considerations as required by Executive Order, and to ensure that the Board doesn't opine on those types of issues in the future. Instead of attempting to limit the scope of the EAB's review, the Administrator should ensure that all of his Regional Administrators understand their obligations under applicable Executive Orders, whether they involve policy considerations or not.

3. Eliminating *Amicus Curiae* Participation

The proposal seeks to eliminate the *amicus curiae* provision in the regulations, that, from my experience, is relatively unused. Because of the alternative means provided for public comment on permits and the ability of any person who commented to challenge a permit listed in the proposal, I agree it can be eliminated.

4. Eliminating *Sua Sponte* Review

The proposal seeks to eliminate the *sua sponte* review provision in the regulations for permit appeals, that, from my experience, is also relatively unused. Currently, the Board does not receive notice of permits when they are issued, and it is unclear how the Board would know it would want to review portions of permits that are uncontested anyway. I agree this provision can be eliminated, so long as it is made clear that the Board can still review enforcement actions *sua sponte* (which is where the Board has exercised its *sua sponte* authority).

5. Expediting the Appeal Process

As stated earlier, in many instances the Region itself requests additional time to consider and respond to the issues raised in the petition for review, including time to consult with appropriate Headquarters offices. I agree that sometimes the requested extensions can be excessive, and support some limits to time extensions in any final rule provided that Agency procedures are streamlined to allow for the Regions to meet these targets without sacrificing internal deliberations on the actions being challenged.

However, the two provisions limiting both the time for the Board to consider the case and length of EAB decisions are at best unnecessary, and at worst counterproductive. Over its 25-year history, only a handful of the EAB's decisions have been vacated or remanded by a reviewing federal court. That is mostly due to the care with which the Board assesses the facts, researches the law, and writes the resulting opinion. Any attempt to short-circuit the decision process will compromise the Agency's ability to defend its final decision (remember, the final decision of the EAB is the Administrator's own decision) on judicial review. I agree that some processes could be streamlined and that some opinions may be unnecessarily long, but putting arbitrary limits on the EAB decision process will only hurt the Agency in the long-run. If the Administrator wants to improve the timeliness of opinions, it would be better to work with the EAB judges on ELMS processes and regulatory tweaks rather than hard stops on the Board's consideration of issues.

Further, it is misguided to prioritize all permit appeals when PSD and NSR permits are statutorily required to be completed within a certain period of time. Those *statutory* deadlines should continue to be prioritized by the Board in accordance with the Agency's FY '18-22 Strategic Plan to meet all statutory deadlines, rather than muddling that directive with arbitrary regulatory deadlines. The rule should not be finalized as proposed.

6. 12-Year Terms for EAB Judges

The explanation for a 12-year term limit for EAB judges in the proposal is so dissonant as to make it entirely arbitrary – especially why the Agency chose to create a set term at all, let alone set it at 12 years. Why, if judges frequently go on to retire or take other positions, and long-serving members admittedly benefit the Board as a whole, are set terms necessary at all? It doesn't help that the preamble states that "For judges joining the EAB since January 1, 2012, the average term of service is four years," especially given all the other authorities the proposal takes pains to elucidate on the service of the judges as members of the SES. The proposal makes it much more difficult to determine who is filling out which judge's term in the event that they leave before the term is up than the current system where a new judge is hired when one leaves and then stays on (unless involuntarily reassigned, but that has not happened to my knowledge).

7. Identifying Precedential EAB Decisions

In one of the most puzzling aspects of the proposal, the Administrator seeks comment on whether a process should be set up to identify precedential EAB decisions. Either the Administrator is unaware that such a process already exists, or is ignoring the extensive body of precedential administrative case law the EAB has developed over the last 25 years in an attempt to cherry-pick longstanding precedents.

As page 12 of the EAB's Citizen's Guide explains:

> When deciding a matter, the EAB generally adheres to the reasoning it applied in previous cases that involved similar factual circumstances or raised similar legal issues. If there are differences that require the EAB to reach a different result, the EAB will explain those differences in its opinion. Lawyers refer to this principle of decisionmaking by a Latin phrase, "stare decisis," which means "to stand by things decided." When a decisionmaking body like the EAB gives its prior decisions precedential value, members of the regulated communities can rely on these decisions to guide their conduct. Moreover, they can be assured of a fair decisionmaking process in which people who conduct themselves in the same way under similar circumstances will be treated the same way by the legal system. If you are participating in an EAB case or are deciding whether to file a case before the EAB, you should read carefully other EAB decisions that address issues similar to yours, as the EAB's earlier rulings may apply to your case. The EAB's website contains a link titled Board Decisions that provides a search function so that you can search both Published and Unpublished Decisions to find other EAB decisions that may apply to your case.

The Board has 16 bound volumes of published decisions (available in any EPA library) that are cited as precedent, and the Board continues to publish significant decisions that it wants to point litigants to in its publication series, the Environmental Administrative Decisions (EAD). Those decisions also can be found on its website and on LexisNexis and Westlaw. Put simply, the Board itself decides what is precedential; any move away from that process would further invite meddling in longstanding EPA interpretations of statutory and regulatory meaning. The Agency should leave that process alone in promulgating any final rule.

8. Administrator's Legal Interpretations

Current practice within the Agency dictates that the Office of General Counsel must be consulted in any matter that is appealed to the Board, so that the position being put forward by the effected Region or Headquarters offices is the position of the Agency as a whole. The proposal seeks to give the General Counsel the power to definitively interpret EPA regulations and the statutes it implements *after* the Agency has already taken action on a permit or enforcement action. Operating alongside the ability to select those EAB decisions with precedential value in proposal #7 above, this proposal consolidates all legal interpretations in the General Counsel, to the potential exclusion of the Office of Enforcement and Compliance Assurance and the EAB judges themselves.

Any administrative lawyer can identify several problems with the proposed change. Most importantly, it opens up the Agency to charges that the General Counsel is promulgating substantive legislative rules while changing the Agency's interpretations of its regulations or statutes without going through notice and comment rulemaking. The proposal also appears to conflict with the Supreme Court's recent decision in *Kisor v. Wilkie* on deference to Agency interpretations of its own regulations. Specifically, the Court said that "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference," which does not include convenient, post-hoc litigating positions or new interpretations. 139 S. Ct. 2400, 2417-18. This proposal encourages just that – any EPA office that has its action challenged can ask the General Counsel for a definitive legal interpretation saying it was right, and no other part of the Agency, including the EAB judges appointed to interpret those very same authorities, can disagree. Although the proposal is undoubtedly meant to give the General Counsel's opinions "authoritative" weight in line with another part of the *Kisor* opinion, reviewing courts will likely question it the first time the General Counsel changes a long-held legal interpretation of an EPA regulation or administered-statute. This change should not be finalized.

The proposal also curiously states that "Nothing in this proposal would limit the Administrator's existing authority (derived from his or her statutory authority to issue the permits in the first instance) to review or change any EAB decision." Except, it ignores the history of the formation of the EAB where the Administrator affirmatively gave up his prior formal role in permit disputes in favor of having them resolved exclusively by the Board. By putting an express provision in the amended regulatory text reserving a role for the Administrator, the proposal puts an unexplained, arbitrary back-door in the current process that would allow the Administrator to intervene in any dispute before the Board. This back-door threatens to obliterate the independence of the Board entirely, and it should not be finalized.

9. Conforming Revisions

Given the back-door in proposal #8 above, interested parties should pay close attention to other potential back-doors introduced as a “conforming revision.”