

**COMMENTS OF EARTHJUSTICE, SIERRA CLUB, DEFENDERS OF WILDLIFE,
AND WESTERN ENVIRONMENTAL LAW CENTER ON PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center very much appreciate the opportunity to comment on the proposed changes to the Federal Rules of Appellate Procedure. We respectfully urge the Advisory Committee not to adopt the proposed changes to the word limits for appellate briefs and to the rules regarding the computation and extension of time.

**I. THE COMMITTEE SHOULD NOT ADOPT THE PROPOSED CHANGES TO
THE WORD LIMITS FOR APPELLATE BRIEFS IN RULE 32.**

The proposed changes to Rule 32 would shorten the length for opening briefs from 14,000 words to 12,500 words and the length for reply briefs from 7,000 words to 6,250 words. As explained in detail below, these shortened word limits will likely present attorneys in complex cases with a dilemma: drop valid claims or raise them in such an abbreviated form as to risk losing the claim and making bad law. This dilemma is especially pointed in cases involving review of governmental agency actions, many of which are heard for the first (and only) time in the federal courts of appeals. *See, e.g.*, 42 U.S.C. § 7607(b) (providing that petitions for review of many final actions taken by the Environmental Protection Agency under the Clean Air Act must be brought within 60 days in the D.C. Circuit); 33 U.S.C. § 1369(b) (requiring petitions for review of regulations issued under the Clean Water Act to be brought in federal courts of appeals); 42 U.S.C. § 6976 (providing that petitions for review of regulations promulgated under the Solid Waste Disposal Act must be brought in the D.C. Circuit). In these cases, a decision not to raise a valid claim – or the failure to adequately brief a valid claim – can have long term adverse impacts not only on a litigant but on the public.

The records for judicial review in these cases are often extensive, and parties may have valid legal objections to numerous different parts of the regulation, each of which needs to be explained separately. The proposed reduction in the word limits would affect attorneys' ability to bring important issues before the courts and to successfully challenge unlawful action.

Cases challenging government action are often multiparty cases where petitioners with different (and often adverse) interests present different and conflicting claims to the court. In environmental cases, for example, courts may be presented with arguments by regulated entities who claim that a regulation is too stringent and by environmental groups who claim it is insufficiently stringent. *See Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115 (D.C. Cir. 2013). In such cases, the D.C. Circuit typically receives two or more petitioner briefs. *See id.* at 1118. Faced with the prospect of multiple briefs, the D.C. Circuit usually reduces the number of words allowed in any individual brief substantially. *See, e.g.*, Ex. A, Order, *U.S. Sugar Corp. v. EPA*, No. 11-1108 (D.C. Cir. May 15, 2014); Ex. B, Order, *Solvay, USA, Inc. v. EPA*, No. 11-1189 (D.C. Cir. Jan. 31, 2014).

In judicial review cases, courts generally defer to agency statutory interpretations so long as they do not contravene Congress's plainly expressed intent and are reasonable. *See Chevron v.*

Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). Similarly, they defer to agencies' factual determinations so long as they are not arbitrary and capricious. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Thus, petitioners in such cases must be able to brief issues that are often both complex and numerous in sufficient detail to overcome significant deference. Notably, the D.C. Circuit has ruled that arguments raised too briefly are waived. See e.g., *Sierra Club v. EPA*, 167 F.3d 658, 666 (D.C. Cir. 1999); *Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1166-67 (D.C. Cir. 2013); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333, 340 (D.C. Cir. 2007) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005)); *Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 173 (D.C. Cir. 2013).

Even where the courts consider arguments that have not been developed in sufficient length, they may still reject such arguments if the briefs do not sufficiently explicate why the government's action was unlawful or arbitrary. Faced with the possibility of losing a claim (and potentially making bad law) because they do not have enough words to explain it fully, attorneys may be forced to refrain from bringing valid claims. The goal of inducing attorneys to present their claims succinctly is certainly worthwhile, but word limits should not act to cap the number of valid issues that parties can raise. Such a result would not only be unfortunate from a public policy point of view, but would undermine the purpose of statutory provisions by which Congress intended to provide fully for judicial review of agency actions.

Some may believe that if word limits are shortened, parties who truly need additional words can obtain them by submitting a motion to the court. As a practical matter, such motions are hardly ever granted. See D.C. Cir. R. 28(e)(1) ("The court disfavors motions to exceed limits on the length of briefs, and motions to extend the time for filing briefs; such motions will be granted only for extraordinarily compelling reasons."). Further, it is neither in the interest of litigants nor judicial economy to create a situation in which parties are forced to file motions to exceed the word limits more frequently.

Moreover, if the word limits are shortened as proposed, it is likely that courts will continue to shorten them further in multi-party cases. It is understandable that courts would want to reduce word limits in multi-party cases, as the amount of material that judges and clerks need to read increases substantially with each additional brief. However, the impetus for reducing word limits for each brief in these cases will not cease to exist just because the default word limit is reduced from 14,000 to 12,500; rather, the result will be to simply lower the starting point for further reducing word limits.

Finally, the current 14,000 word limit was established before the establishment of circuit rules that require parties' briefs to include additional sections. For example, D.C. Circuit Rule 28(a)(7) now provides that "[i]n cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing." It further provides that, "[w]hen the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." *Id.* When the Committee determined that briefs of 50 pages (and later 14,000 words) were appropriate, it did not contemplate the need to include such additional sections, which can substantially reduce the number of words available for merits arguments.

II. THE COMMITTEE SHOULD NOT ADOPT THE PROPOSED CHANGES TO THE 3-DAY RULE.

The proposed changes would eliminate the 3-day rule, which adds 3 days to the period for submitting responses to motions and replies in support of motions. Under the proposed revisions, the period for responding to a motion would decrease from 13 days to 10 days, and the period for submitting a reply in support of a motion would decrease from 10 days to 7 days. The rationale underlying the proposed change is that the 3-day rule is a relic from times when motions and responses were more often served by mail and that the additional 3 days are unnecessary when motions and responses are served electronically.

The practical effect of the proposed changes is to reduce the times for submitting responses and replies to a short period that will be, in many instances, inadequate. It will prevent attorneys from fully presenting their reasons for opposing (or supporting) a motion, leaving appellate courts to make less informed decisions. Further, it will force attorneys to seek extensions more often – a result that is not in the interests of judicial economy. And shortening the process of motions briefing by 3 or 6 days will not expedite the resolution of motions or cases to any significant extent.

The adverse impacts of the proposed changes are best understood in the context of dispositive motions (such as motions to dismiss) and motions to stay government regulations pending judicial review. The courts' rulings on such motions have major impacts on the rights and liabilities of the litigants. They can also have major impacts on the public. Granting a motion to stay government regulations that limit emissions of toxic pollution pending judicial review, for example, can result in a loss of life and other serious health impacts while the regulation is stayed. Plainly then, there is a strong public interest in allowing litigants time to fully develop their arguments for or against dispositive motions and motions to stay and in having courts be fully informed before making their decisions on such motions.

Under the proposed changes, responses to motions would be due within 10 calendar days. Thus, responses to a motion filed at 11pm on the Friday before a holiday weekend would be due the Monday after next – *i.e.*, just 5 working days later. Where responses to a motion were filed on the Friday before a holiday weekend, a reply would be due the Monday after next – again, just 5 working days later. Even in the absence of an intervening holiday, the proposed revision would allow just 6 working days to respond to a motion filed on a Friday, and 5 working days for a reply to a response filed on a Friday. These times are not sufficient to prepare responses or replies, especially where the motions at issue are dispositive motions or motions to stay.

Nor is it the case that these shorter times always applied before the widespread adoption of electronic service. As explained in the Committee's notes accompanying the 2009 Amendments to Rule 26(a)(1), intermediate Saturdays, Sundays, and legal holidays were not previously included in computing periods shorter than 11 days, as they are now. Thus, intermediate Saturdays, Sundays, and legal holidays would not have been counted in computing either the 10-day response period for motions in Rule 27(a)(3)(A) or the 7-day period for replies in Rule 27(a)(4). Rather, under previous rules, a response to a motion filed on the Friday before a holiday weekend would have been due 16 calendar days (10 working days later) – even without the additional 3 days provided by the 3-day rule. Similarly, replies to a response filed the Friday

before a holiday weekend would have been due 12 calendar days (7 working days) later without an additional 3 days. In short, although the proposed rule change appears to be intended to restore the actual times that were provided for responses and replies before electronic service was available and widely used, it actually provides times that are significantly shorter than were allowed under previous rules.