

1 the monitoring was so that you had -- to take the  
2 opacity example, that you have to monitor using method  
3 9 every day or every month or something like that.

4 MR. VOGEL: Thank you, David.

5 MR. FREDERICK: Pleasure to be here.  
6 Sorry I spoke a little too long.

7 MR. VOGEL: Is Sharon Genasci on the  
8 line? Do we have Robert Ukeiley?

9 MR. UKEILEY: Yes.

10 MR. VOGEL: Okay, Robert, go ahead.  
11 You'll have ten minutes for presentation and ten  
12 minutes for questions and answers. I'll remind you  
13 that we are recording this for audio and written  
14 transcript.

15 MR. UKEILEY: Thanks. My name is Robert  
16 Ukeiley. I'm an attorney in private practice in  
17 Kentucky. I've been doing Clean Air Act litigation for  
18 ten years in a bunch of different states, have kind of  
19 alternated between private practice representing  
20 nonprofits and actually working for nonprofit public  
21 interest law firms, but all my work has obviously been  
22 on the side of community and environmental groups.

23 I guess I just want to start out with a  
24 general statement that in general I find that Title V  
25 permits are a very useful tool. I remember working on

1 an enforcement action against municipal solid waste  
2 incinerator in, I guess, 1996 in Colorado and literally  
3 spending days just trying to determine what the  
4 applicable requirements were for the facility.

5                   And I think that Title V permits, you  
6 know, to a large degree do what they're intended to do,  
7 which is tell the public and the permittee and the  
8 regulatory agencies what the requirements are that have  
9 to be. I think that there clearly is a lot of room for  
10 improvement. So I'm going to talk about some of the  
11 areas that I think there's room for improvement.

12                   I think that the issue of states and  
13 local authorities not having issued the initial Title V  
14 permits remains an unfortunate issue. And I think that  
15 that, you know, has dragged on way too long. EPA has  
16 gone through different iterations on that of getting  
17 commitment letters and things like that, but -- and  
18 there have been lawsuits about trying to get the states  
19 to finalize the first round of permits, but yet some  
20 states still haven't done that.

21                   I think that it's unfair from a state to  
22 state or state to local authority point of view, that  
23 some sources have their Title V permits and some don't.  
24 I really think that that playing field needs to be  
25 levelled and that EPA has to, you know, either

1 requiring the states to issue the permits or start  
2 issuing part 71 permits or taking away programs, but  
3 that definitely has to end.

4 I also think that, you know, in the  
5 states that I've seen that there needs to be a little  
6 more prioritization of efforts in terms of the size of  
7 the source. I guess in theory all Title V permits are  
8 created equally, but that doesn't work out to be the  
9 reality. And I just have been disappointed to see  
10 state and local agencies fail to put enough effort into  
11 Title V permits for sources that in general, you know,  
12 have exponential amounts more air pollution than  
13 smaller sources.

14 You know, I guess mainly -- in my  
15 experience it's mainly in the coal fired power plants,  
16 that their emissions are, you know, just substantially  
17 larger than most any other source in the whole state,  
18 and yet it doesn't seem like the state agencies put  
19 significantly more effort into those.

20 That's not uniformly true, although  
21 sometimes the states put more effort into them solely  
22 in a reactionary kind of way. Like, for example, in  
23 Ohio I know that the electric industry that has coal  
24 fired power plants entered into a dial-up process with  
25 the state, but that's not necessarily what I'm talking

1 about. I'm talking about putting more effort into it  
2 to -- the state put more effort into it to ensure that  
3 the permit comes out right.

4           For example, one of the big issues is the  
5 applicability of new source review to coal fired power  
6 plants, and that takes a significant amount of effort  
7 for a state to determine whether new source review is  
8 an applicable requirement. But if you consider the  
9 amount of pollution that's at stake, it seems that that  
10 effort would be a logical prioritization of efforts,  
11 but we really -- I just don't see evidence of that.

12           I also think that there needs to be  
13 significant improvement in monitoring that's included  
14 in Title V permits. I guess I'll give a specific  
15 example. There's a Title V permit for a coal fired  
16 power plant in Georgia called Plant Wadsley by Georgia  
17 Power, and the permit contains an exception for startup  
18 and shutdown, which is illegal but nonetheless -- put  
19 that aside for a second. And then the problem is that  
20 -- well, I guess I should talk about this.

21           The problem is that the SIP has a  
22 provision that EPA generally agrees it's illegal and  
23 yet they take the position that they can't address that  
24 during the Title V permitting process. That if there's  
25 an illegal provision in the SIP, it has to be put in

1 the Title V permit. We -- kind of a strange approach  
2 to acknowledge that something is illegal and yet claim  
3 that they're bound to include it in a Title V permit.

4           But anyway, setting that aside for a  
5 second, the permit contains the provision that  
6 generally exempts the source from violations of SIP  
7 emission standards during startup and shutdown. And  
8 then it defines startup as this period lasting from the  
9 time the first oil fire is established in the boiler  
10 until the time that the mill flash burner performance  
11 and secondary air temperature are adequate to maintain  
12 an existing gas temperature above the sulfuric acid due  
13 point.

14           And so I am involved in enforcement  
15 action against this facility, and during the litigation  
16 it came out that the facility doesn't monitor for these  
17 parameters at all, nor does the Title V permit require  
18 it to monitor. But the mill flash burner performance,  
19 the facility doesn't monitor at all for that, and  
20 obviously it doesn't monitor, it doesn't report. It's  
21 not even clear what mill flash burner performance  
22 specifically means. It's not defined in the permit.

23           Similarly, the facility doesn't monitor  
24 the secondary air temperature and they don't monitor to  
25 determine what the sulfuric acid due point is, which

1 actually -- you know, in general one could predict what  
2 it is, but it is subject to variability.

3                   So this provision was put into a Title V  
4 permit without any analysis of whether it's enforceable  
5 at all, and that just -- it just seems like mistakes  
6 like that shouldn't happen for a facility that  
7 constitutes such a significant portion of overall air  
8 emissions in a total thing.

9                   You know, there are other examples, like  
10 I'm also working on enforcement action against a  
11 facility in Ohio, a steward station which is owned by  
12 Dayton Power & Light, and it has a similar provision,  
13 but in that it defines startup as lasting from the  
14 first oil fire until the exit gas temperature is 250  
15 degrees, and then the permit requires them to monitor  
16 at the gas temperature.

17                   MR. VOGEL: Excuse me, you have about one  
18 minute left.

19                   MR. UKEILEY: Okay, thanks. It's a very,  
20 you know, simple thing. You can go and look at their  
21 monitoring of exit gas temperature to determine whether  
22 the facility actually was in startup or not. So I just  
23 think in general that more emphasis needs to be placed  
24 on looking at the monitoring requirements, especially  
25 for large sources of pollution, because distinctly what

1 happens in the Wadsley permit, which doesn't have to be  
2 there because other states have a better approach,  
3 doesn't happen. I guess I will seize the 30 seconds  
4 left. I would be happy to answer any questions.

5 MR. VOGEL: Carol Holmes.

6 MS. HOLMES: Hi, this is Carol Holmes at  
7 EPA. I have, I think, two questions, but maybe one.  
8 When you talk about the Georgia SIP provision and EPA  
9 saying that the SIP provision is illegal, has the  
10 region actually done a SIP call? I mean, what is the  
11 basis for your statement that -- the reason that the  
12 SIP provision is illegal?

13 MR. UKEILEY: No, they haven't, and  
14 that's the disappointment. In response to one of our  
15 Title V petitions pointing out that the SIP provision  
16 is inconsistent with EPA's position on startup,  
17 shutdown, malfunction, the response said that they  
18 agreed that the provision was inconsistent but that  
19 they cannot address that in a Title V proceeding and so  
20 -- and they mention that we do have the right to  
21 petition for a SIP call. But that was a disappointing  
22 response in that it seems that EPA should have taken  
23 the initiative on that.

24 MS. HOLMES: Did y'all position for a SIP  
25 call afterwards?

1                   MR. UKEILEY: No, we didn't because of  
2 limited resources.

3                   MS. HOLMES: I can appreciate that. I  
4 have one other question, if I could, Ray, or do we need  
5 to move on?

6                   MR. VOGEL: Go ahead.

7                   MS. HOLMES: A quick question. The  
8 example you gave of a permit -- and I had a little bit  
9 of a hard time following it -- the Georgia power plant,  
10 did you comment on the inadequate monitoring or lack of  
11 definition of startup?

12                  MR. UKEILEY: No. The permit was issued  
13 before I was working in Georgia, so no one commented on  
14 it.

15                  MS. HOLMES: Okay. Thank you.

16                  MR. VOGEL: Adan Schwartz.

17                  MR. SCHWARTZ: Hi, Robert. So you were  
18 saying there's a power plant permit that has a  
19 definition of startup and shutdown, and it sounded like  
20 you were saying that it's clearly defined but there is  
21 a monitoring in the permit to track whether the  
22 definition is being met. But would you agree that the  
23 power plant has -- if it wanted to show that it was in  
24 startup or in shutdown, that it would have a burden of  
25 proof of demonstrating that and so that it would have

1 to somehow have the information to support that? And  
2 if you agree with that or if you disagree you can say  
3 why, but if you agree with that, then isn't it  
4 essentially -- would it still be necessary to have that  
5 monitoring specified in the Title V agreement?

6 MR. UKEILEY: It's certainly our position  
7 that it is the burden of the facility to prove that,  
8 and we currently are litigating that issue. I think  
9 that, you know, hoping that the judge follows the law,  
10 but it's hard -- sometimes it's hard to convince a  
11 judge that the defendant has the burden to prove  
12 something. You know, they generally think of things in  
13 terms of plaintiffs have the burden.

14 If the permit had been clearer and said,  
15 you know, the permittee has the burden of proving, then  
16 that would help. But I guess it's unfair -- so in a  
17 perfect world this permit provision doesn't provide any  
18 problems for plaintiffs or the public because the  
19 permittee does have the burden and they're not going to  
20 be able to meet their burden because they don't monitor  
21 these parameters. But I guess in doing enforcement  
22 actions, it's pretty clear that it's far from a perfect  
23 world.

24 MR. SCHWARTZ: That was going to be a  
25 follow-up question. If you thought it would be helpful

1 if the permit at least specified that the burden has to  
2 be carried by the facility, and I think you just  
3 answered that yes, that would be helpful.

4 MR. UKEILEY: Yes.

5 MR. VOGEL: Kelly Haragan.

6 MS. HARAGAN: Hi, Robert. This is Kelly.  
7 I had a question, and you might not able to answer this  
8 here, you might want to provide information, but I was  
9 wondering if you in reviewing permits and commenting on  
10 permits, if you've encountered instances where there  
11 was monitoring that was more than once but that you  
12 thought was inadequate, and if you could describe any  
13 of those examples?

14 MR. UKEILEY: Sure. Well, one example I  
15 worked on recently is Plant Paradise, which is the TVA  
16 facility in Kentucky, and they had -- they, like all  
17 other coal fired power plants, have COMs because  
18 they're required to and have been required to since,  
19 you know, 1972 or whenever that provision went in.

20 They have a requirement to do method 9  
21 testing. And I can't remember exactly the specificity.  
22 But David was saying before, I really think that with  
23 such a big source of pollution -- you know, at one  
24 point Plant Paradise was one percent of the sulfur  
25 dioxide emissions from stationary sources in the whole

1 country. And with such a big source, you know,  
2 monitoring for opacity every three months really isn't  
3 that useful. It doesn't tell you that much about  
4 what's going on in between those three month periods.

5                   And it also -- you know, there could be  
6 some situations where it's inherent that that kind of  
7 monitoring cannot find a problem. Like let's say that  
8 when it rains the coal pile gets wet and there's more  
9 moisture -- I'm just making this up as an example --  
10 and then that decreases the performance of the ESPs  
11 because they get wet and more, you know, particulate  
12 matter comes down and opacity goes up, but that when it  
13 rains they never take method 9 tests because you can't  
14 take method 9 tests when it's raining.

15                   And so there's periodic monitoring which  
16 is more frequently than once but that has inherent  
17 limitations on it that -- I just think there needs to  
18 be a better approach.

19                   MR. VOGEL: Don van der Vaart.

20                   MR. VAN DER VAART: Robert, to get back  
21 to this burden of proof issue.

22                   MR. UKEILEY: I'm having a hard time  
23 hearing.

24                   MR. VAN DER VAART: Sorry. To get back  
25 to this burden of proof issue, you know, at some point,

1 I mean, we have to recognize that the permit is of some  
2 value because if we just go on with this burden of  
3 proof, then some could argue why do I need to monitor  
4 at all.

5 In your case, my understanding was that  
6 you didn't feel the permit was definitive enough in  
7 terms of defining when startup ended and that what you  
8 really wanted was a better definition of startup and  
9 then monitoring pursuant to that definition.

10 Do you see -- do you agree with that or  
11 would you just --

12 MR. UKEILEY: I agree that that's what I  
13 think that the permit should have. It should have a  
14 clear -- exactly. It should have a clearer definition  
15 of when startup ends and monitoring to determine the  
16 definition provided in the permit.

17 MR. VAN DER VAART: Do you -- what do you  
18 think about the issue of just throwing up our hands and  
19 saying, well, at the end of day we can still force the  
20 permittee to bear the burden, would their opinion of  
21 that -- would the facilities' opinion of that not be,  
22 well, why do I even have this permit?

23 In other words, can there be some value  
24 attached to the permit that you would agree with, as  
25 long as it was definitive and well written and the

1 monitoring was pursuant to the definitive nature that  
2 we just discussed?

3 MR. UKEILEY: I'm not sure I'm totally  
4 understanding your question.

5 MR. VAN DER VAART: I guess what I'm  
6 saying is, is does the monitoring have value or does  
7 ultimately do you believe that the monitoring is only a  
8 secondary importance because we can always dump the  
9 entire burden of proof back on the facility outside of  
10 that monitoring, or would you rather have the  
11 monitoring be definitive so that everybody can look to  
12 it and decide what the compliance status is?

13 MR. UKEILEY: I would rather have the  
14 monitoring be definitive.

15 MR. VAN DER VAART: Thanks.

16 MR. VOGEL: Bob Palzer.

17 MR. PALZER: Hi, Robert. You're talking  
18 about the Paradise plant and the -- of course, these  
19 facilities are in startup and shutdown mode, and you  
20 were referring to using the visual method 9 for opacity  
21 reading quarterly. Does this facility have continuous  
22 emissions monitoring.

23 MR. UKEILEY: It does. All large power  
24 plants have to have COMs.

25 MR. PALZER: Is there an attempt based on

1 that monitoring to determine compliance, because that's  
2 actually -- if you could make a proper relationship on  
3 the -- on this oxygen that you're measuring, you should  
4 be able to get some indication of what the particulate  
5 matter is to help solve the problem of the difficulty  
6 doing the visual monitoring.

7 MR. UKEILEY: Well, and that's what we  
8 commented, that the COMs should be used as the  
9 monitoring method rather than method 9. And it -- you  
10 know, sometimes it almost gets absurd like they have  
11 the COMs, why wouldn't you -- why wouldn't you use that  
12 as a monitoring method, but for whatever reason the  
13 agency chose not to.

14 MR. PALZER: If it's any consolation, we  
15 have the same problem on the sources that I look at,  
16 and I agree with you. It seems to be rather strange  
17 when you've got a method that can be used continually  
18 or almost continually as compared with one that has  
19 very limited application, seems strange.

20 MR. VOGEL: Don't see any more questions.  
21 Thank you very much, Robert.

22 MR. UKEILEY: Okay. Thank you.

23 MR. VOGEL: Do we have any other speakers  
24 prepared to talk? Sharon Genasci? Gary Abraham.

25 I'm sorry, would you like to go ahead,