

1 MR. VOGEL: Mr. Zars.

2 MR. ZARS: I'm at several disadvantages,
3 one being that I haven't been in on the call today, so
4 I have not heard all the other testimony except for
5 about the last hour. So some of what I have to say I
6 imagine will be redundant, and I apologize for that.

7 I was going to try to limit my comments
8 to four specific areas, monitoring exceptions like
9 startup, shutdown, deviations, and compliance
10 certification. Quickly, though, a bit of background.
11 I'm a fellow practitioner. I do a lot of citizen suits
12 for environmental groups enforcing Clean Air Act, Clean
13 Water Act, the standard environmental statutes. And
14 the consequence I think working with the Clean Air Act
15 field I have done a fair bit of work with citizens on
16 their efforts to comment on -- review and comment on
17 Title V permits.

18 And then I participated in a number of
19 petitions to EPA objecting to its permit seeking EPA's
20 veto of state permits that have resulted in a number of
21 orders over the years, some here and where I am in
22 Wyoming, some in other states. And I have worked on
23 Title V permits from around the country, mostly here in
24 the West, but also in what I call TVA land in the
25 Southeast.

1 Anyway, before I get on those four
2 subject matters, I was going to say my impression that
3 even though the Title V program was -- I thought meant
4 to be very citizen focused and friendly and -- it's
5 very hard for those of us who are basically marinated
6 in the regs and the law for years to even understand a
7 lot of these permits and the background documents and
8 these various things called deviation reports that are
9 just very hard to figure out and read as someone that
10 spends all your time at it.

11 So my comments are sort of in that vain
12 to try to make these Title V permits, drafts and the
13 finals, both the draft and commenting on them, and
14 finals to use to evaluate compliance accessible and
15 open to citizens where you don't need tons of expertise
16 to understand what the devil is going on.

17 The principal hope with the Title V
18 program was that there would be all the requirements in
19 one document in a method to determine whether this
20 source -- this air pollution source is in compliance.
21 The fundamental problem I found on a number of Title V
22 permits -- I imagine you've heard about this before --
23 is that a bit of failure to either identify the method
24 of determining compliance or a failure of sufficient
25 monitoring to establish compliance, and I could speak

1 about a number of different permits but focused on
2 several on opacity requirements where even though a
3 source like a coal fired power plant will have
4 continuous opacity monitors. Those are used to
5 determine compliance -- it's by Method 9, so-called
6 calibrated eyeball method -- that is far inferior to
7 basically state of the art opacity monitors, and yet
8 the countless, I think, Title V permits are still
9 allowing sources to get away with a Method 9 reading
10 maybe once a year, once a quarter. We've objected.

11 The last one I think that I'm familiar
12 with that I did was a saw mill, it was found to be
13 insufficient to just have a reading I think even once a
14 week. And so that was helpful, but it's not assuring
15 continuous compliance. I'll move on.

16 The previous speaker talked about
17 exceptions and startup, shutdown, malfunction. I agree
18 with her in part and I also agree with the questioners
19 there that part of your problem is the underlying
20 regulation. There are many that are, I think, very
21 outdated now but do set out almost a blanket startup,
22 shutdown, malfunction. I have been in involved in
23 litigation over those for years.

24 I think what is very important that all
25 Title V permits should have, and I haven't seen one yet

1 that says this clearly, to the extent that there are
2 exceptions, they are listed in the permit. So it's not
3 just the limits, but the exceptions to those permits,
4 and then a very clear statement that us lawyers are
5 used to seeing about no other exception shall be
6 allowed or implied.

7 That's always the way I interpreted Title
8 V permits, but every time you go out and push on
9 enforcing one of these permits, with no exception I
10 would say over the last five years that I have been
11 enforcing these, the company will come back and claim
12 others that were supposedly intended or were somehow
13 found another underlying regulation. And I think
14 that's just sort of hide the ball game that the Title V
15 program was meant to eliminate. And it happened to a
16 large degree, and I've never found a Title V permit I
17 could say, look, no, no, you may have startup,
18 shutdown, malfunction, but you don't have load change
19 or you don't have bad fuel quality or high ash hopper
20 or some other excuse, I'm not going to take it, it's
21 not there. So I think that would really help on the
22 citizen enforcement side.

23 Sort of related to that is another issue,
24 which is the so-called deviation and deviation reports
25 where -- again, I haven't read every Title V permit

1 obviously, but I've not seen one that says you shall
2 report all deviations within this certain period of
3 time; and if you haven't, you've waived your right to
4 claim any. And deviations is the umbrella term that
5 covers everything.

6 Now, I don't know if this has come
7 before, but it certainly has in my cases where people
8 claim, well, that really wasn't deviation, that was a
9 startup or shutdown and those are automatically
10 exceptions and we don't have to report anything. But
11 it's, again, a very difficult game for citizens to play
12 if you are trying to review the compliance of a
13 facility to determine whether it is or isn't violating
14 the law and you don't have a requirement to say, okay,
15 here's the limit and then you're required to tell us
16 every time you have a viable or a legal excuse to that
17 limit. If you haven't, you've waived your right to it.
18 Then I can just go down a list, like you can with a
19 DMR, the water instance, and say this is a violation,
20 this a violation, this is a violation, because they
21 haven't even raised -- raised a defense, they're
22 forever waived it. And I can see whether this is an
23 enforceable matter or not.

24 The same thing to a different degree is
25 true with the compliance certifications where I'm sure

1 you all are aware you're getting these squirrely
2 reports that just talk about whether something is --
3 what are the terms -- in periodic compliance or
4 frequent or -- the term is missing me right now, but
5 it's very difficult to determine from those if they do
6 not say yes, we're in compliance, but no, we're, you
7 know, in partial compliance. When were you not in
8 compliance?

9 Most of the reports, the deviation
10 reports are not listed or attached to those. They are
11 often, perhaps, some other quarterly or annual report
12 and are themselves regularly deficient. So it's just
13 very hard ultimately for citizens to come down, look at
14 a document, determine what the law is, pick up the
15 compliance reports to determine whether a source is in
16 compliance or not.

17 Let's see if I've covered everything I
18 meant to here. Another sort of point on trying to make
19 the Title V permits a bit more clearer or open or
20 available to a lay people is to explain in the permit
21 why, for example, an emergency defense may be
22 available.

23 As I understand it, emergency defense is
24 only available against a technology-based limit, but
25 often you'll just see a Title V permit that just has

1 emergency and it lists the statutory and regulatory
2 language, and does it apply, does it not, to which
3 emission in here, which ones are technology based,
4 which ones are SIP or health based or ambient based?
5 You don't know. There's no description. There isn't
6 even a statement in there that says this only applies
7 to the technology base or the technology based emission
8 points on this facility are X, Y, and Z, to which this
9 defense applies.

10 That would be very helpful. Here's one
11 other example. A permit shield provision you'll just
12 see statements, okay, we're shielding the source from
13 the following provisions, and it doesn't say, well,
14 really the law here is that we have to write an
15 exception specifically from the law for this permit
16 shield to apply, and it's not like, well, just
17 everything in this permit is a shield unless we state
18 otherwise. In other words, kind of restating what the
19 law -- what the Title V law is and the regulations are
20 for lay people when they are reading the document to
21 understand what the underlying law or regulations are.

22 MR. VOGEL: Thank you very much.

23 MR. ZARS: That's it. Thanks.

24 MR. VOGEL: Do we have questions from
25 anybody on the Task Force? I don't see any questions.

1 Hang on a second. Adan Schwartz.

2 MR. SCHWARTZ: Well, since Reed is a
3 citizen enforcement attorney who does both NPDS and
4 Title V and since Title V was supposed to bring the
5 Clean Air Act -- make the Clean Air Act more citizen
6 enforceable, I just thought I would ask Reed if he had
7 an opinion about the extent to which Title V has
8 succeeded in that so far. Was that question clear
9 enough, Reed?

10 MR. ZARS: Yes, it's very clear. I was
11 just rolling around percentages in my mind about the
12 extent to which it's succeeded. I'm sorry, I'm a bit
13 pessimistic about this. Maybe 50 percent. I mean,
14 it's not like the Clean Air Act -- there's Clean Water
15 Act cases where you just take the DMR and match it up
16 against the permit limit and enforce, we're free of
17 problems. And the cases -- case books are full of
18 companies still finding ways around, like with the tax
19 law or anything else. But it is far more difficult, I
20 think, to bring these air cases even under a pretty
21 respectable Title V permit for some of the reasons I
22 stated.

23 The exceptions are not as well set forth
24 and the compliance methods are not as clear, and I've
25 had even judges, and certainly defendants, but even

1 judges tell me, well, that's the Clean Water Act you're
2 referring to and you're using all these cases to
3 explain to us Clean Water Act, but we're on to the
4 Clean Air Act and these permits are insane. And
5 sometimes it's true, they are not written as clearly.

6 Here's probably the best example They'll
7 say the DMRs -- and there's a lot of case law on
8 this -- the DMRs are dispositive evidence of proving a
9 violation. It's not as clear at all under the Clean
10 Air Act. You just -- I don't know if you can find a
11 case.

12 I mean, we're all crawling around on any
13 credible evidence rule or this is sufficient evidence,
14 like the Sierra Club, the Public Service Company case.
15 But I don't know if I can find a Clean Air Act case
16 that says, yeah, that's monitoring evidence, that was
17 meant to be dispositive just like it is as a DMR, we
18 got you dead to rights. I'd say that's the principal,
19 sort of failing so far.

20 MR. VOGEL: Steve Hitte.

21 MR. HITTE: Steve Hitte with U.S. EPA.
22 I'll admit I'm still struggling with the startup,
23 shutdown, malfunction issue that you and other people
24 that have testified, but be that as it may, let me ask
25 you this question. Recognizing you're talking to the

1 Title V Task Force, what suggestions do you have to
2 this Task Force to fix this issue?

3 MR. ZARS: Well, you're asking a lawyer
4 who has a fair amount of respect for the law, even if
5 it's wrong, and I -- within those bounds, and not to
6 get too radical, I could see that within the
7 definitions of startup, shutdown and malfunction -- for
8 example, let's look at the NSPS.

9 Well, the startup is defined as the
10 putting into operation of an affected facility, I
11 think, or something like that, and even with that very
12 limited definition, one could through the Title V
13 program require a source to describe what it was doing
14 during that time and demonstrate why all of that
15 period -- and I agree with the woman before me where
16 you can get hours or you can get days of alleged
17 startup. Why all that time is necessary to put that
18 facility into operation?

19 Same thing with a shutdown. You have a
20 very dry definition, you know, the cessation of the
21 operation of an affected facility. I think that's
22 almost verbatim out of the NSPS. Well, explain all of
23 the times -- all of the periods of time and why it was
24 necessary to cease the operation of that facility.

25 That would -- not messing around with

1 anything, I'm not putting a time limit on it, not
2 rewriting any regulation, I'm just asking you to fully
3 justify your characterization of that startup or that
4 shutdown. I think that would be very helpful.

5 For malfunction is probably the -- we'd
6 have a real mine field here or a gold mine because
7 there are requirements, qualitative requirements to
8 establish what a malfunction is, and you shall clearly
9 state and provide the reasons for or justification why
10 this is a malfunction, why it's out of your control,
11 did it meet all the elements of being an unanticipated
12 event. So it meets all of the requirements of the
13 malfunction defense. That would be a huge boost
14 forward.

15 So those are sort of off the top of my
16 head ways in which I think within your Title V purview
17 and within the law you could still get much better
18 report and much better ability of citizens to analyze
19 the validity of those claims.

20 MR. HITTE: That's been helpful. I would
21 say that your answer enters into a debate of whether if
22 we did what you suggested, that you're now asking Title
23 V to fix underlying problems and rules of which Title V
24 is not set up to do that.

25 MR. ZARS: Well, I was trying to tread

1 carefully there because I think you have a better
2 argument to me if you said -- if I said, well, you
3 know, hey, just limit all these startups to five hours,
4 and I've had it. Well, you know, I don't see that in
5 the regulations.

6 And if your aim is just to be putting in
7 the only required due or obligated to do is put in the
8 applicable limits, then I see that might be going too
9 far. But to require better reporting and better
10 justification, I don't know if that's sort of rewriting
11 the regulations or going beyond the scope or intent of
12 the Title V requirement.

13 MR. VOGEL: Okay. Thank you very much.
14 I appreciate your taking the time to be with us today.

15 MR. ZARS: Okay, well, thank you.

16 MR. VOGEL: We are expecting one more
17 speaker, Deborah Master.

18 MS. MASTERS: Yes, I'm here.

19 MR. VOGEL: Thank you.

20 MS. MASTERS: Should I just go ahead?

21 MS. VOGEL: Are there any other speakers
22 on the line?

23 Deborah, go ahead, please.

24 MS. MASTERS: I have to say that there's
25 a gigantic fire in the Brooklyn Navy Yard next to me,