to seeing the results.

BOB HERMANSON: Thank you.

MR. HARNETT: And Don, if you want to move over or get the card over, that would be useful.

Our next speaker is Ann Alexander of the Illinois Attorney General's office.

We welcome you. You have 15 minutes for your presentation, and then there will be a period of questioning after.

I will warn you at a two-minute mark; so feel free and go right ahead.

ANN ALEXANDER: Good morning. I would like to start out by saying that the Attorney General very strongly supports the Title V program in principle. We believe that properly implemented it can bring the compliance status of major facilities into full view and facilitate their achieving compliance; and it also provides an essential tool for public involvement: It takes complex and disparate Clean Air Act requirements and makes them accessible in one document, and requires monitoring to ensure that the public is apprised of compliance on an ongoing basis.

We think those are all extremely important principles and worth defending.

Our concern is that we do not believe that the program's potential is being met here in Illinois. And there are two reasons for that. The first is that severe delays in issuing the Title V permits to some of the worst polluting facilities have -- I would have to say -- gotten out of hand.

These facilities that I'm referring mostly to, the largest coal plants in the state, have been pending -- the permits have been pending for nine years. They're at the proposed permit stage.

That's one problem.

And I think the other what I would characterize as a more serious problem is that the Illinois Environmental Protection Agency has not fully implemented the compliance assurance aspects of Title V despite a lot of evidence of ongoing noncompliance on the part of the applicant facilities.

Touching on the first issue regarding timing, we do recognize that tremendous progress has been made in Illinois; a lot of these permits have been issued. We support that.

In fact, I would say the vast bulk have been issued.

But the problem is the ones -- the permits that

have not been issued are for very heavily polluting facilities: They're the coal plants in Illinois.

And during the nine years that these permit applications have been pending, the public has been hampered in its ability to assess the compliance status of these facilities.

So we -- we think that in and of itself is a significant problem.

But as I said, I think the more significant problem is the compliance assurance issue. Essentially IEPA, as I will explain in more detail, has essentially declined to use the full authority that's vested in it by Title V to assess and assure compliance on the part of the applicant facilities.

To begin with, we believe it could really hardly be plainer as a legal matter that IEPA has both the right and the obligation to assess compliance and assure compliance in the context of Title V with respect to all applicable Clean Air Act requirements. That really is all over the statute in regulations.

Both the federal and the state regulations state that the permitting authority shall have authority to, quote, assure compliance by all sources required to have a permit under this subchapter with

each applicable standard, regulation or requirement of the Clean Air Act.

And in order to implement that authority these regulations, both federal and state, say that a permit application is not complete unless it contains information, quote, sufficient to evaluate the subject source and its application to determine all applicable requirements under the Clean Air Act in its regulations.

Now, to the extent in this application process, once they receive a complete application as thus defined, there is any ongoing noncompliance with any requirement of the Clean Air Act, the applicant is required to submit, again as part of a complete application, a schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.

All of this -- the emphasis on the comprehensive nature of Title V, and specifically the comprehensive nature of compliance assurance -- is entirely consistent with the legislative history of Title V, which makes clear that all compliance issues should be addressed in the permit.

So as far as we're concerned, there's really no

doubt about this. I do have written remarks. So I have provided citations -- not that you all probably don't have them all for this.

But we think that's important groundwork for the fact that the -- this comprehensive nature of Title V clearly encompasses, we believe, the NSR and NSPS programs, which of course are applicable requirements under the Clean Air Act, to the extent the facility has performed modifications that trigger those requirements.

Notwithstanding that, IEPA has specifically declined to address the NSR and NSPS requirements in the Title V permitting process.

Essentially what they have done in these Title V permits for the coal facilities that we've looked at is take at face value these applicants' blanket representation that they were in compliance. The applicants said they were; that was taken, essentially put in the permit with the statement that NSR and NSPS did not comply.

We believe that at minimum what the agency should have done in this context rather than just taking the representations at face value should have been to first request a list of capital projects that

were performed at the applicant's facilities under -- during the relevant time period; and secondly, request information concerning the cost and the purpose and the timing of these projects, whatever is necessary to determine whether the projects constituted major modifications that triggered the NSR and NSPS programs.

It has really been very clear since the 7th Circuit decision in WEPCO what type of information is relevant to an NSR applicability determination. We believe there's no reason that that information should not have been requested in the Title V permitting process, and a lot of reasons that it should.

Now, to the extent any major modifications were found to have occurred based on such information that IEPA should have requested, the agency should have required a compliance plan for meeting the NSR and NSPS more stringent standards.

I would provide an example of, you know, what the practical consequences have been of this failure to essentially look at the -- use or take advantage of the compliance assurance function within the Title V program.

U.S. EPA Region 5 here has been actively seeking for quite a long period of time information

from Midwest Generation through Section 114 regarding the applicability of NSR and NSPS. Now, what there -- what they're seeking has not -- they have not been entirely successful in retrieving it, essentially due to the vagaries of the Section 114 process.

They have essentially thus far failed to obtain a complete set of the necessary information to determine whether there have been violations on the part of these midwest generation facilities.

This circumstance highlights and really makes it all the more important that IEPA fulfill its obligation under the Title V program to request this information; and it really makes it all the more damaging that it has failed to do so.

Simply put, enforcement is not an efficient way to gather data on NSR compliance, and the Title V program is.

I would mention also in addition to the NSR, NSPS violations which are obviously -- which are sort of front and center in what we have been looking at, there do appear to be other noncompliance issues that have not been addressed by IEPA in the Title V process. Specifically, we've learned through inspection of documents that there have been years of ongoing opacity

violations by some of these coal-fired plant permit applicants, yet none of the proposed permits address those violations either.

We are mindful in all of this of the fact that evaluation of NSR and NSPS applicability is resource intensive. We're mindful of the fact that IEPA's resources are limited.

However, the agency has specifically taken the position at one time or another that it's not legally required to address the NSR and NSPS requirements in the context of the compliance assurance portions of the Title V program. And we believe that's simply wrong on the law.

It really needs to be made clear to permitting agencies that their obligation in the Title V process to address all requirements actually means all requirements.

Once that is clear, steps should be taken to ensure that these agencies have the resources that they need to carry out their legal obligation.

In particular, we believe it would be helpful if first the regions would collaborate more closely with the state permitting authorities to ensure that their efforts to gather necessary information are

working in tandem; and secondly, the state authorities should receive, to the extent possible, whatever technical assistance they may need in addressing the complexities of the NSR and NSPS programs.

That concludes my remarks. If you have any questions?

MR. HARNETT: Thank you. Don van der Vaart?

MR. VAN DER VAART: Thanks a lot.

That's -- you all are working hard on utilities.

Let me ask you a question about that.

First of all, just in -- in -- to set the stage, you believe that the Title V permit should define both compliance and noncompliance.

Did I -- did I hear that right?

ANN ALEXANDER: Well, essentially -- the Title V program essentially as we read it requires that they collect information on compliance. And to the extent there is noncompliance, that must be addressed in a compliance plan.

MR. VAN DER VAART: Or once they get their permit in the certification.

ANN ALEXANDER: Yes.

MR. VAN DER VAART: Okay. Now, the thing as far as

the NSA and NSPS questions, is the agency proposing a permit -- I presume they haven't actually issued the permit yet?

ANN ALEXANDER: It's a proposed permit.

MR. VAN DER VAART: Are they proposing in the app. Permit an applicable shield, saying they are not subject to NSR and NSPS, or are they not including any permits to show compliance for those?

ANN ALEXANDER: What they have is a specific statement saying NSR and NSPS do not apply to these facilities. There's no explanation of what goes behind that. It's essentially based on the company's representation; but it's expressed.

MR. VAN DER VAART: That's a shield under the 504(f) too.

ANN ALEXANDER: Uh-huh.

MR. VAN DER VAART: And that hasn't gone through Region 5 yet.

ANN ALEXANDER: Well, actually there is -- you might have heard about this yesterday perhaps, but there's a lawsuit pending because Region 5 did not object; they were petitioned to object; they did not. And essentially a 60-day notice was filed, and as of two days ago suit was filed by environmental groups

concerning that.

MR. VAN DER VAART: Had Section 114 letters gone to these utilities prior to the drafting of these permits?

ANN ALEXANDER: I don't know the exact timing on drafting. The per -- as I mentioned, the permit applications were back in 1995. So some stage of the drafting may have happened then.

The 114s were all from the last two years.

MR. VAN DER VAART: Right. But the 114 letters had gone out to these utilities before the proposed permit went down to Region 5 for approval?

ANN ALEXANDER: Yes.

MR. VAN DER VAART: Oh.

MR. HARNETT: Adan Schwartz?

MR. SCHWARTZ: Hi. I'm a lawyer with a Title V permitting agency as a client, and I can relate to not being always happy with the way they're doing things. It seems to be your situation.

But -- is this on?

THE AUDIO TECHNICIAN: It is.

MR. SCHWARTZ: My question goes to one of your statements, the statement that enforcement authorities are not as effective as Title V authorities to gather information about NSR violations. I think I -- if I

fairly restated that.

I've usually had a different point of view on that. So I'm going to ask you to expand on that statement.

But first I want to make the observation that -- and this does tend to be fact-specific, so generalizations are hazardous. But the problem I have seen is that when you -- for instance, when you want to put a compliance schedule in a Title V permit based on a perceived violation, you essentially have to put your case together in the record to support that permit issuance. And -- because you're going to be defending that when they appeal it.

And that can take a lot of work as well.

And it also tends to hold up issuance of the Title V permit.

And so what you're doing is you're holding up the issuance of this permit, which is going to be a useful compliance tool for at least for other reasons, and you're holding it up to try to resolve this violation.

And so there's -- you know, there's a cost benefit to be examined there.

But anyway, if you could expand on your

thoughts about enforcement authorities versus Title V authorities.

ANN ALEXANDER: Well, I mean, let me just say that my remarks about the effectiveness are based on observations of what's been happening in Illinois and in Region 5, which is that it just has not been smooth or efficient or effective to gather the necessary information through 114. Whether or not that's universal or whether or not it has to be, I think, you know, is arguable. That would certainly be open for discussion.

I think what's important to bring it back to is that this -- this is the law. The law does require that all applicable requirements be incorporated into the permit.

And our concern beyond the fact that that's the law and we need it -- believe it needs to be complied with, is there is emerging evidence or statements, I should say, in recent court decisions that it may even be problematic if a compliance schedule has not been imposed in the context of Title V permitting, if then enforcement is prosecuted independently.

We believe that -- what really should happen is that these tracks should be going in tandem. I'm not

suggesting that, you know, the regions no longer send out 114 requests, I'm suggesting that this is not sufficient and that both things should be happening.

And yes, it may create some delays, but we don't think that essentially these important compliance assurance requirements should be sacrificed on the altar of speed.

I mean, notwithstanding our frustration with the pace of this permitting, we think that that requirement is central enough that it just has to happen.

MR. HARNETT: Bernie Paul?

MR. PAUL: Do you know how long the process has been involved with the 114 letters and the gathering the information to establish the enforcement cases?

And let me get some context about that.

Let's just say that process has taken five years to accomplish and you've gotten so far in the process.

Would you expect that that same information-gathering process necessary to create the right conditions in the Title V permit so that, you know, you and the source will ultimately agree what the right act determination is and so forth -- how long do

you expect that would take in implementing that Title V, and how would you resolve that with your desire to get the permits out more quickly?

ANN ALEXANDER: Well, I think to a large extent that really depends on the aggressiveness with which the agencies, both federal and state, pursue these.

In this case the title -- I'm sorry -- the 114 information process has been in place -- I'm not positive, I'm estimating about two years.

It's nowhere near complete.

The agent -- the utility has not been providing the necessary information, so it's hard to estimate how long it's going to go on.

That having been said, I -- well, I mean, as I just said, I think that there are ways to make that process move faster.

I think that, you know, with these tools in hand, 114 and the NS -- and the Title V process working in tandem, you would hope that these could be resolved not instantaneously but not after nine years of delay either.

MR. PAUL: Just to follow up -- and you suggest it could be then perhaps more expeditiously through Title V.

Does that process assure the source of the same due process that they would be entitled to in an enforcement action?

I'm concerned that when you say that the Title V process could be -- can expedite more quickly, the source may not be entitled to the same senses and opportunities to present their case which they were in enforcement action.

And so that's something that I'd like to hear your views on.

ANN ALEXANDER: Okay. Well, I think -- I mean, you can also break this down into two parts. The first part is the information gathering. That is an independent requirement within the Title V program.

There really is no difference for due process purposes whether the information is gathered in the context of 114 or whether it's gathered in the context of the -- of the compliance assurance process of Title V.

Once that happens, I think that the question really is not a lack of due process in either context but what the avenue for challenge would be. An enforcement action it's more direct, but there would still be opportunities if necessary to challenge the

permit.

Arguably the advantage of the Title V process is that there is more opportunity for dialogue with the permitted agency rather than coming at them after the fact. You know, essentially to present them with what's happened, hold the discussion, work it out in the context of the permit.

It's a more naturally cooperative process.

MR. HARNETT: Richard Van Frank?

MR. VAN FRANK: Bob Palzer's had his card up.

MR. HARNETT: I'll get to everybody.

MR. VAN FRANK: Okay.

You mentioned that there's been a nine-year period and there's still no permit.

Do you know whether the permit applications have been updated during that nine-year period?

And the reason I ask this question is that the permit is supposed to be based upon the application. And the public cannot go in there and comment on the permit very well if the application does not -- if the permit does not really reflect what is in the application.

ANN ALEXANDER: That one I'm -- I can only say I have not seen updates to the application. I do not

know that they have not happened.

MR. HARNETT: Bob Palzer.

MR. PALZER: You mentioned your concern with the long timeline getting some of these major facilities permitted. And that's been a general theme both from some of the sources in the length of time it takes to get the permit as well as with the, you know, members of the public who are concerned that sources aren't regulated.

Can you suggest any specific ways that this process could be expedited?

ANN ALEXANDER: It's a difficult question to answer, because I recognize that to some degree it is based on resources. And I also have to confess that since I don't work at IEPA, I would almost hesitate to offer too many proposals as to how they should adjust their process.

My statement is really kind of more general along the lines of nine years is a very long time. And I have to believe that there are ways that this could be moved along faster, although it may well provide -- it may well require that more resources be provided to the agency.

I mean, as I mentioned in my remarks, I'm well

aware and I hear from them very often that they feel that they lack the staff time to carry out what we're asking them to do.

MR. HARNETT: Lauren Freeman?

MR. PALZER: Actually, could I do a follow up in.

MR. HARNETT: Sure.

MR. PALZER: This also seems to be a generic problem, and that is that many of these agencies don't seem to have the funds to be able to carry on the program, yet it is a requirement that the Title V program is supposed to gather enough in fees to be able to support the program.

Any suggestions along those lines as to what could be done?

ANN ALEXANDER: Well, I -- I mean, I think the question of appropriate funding sources is a difficult one.

I mean, you've just mentioned one option, which is fees. And honestly, I hesitate to answer that because I have not studied carefully the fee structure of the Title V program. I think that it's important that all options be considered in terms of how more resources can come to the agency.

And it's entirely possible that we're not

merely talking about funds. It seems to me that a closer working relationship between the regions and the state permitting authorities could also facilitate the process; perhaps not so much with an injection of funds but simply with the resource expertise that I believe sometimes the regions can offer in these situations.

And more specifically, it -- it enables them not to reinvent the wheel in the sense that if the region is in fact putting out a 114 request and they have information and they have already begun to look at this question, then that information should be shared collaboratively with the state agency so that they can perhaps take it from there in their information-gathering rather than having to look at the problem from scratch.

MR. HARNETT: Lauren Freeman?

MS. FREEMAN: I just wanted to get back for a bit on this due-process question.

You cited a number of regulations about compliance assurance. And I'm aware of the regulation that would require a compliance plan if a responsible official certified noncompliance. No question there, no dispute about it.

But can you cite specifically a regulation or

1 something in the Clean Air Act that would impose a
2 requirement or even the authority to adjudicate a
3 disputed allegation of noncompliance in a Title V
4 permitting process?
5 Or to issue a permit without an adjudication.
6 ANN ALEXANDER: Well, to some extent I think that
7 putting the question that way would essentially make --
8 I mean, what I understand the -- that you're positing
9 is that if there is a dispute regarding noncompliance,
10 then essentially there is, arguably, no longer
11 authority on the part of the permitting agency to
12 certify that.
13 What I -- I would respond that I think
14 essentially what that creates really is an exception
15 that swallows the rule. Because in that situation the
16 regulated entity is pretty much always going to argue
17 that there's controversy over compliance.
18 It's not difficult to find a hook to argue:
19 Yes, we really are in compliance. That would then put
20 these in dispute and essentially leave the agency
21 without authority to determine -- you know, to
22 essentially put noncompliance in the compliance plan or
23 to address it in that way.
24 Essentially we believe it's clear that just

given the nature -- well, for example, of the NSR program, but I also mentioned opacity as well -- there are certain requirements that the regulated entities must adhere to. If those requirements have not been met, if there is evidence of noncompliance, the agency is allowed to judge that. They do that all the time in the enforcement context.

And yes, there are avenues by which that can be challenged in the enforcement context, and there are avenues that can be appealed in the appeal process; but we don't believe the agency's hands are tied merely by the fact that a controversy has been raised regarding compliance.

MS. FREEMAN: Just follow up. I hear you making some policy arguments about what you believe Title V ought to do, but can you cite something that actually suggests that Title V was meant to trump 113 and the procedures that are there to establish violations?

ANN ALEXANDER: Well, I believe that what I have cited -- and I -- the citations, as I mentioned, are in my written remarks -- is really very clear. It says that any time there is noncompliance, that noncompliance shall be addressed in a compliance plan.

Now, I think what you're arguing is that

1 essentially it's not noncompliance in the sense that
2 you can deal with it in the compliance plan to the
3 extent that there is a controversy. What I'm saying is
4 that's an exception that I don't believe that there is
5 any evidence for anywhere.
6 I think that it's very clear on the face of it
7 that if there's noncompliance, if the agency determines
8 that there is, that that goes into the compliance plan.
9 And I guess I would turn the question around to
10 you and ask for any evidence to the effect that -- that
11 simply raising a controversy, a permitting authority
12 challenging the compliance status essentially wipes out
13 that authority.
14 MS. FREEMAN: Well, I mean, there are procedures.
15 You issue an NOV, you file a District Court complaint.
16 I mean, there are procedures that you use to pursue
17 alleged violations and to adjudicate it.
18 ANN ALEXANDER: And this is a different set of
19 authority. That's one set, and this is a different
20 set.
21 That is really very clear in the regulations.
22 It says to the extent that there are violations that
23 are determined through the permit application process,
24 then those violations need to be addressed in Title V.

It's there in the regs, it's there in the statute, it's there in the legislative history.

MS. FREEMAN: So you would have all appeals of the agency's determinations of violations through Title V go through the state court permit appeal process?

That's what you think the Clean Air Act contemplates?

ANN ALEXANDER: Yeah; I mean, there -- there are ways in which these could ultimately -- yeah; I mean, whatever the permit appeal process is in the state court, that's where they should go.

MR. HARNETT: We're going to probably run a little long with this questioner, but we're ahead of schedule. So that's why I allowed the exchange to continue there.

Shannon Broome?

MS. BROOME: So I -- I just want to understand: Has there been a determination of noncompliance?

ANN ALEXANDER: No; because they don't have the information sufficient.

MS. BROOME: So there's been no determination of noncompliance. And that's part of your concern with -- Illinois EPA has not made one.

ANN ALEXANDER: Well, no, it's beyond that. What they've done is they've made a determination of

compliance without any information.

MS. BROOME: Okay. So let's -- okay. So there's been no determination of noncompliance.

And without any formal determination of noncompliance, you would agree that there's no basis for a compliance schedule; right?

ANN ALEXANDER: Well --

MS. BROOME: Without a determination.

ANN ALEXANDER: There's no basis because they haven't looked for a basis. The company said we're in compliance, and they said we believe you.

MS. BROOME: Let's take your premise and assume that they were to put a compliance schedule in the permit.

Are you aware that permit terms are not stayed and so that they might put in that you have to install the BACT or LAER or whatever, and a company could be forced to be installing these controls while it was in the appeal process on the permit, and that that would be a different approach than has typically been taken under any kind of enforcement regime?

ANN ALEXANDER: Well, I think it's an argument for expediting the permit -- the appeal process. But again, I come back to the fact that the

requirements -- that it really is required to be encompassed in Title V. And our concern is that enforcement might even be jeopardized if it's not put in there.

MS. BROOME: How so?

ANN ALEXANDER: Well, what I'm saying is there have been suggestions in Court decisions that it could be problematic if a requirement is not put in the Title V permit.

MS. BROOME: Okay. I would just submit to you that the regulations are absolutely clear that there is no permit shield for things that occurred prior to the issuance of the Title V permit. So there would be no shield. There just wouldn't be.

And --

ANN ALEXANDER: I hope the Courts are wrong.

MS. BROOME: I would be interested to understand how the Title V permit process could be read to supplant the enforcement system that's been in place for 20 years.

ANN ALEXANDER: And I don't think it's a question of supplanting the enforcement system. It is really -- the law is clear that they can work in tandem and that this is one way in which information is supposed to be

gathered.

It's -- that the language really is very clear that they're supposed to gather information on compliance with all applicable requirements. And to the extent noncompliance turns up, it's got to go in the permit.

Now, I think we can argue about the policy/procedural complications of that requirement, but it just doesn't change the fact that it's a requirement.

MR. HARNETT: John Higgins?

MR. HIGGINS: Thanks.

I'd like to offer a couple observations and ask a question.

New York we're quite fortunate that the DEC and the attorney general's office kind of are on the same page. Because we sue all you guys all the time.

But anyway, when we were starting to do our Title V program, we had what we perceive as NSR issues with several of the utilities. And we had to ask ourselves the question what's the best way to proceed.

And in New York we -- the accused has significant rights in negotiating the settlement to an NOV.

And I originally thought it would be a really cool idea to put a compliance plan in their Title V permit and say have a nice day.

Well, both our lawyers and the attorney general's lawyers said nice try, but that's not going to work. And what we chose to do is in the body of the permit language reserve our rights to carry out enforcement for past violations. And we have been in negotiation with several utilities for years now on opacity violations and PSD violations; and we're almost at the end of the road.

But we preserved our rights to prosecute, for lack of a better word, and issue the Title V permit kind of concurrently. So the utilities were the guys we did first because we thought they were -- you know, they have the biggest tonnage coming out. And that was our choice.

I'm not sure why Illinois EPA's decided otherwise. And I had a question if only I could remember -- Oh. Now I remember.

Do you have any authority under Illinois state law to either sue your sister agency or in some other way force them to proceed along the lines that you would prefer they proceed?

ANN ALEXANDER: We would ultimately have that authority. We hope it does not come to that. But that would be a possibility.

You know, I would also remark that while I think -- you know, we -- we could perhaps differ regarding the approach I'm proposing and what you've done, I think what you're describing that the New York DEC has done is a far cry from what Illinois IEPA did. Because essentially EPA just made the blanket statement they're in compliance. And that's what we really have the most significant problem with.

Had they reserved right, I don't think that we would like it as well as what we're proposing, but at least there would have been some recognition that the appropriate investigation has not been done.

MR. HARNETT: Kelly Haragan?

MS. HARAGAN: I just wanted to ask another question to kind of clarify on this due-process issue and see if you agree that there's -- there's kind of two separate issues here.

One is the agency's obligation to issue a permit that assures compliance with all of the core requirements, and that that's why they need to have provisions in that permit to assure that going forward

the source is in compliance with all requirements including new source review and NSPS; and that agencies do that all the time, they make decisions what to put in a permit, and all the time industry disagrees with it, and that's resolved through the permit process.

But that's a separate issue from determining liability for past violations; which if that's going to happen, that still goes forward through a separate track which has the due process rights it always has.

I just don't see this as being very different from -- there are bigger issues and bigger expenses with companies; but the agency issues permits all the time that industry disputes what's in it, and that's a part of the appeal process.

ANN ALEXANDER: I think what you're saying is basically true. The complication of course when you're dealing with the NSR program is you just want to get your terms straight: What's a past violation, what's an ongoing violation. In the NSR context, the failure of a permitted entity to do something in, you know, 1980 is an ongoing violation.

So I would not call that a past violation.

But, yeah, to some extent if you're dealing with -- you know, if they had an opacity violation in

1980 and it ended, that's -- you know, that's a slightly different procedural situation.

MR. HARNETT: Bernie Paul.

MR. PAUL: I'm thinking about what is the most effective and efficient way to handle this issue. And if I understand what you've posited, or your -- the approach that's got to be taken, I'd like to hear your views on whether or not you think this scenario would actually play out.

The state determines that the source is not in compliance with NSR and puts a compliance plan in the Title V permit. And the source doesn't agree that they were not in compliance, and so they appeal the process. And that takes a couple of years to resolve, if that long.

And ultimately the Court says, we agree there's a controversy over whether or not this was an actual noncompliance situation, so this should be handled through enforcement action first.

How does that -- do you think that that scenario is likely?

And do you think that that adds to the efficiency of the program giving Title V permits out?

ANN ALEXANDER: I think the scenario is likely only

to the extent I -- you know, I think the courts are sometimes wrong. I'm not saying a court wouldn't do that, but what I think is the more appropriate scenario, and what genuinely is the more likely scenario is that a court would evaluate what the agency has done, and as courts always do in these situations where they're evaluating an administrative decision, they would determine based on whatever standard of review was in place whether the agency's decision was appropriate.

And if they looked at it and said the agency's decision was an abuse of discretion or arbitrary and capricious, or whatever it is that applies, then they would send it back to the agency. Otherwise they would affirm the decision.

I -- I don't think it's likely that they would turn it over to a completely different division of the agency and say you have to divide it -- decide it this way. I don't think the courts generally interfere in agencies' processes to that degree.

MR. PAUL: And so do you think that that permit appeal process provides the source with the same opportunities to contest the -- the noncompliance claim of the state?

ANN ALEXANDER: Essentially. I mean, it's a different path to take it up. And they -- you know, I can't argue that the permitting -- the permitted authority might not have preferences as to which avenue of challenge they take; either more direct route from enforcement, or a more -- or the permit appeal route.

But sure, it's simply a different way to take it up.

MR. PAUL: My -- and here's my due-process concern. And that is that the appeal of the Title V permit in reviewing the body, whether it's an administrative law judge or court, is basically going to look at whether or not the state abused its discretion or was arbitrary or capricious, those types of standards which are highly deferential to the agency's opinion.

The determination of compliance or noncompliance is really -- I think in a civil action it's the more likely than not standard that that actually occurred.

So to me -- I'm not a lawyer, I'm I just play one on TV -- I see this approach as reducing the sources's due-process rights.

ANN ALEXANDER: First of all, the standards I do not believe are different. Essentially courts do defer

to agency determinations; and we believe that's as it should be in the sense that agencies tend to know more about matters of, say, new source review than a court does.

That having been said, the -- assuming hypothetically that in one forum there would be a slightly different standard of review that applies, that is not a due-process issue. One does not look at a standard of review and say, well, the Court is scrutinizing this less closely, therefore 14th Amendment due process has been violated.

The 14th amendment just doesn't go to issues like that.

MR. HARNETT: I'm going to freeze it at the current card setup. And I have one question before I go to Adan.

I'm -- hypothetically, I'm assuming Illinois EPA did not send letters on capital projects to any of its other Title V sources and yet has issued final permits.

Is it your interpretation that those sources, now that they've been given a Title V permit that says they were in compliance with all provisions, that they are now absolved of any previous actions by the

Illinois EPA?

ANN ALEXANDER: I -- I think, unfortunately, that would be a fair reading of it. I don't know that that's actually the approach that IEPA is going to take. That has not been made clear in our discussions with them.

I don't think -- I mean, I think it's a legal matter. One would hope, again, with the caveat that you don't know exactly what courts are going to do, I think that the correct approach would be, yes, you could continue enforcement against these entities.

However, I think that this creates a danger that there are going to be hurdles to that.

I would also mention that the permits are proposed, they're not actually final, the ones where this finding has been made of compliance.

MR. HARNETT: Adan?

ADAN SCHWARTZ: This is going to be more of a comment than a question, although feel free to respond.

First of all, I agree with you on two things; one is that I think Title V authorities who deal with noncompliance and enforcement authorities who deal with noncompliance are intended to exist in tandem, and neither displaces the other.

The second thing I agree with you on is I agree it's problematic if Illinois is making findings of compliance and issuing these permits if there's any question about that.

At my agency we routinely get comments directly to us from the public -- Marcie Keever knows this very well, because she's written some of them -- making allegations of noncompliance with NSR; and we usually -- whether we agree -- putting aside whether we agree with any specific allegations, we usually take two positions. One is that we're not obliged to go out and find facts and resolve those before we issue a Title V permit. The law aside, from a policy standpoint that would tie us up horrendously.

And the other is we're very careful to preserve our enforcement rights so that -- so that hopefully the Title V permit isn't going to hamper us later.

And the last thing I want to say is I think there are important generic issues raised by what you've brought to us today, and so I wanted to thank you for -- for coming here and heightening our sensitivity to these issues.

ANN ALEXANDER: Thank you. And I guess my response would be similar to - it was to the gentleman from

New York, DEC, which is, while I think we might disagree on exactly what the appropriate execution is, I think what you're doing is a significant step beyond what Illinois EPA is doing.

MR. HARNETT: Thank you very much for both coming in and putting up for -- with some extended questioning.

It's been very helpful to us.

ANN ALEXANDER: Would you like a written copy of this?

MR. HARNETT: If you could leave it with Graham right at the corner, that would be good.

Our next speaker is Susan Zingle of the Lake County Conservation Alliance.

SUSAN ZINGLE: Good morning.

MR. HARNETT: Good morning. You will have 15 minutes for your presentation or talk part of it, and as you get 2 minutes left, I will give you a warning.

SUSAN ZINGLE: Okay. Thank you so much. I will caution you, I have nowhere near as technical as the prior witness; but I bring a very interesting perspective, and that is one of the public who's been dealing with this for about the last four years.

Lake County Conservation Alliance is a