1 (Brief recess.)

2 MR. LING: I had a change to the speaker

3 order. The next speaker will be John Walke, then

4 Lyman Welch.

5 Go ahead and take your seat, John. We'll

6 wait a couple of more minutes. Then we'll start.

7 (Pause.)

8 MR. LING: Not everyone's here, but you

9 can start when you're ready. If you'd like to wait a

10 few more minutes, feel free. But let's just start

11 whenever you're ready.

12 MR. WALKE: I'm ready. My name is John

13 Walke, Clean Air Director with the Natural Resources

14 Defense Council located here in Washington, D.C.

15 Just by way of quick background, I started

16 practicing in private practice at a law firm here in

17 Washington in the early 90's and did about three or

18 four years of Title V permitting there for private

19 companies, Fortune 500 companies, mostly preparing

20 applications at that stage because it was the very

21 beginning of the program.

22 Then I moved to EPA's Office of General

1 Counsel in 1997, where I was EPA's national Title V
2 attorney from 1997 to 2000 counseling the regions and
3 headquarters on all aspects of the program really.
4 Then I joined NRDC in 2000 and have been
5 there since.
6 I want to revisit just a little bit of
7 history to explain how we got where we are from the
8 public's perspective because I think that highlights
9 some of our views of how the program has been carried
10 out and how it's promises have been met in some
11 respects and how its promises have certainly not been
12 met in other respects.
13 It's fair to remember that Title V in 1992
14 and the rules that were issued under the first Bush
15 administration were that the air pollution equivalent
16 of NSR under this administration -- it was an
17 extremely contentious process.
18 And you'll all recall the vice president's
19 council on competitiveness in the Office of
20 Management and Budget, which interfered with EPA's
21 issuance of the rule, leading to Congressional
22 oversight and frankly rules that were not consistent

1 with the Clean Air Act in 1992.

2 And litigation resulted. That's the only

3 mention I'll make of the litigation. But in 1994 and

4 1996 EPA put forward rulemaking proposals to rectify

5 the problems, some of the problems and some of the

6 concerns with the original rules.

7 Both from industry's perspective and

8 states and environmental group perspectives some 8 to

9 10 years later it's really quite a scandal that those

10 rule revisions have not been adopted yet.

11 I think that's one of the reasons we're in

12 a state now that is far from ideal. It's far from

13 what Congress expected.

14 The environmental petitions who brought

15 those original suits recently moved to reopen that

16 original lawsuit out of frustration that the rules

17 had not been finalized at this late date -- and

18 seeing no prospect of that being done.

19 I think it's fair for this Task Force to

20 understand that only then was an idea of a Title V

21 Task Force floated. I think it occurred to us and

22 many others that this was quite obviously a blocking

1 move to prevent adoption of those final rules or a
2 reopening of the lawsuit.
3 So I just wanted to present that
4 alternative picture while at the same time eagerly
5 participating in good faith before a group of other
6 people who are also participating in good faith.
7 But fundamentally there are just some
8 irreconcilable conflicts at the heart of what people
9 think Title V is to accomplish and that is embodied
10 in the original 1992 rules, the '94 and '96 proposals
11 and the lawsuit over the original rule.
12 It's my respectful suggestion that one of
13 the best ways to get on with this program and
14 accomplishing what it should is that we should have a
15 resolution of those matters.
16 Frankly I don't view it as being entirely
17 helpful that the agency has embarked upon another
18 one-year delaying process in the form of this Task
19 Force to prevent that resolution from occurring.
20 So to the extent that this body can
21 address some of those foundational principles, I
22 think it would be most helpful to the public. How

1 you do that with the pending lawsuit is up for you to
2 decide, but that would be one recommendation I have.
3 Along those same lines, notwithstanding
4 the agency's inability to adopt final rules that were
5 proposed in 1994 and 1996, it's recently come to our
6 attention that the agency is, nonetheless, going to
7 embark upon another rulemaking proposal on Title V by
8 the end of this year that they intend to finalize it
9 in short order thereafter.
10 Clearly -- what explains this? Well, what
11 explains it is the new rulemaking proposal that's
12 coming out, a new round of industry flexibilities
13 arising out of the White Paper #3 draft guidance
14 document that the agency issued at the end of 2000
15 for comment, but has languished ever since, hopefully
16 at least in my estimation because of the strong
17 negative comment that greeted that document.
18 If the agency has time to issue White
19 Paper #1 and White Paper #2 and draft White Paper #3
20 and proposed White Paper #3 rulemaking, surely it has
21 the ability and the resources to finalize those
22 revisions and have this end up in the courts where

1 that resolution that I mentioned earlier can occur.
2 I've already made a request to Bill
3 Harnett that he place before this Task Force the
4 issues that the agency intends to propose for comment
5 in the white paper number 3 rulemaking. Without
6 giving me a formal response he sounded open to that.
7 So that's something else I would encourage
8 you to do and to consider whether it really makes
9 sense to have a new rulemaking without those earlier
10 rulemakings, which go to so many foundational
11 principles, resolved yet.
12 The original Title V program in my view
13 had three basic purposes. We've discussed them. But
14 let me just give them my own labels since that's how
15 I'll be structuring my remarks.
16 The first was a compilation purpose.
17 Title V is supposed to compile applicable
18 requirements into the same document structured after
19 the Clean Air Act-NPDS permit program because the Air
20 Act didn't have one.
21 Congress looked at the chaos of the SIP
22 world and all the federal rules at the 80's and said,

1 you know, we really just need to provide a structured
2 place to have one document where everyone knows
3 what's going on.
4 That process has been long and
5 frustrating. But ultimately I believe after the
6 first round of permits are issued, we'll be far less
7 resource-intensive and contentious in the future,
8 because frankly the renewal permits and the renewal
9 permit applications -- especially with the fact that
10 you get a permit shield if you submit a renewal
11 permit application -- it's not going to be nearly the
12 amount of work it was in the first decade.
13 Certainly there will be new units on line
14 and new requirements that have come into place. But
15 I hope we can all agree that it's not nearly going to
16 be as much work.
17 The second purpose is kind of a broad
18 public participation purpose to the program.
19 Dispersed throughout Title V are additional
20 opportunities for public participation and the permit
21 issuance process, the permit review process, the
22 permit petition process, the permit appeal process.

1 I'm not going to do all those, although it
2 is the view of the environmental petitioners that the
3 agency did not meet its statutory obligations with
4 respect to the permit revision process.
5 And you'll probably recall that was the
6 source of all the controversy and media coverage in
7 the '92 period surrounding the intervention of the
8 competitiveness council.
9 I do just want to make one point since I
10 think it's highly relevant to what you're discussing.
11 The vast majority, overwhelming majority, of comments
12 on permits, arguments about permits terms and the
13 like come from the sources themselves.
14 At least let's be candid about that. The
15 public comments on relatively few, exceedingly few --
16 in Dayton, Ohio, no permits.
17 But the negotiation process that occurs
18 between source owners and permitting authorities is
19 by far the most conversation that occurs between
20 regulators and outside parties.
21 Now, the following remark is made in jest,
22 but if you want to streamline the process, don't let

1 source owners comment on their permits. Obviously
2 that's not going to happen. But if this body -- and
3 it should not happen.
4 But if this body is going to consider ways
5 in which public involvement is a potential impediment
6 to the process and a resource drag and a burden and
7 arguments over what terms should or should not be,
8 let's just recognize that that's coming from the
9 private sector side and not from the public.
10 I'm not contesting that right, but at
11 least as a factual matter I think it's important to
12 make that point.
13 The third aspect of the program, which I
14 think is the greatest value added in my personal
15 opinion, but also the area where the agency, EPA, and
16 states have most thoroughly fallen down on the job,
17 is what I call the compliance enhancement aspect of
18 the program.
19 By that I refer to the actual procedural
20 substantive requirements that Title V added to pre-
21 existing permitting regimes and regulatory regimes,
22 and those are enhanced monitoring, periodic

1 monitoring, compliance certifications, deviation
2 reporting, semiannual reporting, and things of the
3 like.
4 Congress decided, I think, correctly, that
5 the clean air world, in particular, was woefully
6 inadequate when it came to the actual ability of the
7 public regulators and industry to determine whether
8 they were in compliance or not. Again, they looked
9 to the Clean Water Program and saw NPDS permitting
10 and monitoring being much more rigorous, and, again,
11 the underlying certification aspect of the program
12 found their genesis in the Clean Water Program as
13 well.
14 The most contentious aspects of the
15 program, from the beginning, and the source of the
16 greatest challenges and difficulties when I was at
17 the Agency, dealt with these core aspects. In my
18 opinion, industry, and, above all, industry lobbyists
19 in Washington, never bought into those parts of the
20 program and have systematically done what they could
21 to undermine those aspects of the program.
22 I must say, unfortunately, EPA, under the

1 previous Administration, certainly continuing with
2 this Administration, succumbed to that pressure. The
3 Enhanced Monitoring Rule, which became the Compliance
4 Assurance Monitoring Rule, fails to provide the
5 public with knowledge or certainty that industry
6 knows what its emissions are. To this date, permits
7 do not have monitoring because the Agency delayed in
8 the imposition of that monitoring until permit
9 renewals, so a function of permits not being issued
10 all across this country, ten years after the program
11 -- 12 years after the program started, and six to
12 eight years after the statute required that all
13 permits be issued.
14 The function of EPA's decision not to
15 require monitoring to permit renewals, is that we
16 still do not have monitoring that was called for by
17 the 1990 Clean Air Act. The Office of Management and
18 Budget and Competitiveness Council intervened in 1991
19 and 1992 to ensure that periodic monitoring language
20 was written into the regulations, but also failed to
21 provide the public with any assurance that sources
22 had monitoring sufficient to allow them to assure

1 compliance.

2 Then, most recently, and most

3 scandalously, the Agency has backed away from what

4 requirement was in the regulations themselves to

5 provide sufficiency monitoring that would also

6 provide the ability for the public to know if

7 industry was accurately monitoring their emissions or

8 not.

9 For those people on the panel who are not

10 aware of that, that last action by the Agency is

11 under challenge in the D.C. Circuit Court of Appeals

12 in Washington right now. I won't comment on it any

13 further.

14 In addition to really just woefully

15 inadequate monitoring that doesn't legitimately allow

16 any business around this table or anyone in the

17 country to actually tell the public with confidence,

18 whether they are in compliance or not, or, more to

19 the point, whether they can accurately quantify their

20 emissions or not, with the exception of probably the

21 utility sector because of their continuous monitors

22 and the like, and certain other industries that have

1 them.

2 Regulators or insiders like us, simply

3 could not honestly tell people at a cocktail party

4 that industry is able to accurately quantify their

5 emission and knows what its emissions are. That

6 situation is repeated on the compliance certification

7 front, where there has been a relentless campaign

8 from the beginning to ensure that industry didn't

9 actually have to sign a document that said whether

10 they were in compliance or not.

11 Part of that was struck down through the

12 continuous or intermittent compliance portion of the

13 court decision in the CAM case, but to this day, the

14 most contested part of permits and the like, just

15 comes down to the very basic fact of whether industry

16 can tell the public whether they're complying with

17 the law or not.

18 The situation is not much better, from I

19 can tell, than it was before the intermittent

20 monitoring rule was struck down by the D.C. Circuit.

21 But for a program that held out the promise to the

22 public that we would better be able to tell whether

1 people are in compliance or people know what their
2 emissions are, I think it's very telling that those
3 are the parts of the program that we have focused on
4 so much in these regulatory fights in Washington, and
5 it's not a very reassuring situation for the public
6 to think that we spend so much energy trying to avoid
7 those very basic and fundamental questions.
8 I want to touch on just a couple of other
9 issues, to allow you to ask some questions and to
10 have the other speakers touch on their remarks as
11 well.
12 Actually, one of my pet peeves has already
13 come up -- insignificant emissions units. The Agency
14 chose the most derogatory semantic label that they
15 possibly could have. There is no such thing as an
16 insignificant emissions unit in the statute. The
17 Clean Air Act doesn't mention it.
18 This was a label that the first Bush
19 Administration came up with. The question is, is an
20 emissions unit subject to a legal requirement under
21 federal law, or is it not?
22 If it is, it should be in the permit, and

1 the public should have the same right to understand
2 whether it is complying with the law and being
3 subject to monitoring and compliance for
4 certification as anything else. The fact that we
5 call it an insignificant emissions unit is just
6 nothing more than a derogatory label.
7 As Keri has pointed out already, these
8 things can add up. I would encourage you to get past
9 labels and to look to see whether it's with the basic
10 purpose and framework of Title V to require emissions
11 unit, subject to federal law, to be subject to the
12 permit program.
13 The last time I checked, it's the current
14 policy, the legal position and policy of EPA, that
15 units do have to be included in the permit, if they
16 are subject to applicable requirements.
17 Now, I'm all in favor of sensible
18 streamlining. The thing that troubles me most about
19 the program, both when I was at EPA in talking to
20 John Paul and others, is the unnecessary resource and
21 time and burden associated with the program.
22 That does not benefit the public. I'd

1 rather have regulators focused on air quality
2 objectives as well. But the truth be told, I still
3 fundamentally believe that a lot of delay comes up
4 through the source interactions.
5 More to the point, some permits are just
6 written poorly and need not take that much time, or
7 need not be written at the length that they are. The
8 Agency has tried to address that through streamlining
9 guidance and the like in the past.
10 Since this permit also came out, the Air
11 Force permit that was mentioned earlier, I actually
12 looked into this because I was curious about it. The
13 one for Wright-Patterson Air Force Base that was
14 mentioned as being 634 pages long, actually the
15 permit is 295 pages long. The additional 334 pages
16 associated with the permit comes from an attachment,
17 which is 40 CFR Part 63, Subpart (MMM), both the
18 preamble and the rule in the Federal Register.
19 That's certainly not necessary to add to a
20 permit, and it cuts the permit in half right there.
21 Of the 295 pages of the permit itself, I counted 30
22 blank pages that are in there inexplicably, and there

1 is a great deal of boilerplate that is found in all
2 permits.
3 The State of Ohio, for reasons that aren't
4 clear to me, also chooses to write out federal
5 requirements, word-for-word, in the permit. There's
6 no need to do that. You don't have to write the
7 NESHAP into the permit. That adds tremendous length
8 to a permit.
9 You can incorporate those things by
10 reference. The truth is, if someone wants to find
11 out what the requirements are, they're either going
12 to have to look in 40 CFR Part 63, or you can look
13 into the permit, but you can't blame Title V, because
14 EPA wrote Subpart A or Subpart DD to be as long as it
15 is.
16 That's just a fact of life. Maybe it does
17 make sense to have a 300-page permit with all of the
18 NESHAP there, so you don't have to go to a library
19 somewhere on the site to do it, to look up the
20 subpart. I think that kind of makes sense.
21 But I don't think you can really turn
22 around and criticize the permit for being 300 pages

1 long. Anyway, I thought Keri's points were also very
2 well taken.
3 Streamlining recommendations from this
4 group would be welcomed. I think there are sensible
5 things that can be done, so long as we don't lose the
6 legal requirements or we don't try to pull any fast
7 ones, which I personally think White Paper 1 and
8 White Paper 2 do, in order to eliminate requirements.
9 As one of the speakers, Ms. Owen, referred
10 to already, I think it's questionable, whether those
11 legal requirements actually do evaporate through some
12 of the White Paper's guidance. But putting that
13 aside, I think there's always sensible streamlining
14 that can occur.
15 I want to just quickly touch on one
16 subject that came up, and that is the question of
17 funding. This is actually something I dealt with a
18 lot when I was at the Agency.
19 There are a lot of dirty little secrets
20 about Title V funding and they are part of the
21 history here. One is that state legislatures, almost
22 from the beginning, placed artificial caps on the

1 amount of permit fees that could be charged, without
2 regard to any knowledge of how many resources it was
3 going to take to issue permits.
4 Another phenomenon that occurred is that
5 in the mid-'90s, there was a wave of elections of
6 conservative governors who slashed permitting staffs
7 across the country, and in Michigan, being a
8 notorious example, with the effect that, guess what?
9 They weren't able to issue the permits.
10 Congress imposed an artificial, arbitrary,
11 statutory deadline for permit issuance. We are all
12 stuck with that. EPA didn't meet it anywhere, so the
13 blame, as is often the case, lies with Congress, but
14 EPA was given a mandate and states were given a
15 mandate to issue permits under a certain schedule.
16 The fact is, they allowed permit fees and
17 funding to be instituted in programs that were not
18 adequate to do the job.
19 I have great sympathy for John Paul, and I
20 think he's taken a responsible position as a manager
21 for doing the best that he can with the resources
22 that he has. But if you want to look at whether the

1 program is working in a timely fashion, look at the
2 funding mechanisms. It's supposed to be self-funded,
3 another little dirty secret.
4 My favorite part of the program is that
5 there are actually states out there that are stealing
6 Title V money and putting into the general treasury
7 fund. There are at least five or six that I
8 remember, and who knows how many are going on now.
9 One recommendation would be to do an audit
10 of these programs. It is illegal for these states to
11 take money from the Title V self-funding mechanism
12 and put it into the general treasury, which I'm sure
13 is very tempting, but doesn't help the program a lot,
14 and it's something that EPA can easily uncover, and
15 they have in the past.
16 They should be doing audits in the future.
17 I think I'll stop there. I could probably go on.
18 I've got some other personal pet peeves, anti-
19 credible evidence language that's cropped up in
20 permits, which fit in which my third thesis about the
21 compliance enhancement portions of the program.
22 But, in the name of taking questions, I'll

1 just stop right here. Thank you.

2 MR. LING: Thank you very much, John.

3 Questions for John? Bernie was first, I think,

4 although it was close.

5 MR. PAUL: I'd like to get a clarification

6 from you on one of your statements. You seemed to be

7 supportive, initially, of the approach of

8 incorporating complex regulatory requirements into

9 the permit, by reference. But you followed that with

10 statements that it would be helpful to have all those

11 requirements in the permit. What's your final view

12 of how complex rules should be incorporated into the

13 permit?

14 MR. WALKE: I should have been more

15 refined in my response, because the statutory

16 language actually guides us on this. I believe it's

17 Section 504(a) of the statute that requires assurance

18 of compliance with all applicable requirements,

19 including emissions limitations, monitoring, or

20 something or other. I'm not quoting it accurately,

21 of course, but I think the statute requires those

22 core requirements, such as emissions limitations and