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SOVEREIGN IMMUNITY AND STATE IMPLEMENTATION PLANS: THE SUCCESS (OR FAILURE) OF CITIZEN SUITS UNDER THE CLEAN AIR ACT

Sierra Club v. Tennessee Valley Authority[1]

I. INTRODUCTION

The Clean Air Act ("CAA")[2] regulates the amount of pollutants emitted into the air through individualized state-developed implementation plans.[3] These plans are approved by the Environmental Protection Agency ("EPA") and enforced through suits brought by citizens or state governments, which pose a variety of penalties (*e.g.*, injunctions, punitive civil monetary penalties).[4] A variety of factors weigh in as to how successful an action for compliance with the standards will be, but of late no issue is more important than that of a statute's waiver of sovereign immunity. While Supreme Court precedent provides some guidance, circuits are split as to whether the CAA provides a clear waiver of sovereign immunity for federal agencies.[5]

II. FACTS AND HOLDING

The Tennessee Valley Authority ("TVA") operates eleven coal-fired power plants that generate electricity for customers in seven states.[6] The plant at issue in this case ("Colbert plant") is located near Tuscumbia, Colbert County, Alabama, in the northwest corner of the state on the Tennessee River.[7] The Colbert plant runs five generator units.[8]

[1] 430 F.3d 1337 (11th Cir. 2005).
[2] 42 U.S.C § 7401 (2006).
[3] EPA, *The Plain English Guide to the Clean Air Act, Features of the 1990 Clean Air Act*, *available at* http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html#topic2a (last visited Apr. 16, 2006).
[4] *Id.*
[5] Stephan J. Schlegelmilch, *The Clean Air Act, Sovereign Immunity, and Sleight of Hand in the Sixth Circuit: United States v. Tennessee Air Pollution Control Board*, 50 CASE W. RES. L. REV. 933, 938 (2000).
[6] *Sierra Club*, 430 F.3d at 1340.
[7] *Id.*

Electricity is generated by burning coal in the unit's furnace, which produces heat that converts water into steam.[9] This steam is transformed into rotational energy, and a generator converts the energy into electricity that is distributed across the TVA power grid.[10] This process releases by-products into the air, which become air pollutants when not captured.[11]

The plant also maintains a pollution control system.[12] This system captures up to 99.9% of the air pollutants that would otherwise be released into the air through the electricity generation process.[13] However, what is not caught by the pollution control system is released into the air through two smokestacks.[14] Per the state permit requirements for operating the plant, the TVA maintained a continuous opacity monitoring system ("COMS") in each smokestack to constantly measure the opacity of the smoke plumes.[15]

Opacity is one of the most basic emission limitations imposed upon sources of air pollution like the TVA plant.[16] Opacity is determined by how much a plume of smoke reduces the transmission of light and is measured in percentages of the light blocked.[17] Opacity is not a measure of pollution; however, it is an important indicator of the amount of visible pollutants discharged by plants under the CAA.[18]

The EPA regulations and the CAA require each state to maintain a state implementation plan ("SIP") to enforce the national air quality standards set forth in the CAA.[19] In order for the SIP to be effective, the EPA must approve all relevant sections.[20] Alabama maintains a SIP, which includes the specific provisions laid out by the EPA, and

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1340-41.
[16] *Id.* at 1341.
[17] *Id.* "COMS measures opacity by projecting a beam of light across the interior diameter of a smokestack to a mirror mounted on the opposite side . . . ." *Id.* The device then measures how much light is reflected back. *Id.* "COMS then records the amount of light that was absorbed or scattered on the trip. *Id.*
[18] *Id.*
[19] *Id.; see* 42 U.S.C. 7410 (2006).
[20] *See id.*

incorporates some provisions of the Alabama Department of Environmental Management's ("ADEM") Air Pollution Control Program.[21] However, not all sections or provisions of this plan were approved by the EPA and therefore are not a part of Alabama's SIP.[22] There are three provisions of the ADEM regulations at issue in this case: (1) a 20% opacity limitation; (2) the 2% de minimis rule; and (3) the credible evidence rule.[23]

The Sierra Club and the Alabama Environmental Council ("AEC") sued the Tennessee Valley Authority ("TVA") under the CAA.[24] The Sierra Club and the AEC claimed the TVA plant in Colbert County violated the 20% opacity limitation.[25] The violation of the 20% opacity limitation was an element of the Alabama SIP approved by the EPA.[26] The complaint alleged over 8,900 individual violations of the opacity limits during a five-year period from 1997 to 2002.[27] The Sierra Club and AEC sought declaratory and injunctive relief,[28] as well as civil penalties in the amount of $27,500 per day for TVA's violations.[29]

The District Court for the Northern District of Alabama granted summary judgment to TVA.[30] The court found that the opacity violations fell within the ADEM's "2% de minimis rule" forgiveness zone.[31] Additionally, the trial court held that the data offered to prove the violations, which was generated from the Colbert plant's continuous opacity monitoring system ("COMS"), could not be used to establish violations before May 20, 1999 because Alabama had not yet adopted the credible evidence rule.[32] Finally, the court found that even if violations had occurred, the state had not waived sovereign immunity, and thus no civil penalties could be imposed.[33] The Sierra Club and the AEC

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[21] *Id.* Alabama's SIP is codified at 40 C.F.R. § 52.69 (2006).
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1339.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1343.
[30] *Id.* at 1339.
[31] *Id.*
[32] *Id.* at 1339-40.
[33] *Id.* at 1340.

appealed, challenging the district court's basis for finding that they had failed to prove violations and the additional ruling that civil penalties could not be assessed against the TVA.[34]

The Eleventh Circuit Court of Appeals issued several holdings.[35] First, the court addressed the issue of standing, even though it was not addressed by the district court or raised on appeal.[36] The court held that the Sierra Club and the AEC had standing to bring suit.[37] The court then reviewed the grants of summary judgment de novo.[38] The court held that to be applicable in excusing violations, the 2% de minimis rule must have itself been authorized or permitted by the SIP.[39] However, since Alabama did not submit the proposed rule for EPA approval, the 2% de minimis rule was tantamount to an unapproved modification of the opacity limitation, and the rule changed what would otherwise be a violation under the CAA and Alabama SIP.[40] Therefore, the 2% de minimis rule was not valid and could not serve as an excuse for the Colbert plant violations.[41] The court next considered whether the 2% de minimis rule could be considered an interpretation of the credible evidence rule.[42] The Eleventh Circuit held that that the rule could not be construed in this way to avoid

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 1344.

[37] *Id.* at 1344-45.

[38] *Id.* at 1345-46. Generally a court will review a district court's denial of injunctive relief only for abuse of discretion. *Id.* at 1346. However, since injunctive relief was denied here solely because summary judgment was granted, that is not the appropriate standard. *Id.* Since summary judgment is not a discretionary act, it can be reviewed de novo. *Id.* The major issues in the case center on the grant or denial of summary judgment, so the appeals court reviewed the entire case de novo. *Id.*

[39] *Id.*

[40] *Id.* at 1347.

[41] *See id.*

[42] *Id.* at 1340. The credible evidence rule states that "[n]otwithstanding any other provision in [the ADEM regulations], any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed, can be used to establish whether or not an owner or operator has violated or is in violation of any rule or standard in this Division." ALA. ADMIN. CODE r. 335-3-1-.13(2) (2005). The EPA mandated that each state adopt its own credible evidence rule in part "to clarify that the inclusion in a state implementation plan (SIP) of enforceable test methods for SIP emissions limits does not preclude enforcement based on other credible evidence or information . . . ." Credible Evidence Revisions, 62 Fed. Reg. 8314, 8316 (Feb. 24, 1997) (to be codified at 40 C.F.R. pts. 51, 52, 60, and 61 (2005)).

the violations.[43] Therefore, TVA was not entitled to summary judgment on the grounds that there were no violations in light of the 2% de minimis rule.[44]

Next, the court considered whether TVA was entitled to summary judgment based on the use of COMS data to prove violations of the opacity limitations.[45] The court found that until the credible evidence rule was adopted in May of 1999, the regulations commanded use of another process, Method 9, for measuring opacity.[46] Once the credible evidence rule was adopted on May 20, 1999, COMS data was a permissible measure of opacity violations.[47] However, the rule change did not apply retroactively.[48] Therefore, the COMS data could not be used to prove emissions violations prior to May 20, 1999.[49] The court held that TVA was entitled to summary judgment with regards to the alleged violations prior to May 20, 1999.[50] The court also rejected the argument that the federal credible evidence rule was applicable at the time when Alabama's credible evidence rule was not and held that the federal credible evidence rule is not available in citizen suits to enforce emissions limitations.[51]

Finally, the court addressed the grant of summary judgment to TVA regarding Sierra Club and the AEC's claims for civil penalties.[52] The court held that Congress, in writing the relevant portions of the CAA,[53] did not waive the sovereign immunity of TVA from liability for punitive fines imposed for past conduct.[54] Likening the situation to the previously interpreted Clean Water Act,[55] the court found that the United States and its agencies were not "persons" under the statute, and therefore

[43] *Sierra Club*, 430 F. 3d at 1349.
[44] *Id.* at 1349-50.
[45] *Id.* at 1350.
[46] *Id.* at 1350-51. The Method 9 procedure relies on a state-certified observer to visually gauge the opacity of a plume of smoke as it releases from a smokestack. *Id.* at 1342. Under Method 9, observations are conducted only periodically (between 1 and 15 days in a given year) and during the day, unlike COMS which monitors constantly. *Id.*
[47] *Id.* at 1351.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 1353.
[52] *Id.*
[53] *See* 42 U.S.C. § 304 (2006).
[54] *Sierra Club*, 430 F.3d at 1355.
[55] 33 U.S.C § 1365 (2006).

civil penalties did not apply.[56] The court found that short of a clear and unequivocal waiver of sovereign immunity, the TVA could not be liable since waiver is to be strictly construed in favor of the sovereign.[57] Because an express waiver from TVA was not found, and a broader waiver could not be inferred, sovereign immunity was not waived.[58] The Ninth Circuit ruled that the district court properly granted summary judgment to TVA on the claim for civil penalties for past opacity violations.[59]

III. LEGAL BACKGROUND

A. Clean Air Act Generally

The CAA is the nation's primary law for protecting the environment and public health from air pollution.[60] The Air Quality Act of 1967 established the first air pollution control program.[61] The Air Quality Act required states to create air quality control regions, adopt air quality standards for pollutants, and develop implementation plans to achieve their specified standards.[62] When the Act was passed, the federal government did not set air quality standards and had little control over the development of the implementation plans.[63] In 1970, Congress passed the CAA amendments, which began to mold the CAA into its current state.[64] The statute put control of setting air quality standards into the hands of the EPA, rather than the states, by requiring each state to develop a SIP for the EPA to approve.[65]

The CAA's stated purpose is to promote public health and welfare,

[56] *Sierra Club*, 430 F.3d at 1355.
[57] *Id.*
[58] *Id.* at 1357.
[59] *Id.*
[60] Clean the Air, *The Clean Air Act: A Primer*, http://www.cleartheair.org/proactive/newsroom/release.vtml?id=24720 (last visited Apr. 18, 2006) (hereinafter "Clean the Air).
[61] Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans — Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 211 (2004).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

initiate and accelerate national research on controlling air pollutants, and encourage and promote pollution prevention.[66] The CAA accomplishes these goals by "provid[ing] technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs . . . ."[67] The statute seeks continuity and cooperation between federal, state, and local governments to combat the negative effects of air pollution.[68]

The goals of the CAA are achieved primarily by establishing emission limitations and standards.[69] State and federal administrators set limits on the quantity, rate, and concentration of emissions of air pollutants on a continuous basis.[70] These rules also relate to the modes of operation and maintenance of emissions sources (*e.g.*, factories).[71] The administrators can set design, equipment, work practice, and operational standards under the statute.[72]

The rules and standards determined by the administrators are codified in a set of individual state and federal implementation plans (discussed below).[73] These plans include enforceable emissions limits, control measures, means and techniques, and generally provide for ways to attain the relevant national ambient air quality standard.[74] Implementation plans are relevant and enforceable against emission sources only if they have been approved by the EPA under section 7410 of the statute.[75]

The benefits of the CAA are numerous. The regulations promulgated in the CAA have helped save lives and avoid illnesses.[76] The CAA helps protect national parks and wildernesses, and aids in cleaning up the scourge of acid rain.[77] In addition, the returns to society from its

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66 42 U.S.C. § 7401(b) (2006).
67 *Id.* § 7401(b)(3).
68 *Id.* § 7401(c).
69 Clean the Air, *supra* note 60.
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*

monetary investment in the CAA have dramatically exceeded the costs.[78]

If states or emissions sources fail to comply with the provisions in the CAA, the EPA has several enforcement options to reach the goals and benefits of the CAA. Although states promulgate implementation plans, the federal government enforces these plans.[79] If a violation offends any state's implementation plan, the EPA must notify the violator and the state in which the violation occurred.[80] Thirty days after such notice, the EPA can issue compliance orders, levy administrative penalties, or initiate civil proceedings in federal court.[81] The EPA may also impose criminal penalties for violation of CAA provisions.[82]

The EPA's authority to issue compliance orders is nearly boundless—the only prerequisite is a notice of non-compliance.[83] However once a compliance order is issued, if a violator avoids complying with the order, the violator will be subject to stiff penalties.[84] The CAA permits the EPA to impose administrative penalties of up to $25,000 per day for each violation and civil penalties of up to $5,000 per day for each violation.[85] Under section 120, there are no limitations for penalties if the punishments are intended to deprive violators of the full economic benefits of violations.[86] The EPA may also issue permanent and temporary injunctions in its attempts to enforce the CAA and state implementation plans.[87]

B. State Implementation Plans

Air pollution is regulated by federal, state, and local law under the police powers.[88] SIPs, created by state governments, are the primary implementation mechanisms for achieving clean air.[89] States intend SIPs

[78] *Id.* The EPA estimates that for every $1 the public spends, it receives $40 in return. *Id.*
[79] DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL § 10.05 (2001).
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] 39A C.J.S. *Health & Environment* § 163 (2005).
[89] Daniel P. Selmi, *Conformity, Cooperation, and Clean Air: Implementation Theory and its*

to be "comprehensive strategies for ensuring attainment of the national ambient air quality standards."[90] In formulating SIPs, states must consult with local governments and officials. State and local governments are to jointly determine their respective responsibilities for planning, implementing, and enforcing a SIP to meet the standards.[91] States must show they have the legal authority to carry out the plan contained in the SIP by identifying the organizations responsible, setting forth their responsibilities, and including agreements and memoranda of understanding from the organizations.[92]

The only restriction or limitation on SIPs is that the EPA must approve them; states have the primary responsibility of establishing implementation plans intended to meet air quality standards.[93] States have considerable latitude in setting standards, as long as they are consistent with the CAA and legislative intent.[94] The CAA leaves considerable discretion to the states in choosing the mix of pollution control devices.[95] If a state's SIP meets the statutory requirements, the EPA will approve it.[96] However, the CAA prohibits any federal agency from supporting, permitting, or approving any activity that does not conform to an approved SIP.[97] If a state fails to promulgate an SIP, the federal agency may create a SIP for it.[98] The EPA will intervene only if a state is unsuccessful in its air pollution control planning attempts and fails to create an SIP.[99]

The EPA may apply significant sanctions if the states do not submit and carry out measures to attain national air quality standards, including when a state does not have its own SIP.[100] Thus, the EPA will sanction a state without an SIP, and then create and maintain an SIP for that state until it creates one for itself.[101] The CAA's structure relies on

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Lessons for Air Quality Regulation, 1990 ANN. SURV. AM. L. 149, 149 (1991).
[90] *Id.* at 151-52.
[91] *Id.*
[92] *Id.*
[93] 39A C.J.S. *Health & Environment* § 163.
[94] *Id.*
[95] Selmi, *supra* note 90, at 152.
[96] Reitze, *supra* note 61, at 211.
[97] Selmi, *supra* note 90, at 154.
[98] 39A C.J.S. *Health & Environment* § 163.
[99] Selmi, *supra* note 90, at 152.
[100] *Id.* at 153.
[101] *Id.*

the states to carry out federally established standards and leaves oversight to the EPA through sanctions, if necessary.[102]

Alabama's state implementation plan is contained in chapter 335 of the Alabama Administrative Code[103] and codified federally in chapter 40, section 52.69 of the C.F.R.[104] Alabama's SIP provides that "no person shall discharge into the atmosphere from any source of emission, particulate of an opacity greater than that designated as twenty percent (20%) opacity, as determined by a six (6) minute average."[105] The SIP permits the Director of the Department of Environmental Management to approve exceptions to the rule, provided that the exceptions regard startup, shutdown, load change, rate change, or other short, intermittent periods of time.[106] The SIP provides for use of a continuous opacity monitoring system as an indication of opacity emissions.[107] The Alabama SIP, as written, also contains a provision that is referred to as the "2% de minimis rule,"[108] which the EPA has not approved or incorporated into the SIP codified in the C.F.R.[109]

After the EPA developed the credible evidence standard (discussed below), the Alabama SIP also incorporated the credible evidence rule into its own state plan.[110] Alabama's code states that "[n]otwithstanding any other provision . . . , an owner or operator may use any credible evidence or information relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed . . . ."[111] The next section permits anyone to use such credible evidence to establish whether an owner or operator has violated or is in violation of any rule of the SIP.[112]

Alabama's credible evidence rule became effective on May 20, 1999.[113] The EPA re-approved Alabama's SIP, including the new credible

[102] *Id.*
[103] ALA. ADMIN. CODE r. 335-3-1 (2005).
[104] 40 C.F.R. § 52.69 (2006).
[105] ALA. ADMIN. CODE r. 335-3-4-.01(1)(a).
[106] ALA. ADMIN. CODE r. 335-3-4-.01(1)(c).
[107] ALA. ADMIN. CODE r. 335-3-4-.01(3)(a).
[108] ALA. ADMIN. CODE r. 335-3-4-.01(4).
[109] *Sierra Club*, 430 F.3d at 1340.
[110] ALA ADMIN. CODE r. 335-3-1-.13.
[111] ALA ADMIN. CODE r. 335-3-1-.13(1).
[112] ALA ADMIN. CODE r. 335-3-1-.13(2).
[113] *See* ALA ADMIN. CODE r. 335-3-1-.13.

evidence provisions on November 3, 1999.[114] The EPA approved the changes as consistent with EPA and CAA policy, and in conformity with the requirement that states must include this rule in their SIPs.[115]

C. Credible Evidence Rule

In 1993 the EPA began drafting a proposal to amend the C.F.R. to eliminate language that provided for exclusive reliance on reference test methods as the only means of demonstrating compliance with the CAA.[116] The revisions, entitled the "credible evidence" rule, clarified that non-reference test data could be used in CAA enforcement actions.[117] In October of 1999, the EPA called for all states to adopt the credible evidence rule in their individual SIPs. This ensured that evidentiary rules for CAA violations were consistent in all fifty states.[118]

Section 113 of the CAA authorizes the EPA to bring administrative, criminal, or civil actions "on the basis of *any information available* to the Administrator."[119] The EPA has clear statutory authority to use any information—both reference test *and* any other data from federally promulgated and approved compliance methods.[120] Case law, in interpreting the statute, had previously held that only reference test data could be used to prove violations of the CAA.[121] Drafters designed the credible evidence amendment to overrule this line of cases.[122] The CAA only limits the EPA by general evidentiary rules in enforcement of the CAA, and not solely by the use of reference method data.[123] The credible evidence amendments eliminated any potential ambiguity relating to the

[114] EPA, *Approval and Promulgation of Implementation Plans: Revisions to the Alabama Department of Environmental Management (ADEM) Administrative Code for the Air Pollution Control Program*, 64 F.R. 59633-01, 59633 (Wed. Nov. 3, 1999).
[115] *Id.*
[116] EPA, *Credible Evidence Revisions*, 62 F.R. 8314-01, 8314 (Mon. Feb. 24, 1997).
[117] *Id.* The credible evidence rule changes 40 C.F.R. sections 51.212, 52.12, 52.30, 60.11, and 61.12. *Id.* This rule became effective on April 25, 1997. *Id.*
[118] *Id.*
[119] *Id.* (emphasis added).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

use of non-reference test data.[124]

The EPA merely intended the revisions to address a rule of evidence, and not to affect the stringency of the underlying emission standards or amend the nature of the compliance obligation.[125] The credible evidence rule does not affect the emission standard—the statute already requires continuous compliance unless specified otherwise.[126] Also, the rule does not affect the existing requirements for periodic testing and inspection.[127] Regardless of the use of credible evidence, states must continue to comply with the testing procedures established in their SIPs.[128] The rules also do not identify any particular set of data as more probative of a violation than others.[129] If an SIP identifies a particular approved method to determine compliance, data from this identified method will be the benchmark against which other credible evidence data will be measured.[130]

Prior to the credible evidence rule, state regulatory agencies relied primarily on infrequent on-site inspections and infrequent reference tests to check compliance.[131] Data other than reference methods was already available and utilized for other purposes, and it was an easy transition to use such data to prove compliance.[132]

This rule also puts emissions sources and potential enforcers on the same evidentiary footing in enforcement actions.[133] Anyone can pursue actions based exclusively on any credible evidence, without the need to rely on data from any particular reference test.[134] The EPA, states, and citizens can use the credible evidence to assess and respond to non-compliance by sources.[135] Citizens have used and continue to use credible evidence in clean air enforcement.[136]

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*

The determination that the evidence or data is credible is merely a determination that it is legally admissible and relevant in the enforcement action.[137] The credible evidence data bears on whether the EPA would have found the facility in compliance during the period in question if the facility had conducted the appropriate performance test.[138] Congress intended the threshold for evidence to bring a suit to be a low one.[139] Congress' emphasis on providing reliable and timely compliance information is inconsistent with the notion that only data from infrequently performed reference tests is relevant to compliance certification and enforcement actions.[140] This was the primary policy for the adoption of the credible evidence rule.

The credible evidence rule meets the EPA's overall goal of deterrence.[141] The fundamental goal of the CAA and emission standards is to achieve clean air.[142] Routine compliance is critical to achieving these goals.[143]

D. Sovereign Immunity

Sovereign immunity is not mentioned in the Constitution, but "the Supreme Court has recognized and routinely enforced this federal protection since 1821."[144] The rule rests both in tradition and practical administration.[145] Because the Constitution doesn't mention the doctrine, Congress is free to waive it, and does so in many instances.[146] However, it is unclear what steps must be taken for Congress to waive the immunity in environmental regulatory schemes.[147]

Over the past ten years, the Supreme Court has curtailed the situations where a court may find that Congress has waived sovereign

[137] *Id.*
[138] *Id.*
[139] *Id.* The threshold is "any evidence." *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] Schlegelmilch, *supra* note 5, at 938.
[145] *Id.*
[146] *Id.*
[147] *Id.*

immunity.[148] There are four rules by which waivers are to be interpreted: (1) "a waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statutory text;" (2) "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign;" (3) when involving a suit claiming monetary damages, "the waiver must extend unambiguously to such monetary claims;" and (4) "a statute's legislative history cannot supply a wavier that does not appear clearly in any statutory text."[149] Even if and when legislative history is clear, a court must ignore it if the waiver is not clearly in the text of the statute.[150]

The issue of whether the CAA waives sovereign immunity is one of varied interpretation. Circuits are split, despite guidance from the Supreme Court when it interpreted similar provisions in the Clean Water Act.[151] As early as 1978, the EPA stated that the CAA waived sovereign immunity in its entirety.[152] Yet, several district courts have found otherwise.[153] The Supreme Court interpreted almost identical sections of the Clean Water Act to *not* waive sovereign immunity.[154] Despite the Supreme Court's interpretation, the Sixth Circuit, in *United States v. Tennessee Air Pollution Control Board,*[155] found that the CAA fully waived sovereign immunity.[156] The rules for determining whether sovereign immunity exists in a particular statute renders the waiver provision in the CAA questionable, despite legislative history.[157]

The relevant provision to sovereign immunity in the CAA is section 7481.[158] This section requires facilities owned or operated by the federal government to comply with a state's SIP.[159] Further, the federal entity should comply with all requirements, administrative authority, processes, and sanctions in the same manner and to the same extent as any

[148] *Id.* at 939.
[149] *Id.*
[150] *Id.* at 940.
[151] *Id.*
[152] *Id.* at 935.
[153] *Id.*
[154] *Id.*
[155] 185 F.3d 529 (6th 1999).
[156] Schlegelmilch, *supra* note 5, at 935.
[157] *Id.* at 940.
[158] *Id.* at 937; *see* 42 U.S.C. § 7481 (2006).
[159] *Id.*

other non-governmental entity.[160]

The Supreme Court interpreted a similar provision in the Clean Water Act in *Department of Energy v. Ohio.*[161] The Court held that in a citizen suit, coercive penalties were appropriate against a federal agency, but punitive penalties were not.[162] The Court reached this conclusion by closely scrutinizing the language of "civil penalties" and "persons" in the statute, and ultimately the Court found that a "person" did not include the federal government and thus did not waive sovereign immunity.[163] The Court also noted that Congress intended federal facilities to be subject to any processes and sanctions, but those sanctions did not necessarily imply punitive measures.[164]

It seems that such an interpretation by the Supreme Court would be controlling, since the Clean Water Act contains nearly identical provisions to the CAA.[165] However, district courts have interpreted this holding expansively and have reached varying results concerning the CAA.[166] The court adopted the Supreme Court's reasoning as applied to the CAA in *United States v. Georgia Department of Natural Resources*[167] and in *California Sacramento Metropolitan Air Quality Management District v. United States,*[168] but not in the district or appellate court's decision in *United States v. Tennessee Air Pollution Control Board.*[169] In the latter, the district court found the CAA to be sufficiently different from the Clean Water Act as to warrant a waiver of sovereign immunity, which was unequivocal and unambiguous.[170]

When courts are faced with an arguably ambiguous waiver provision, a federal court must choose between two options.[171] The court can either engage in a "tortured discussion" of the statutory text to find the requisite "unequivocal expression" of waiver, or ignore legislative intent

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[160] *Id.* at 937-38.
[161] 503 U.S. 607 (1992).
[162] Schlegelmilch, *supra* note 5, at 941.
[163] *Id.* at 942.
[164] *Id.* at 942-43.
[165] *Id.* at 944.
[166] *Id.*
[167] 897 F.Supp. 1464 (N.D. Ga. 1995).
[168] 215 F.3d 1005 (9th Cir. 2000).
[169] 185 F.3d 529 (6th Cir. 1999).
[170] Schlegelmilch, *supra* note 5, at 947.
[171] *Id.* at 950.

and reach a result that may or may not be contrary to Congress's desired intent.[172]

IV. INSTANT DECISION

In the instant decision, the court of appeals first reviewed Alabama's SIP to determine what the plan incorporated and what provisions had EPA approval, specifically focusing on the three provisions at issue in this case.[173] The court found that the SIP incorporated Alabama's 20% opacity limitation, along with four exceptions to the opacity limitations.[174] The court also found that the opacity limitations required Method 9 compliance observations and that authorization to measure opacity using COMS was missing from the SIP.[175]

The court did not, however, find that the 2% de minimis rule was part of the approved SIP.[176] The rule allows a safe harbor period from the 20% opacity limitations.[177] Under the rule, emissions as measured by COMS may exceed the 20% limitation for up to 2% of the operating hours of the plant in each quarter, measured in six minute intervals and excluding times when other approved exceptions apply.[178] The court found that while the rule may have been a practice of the ADEM, it was not officially adopted as part of the ADEM regulations until October of 2003, over a year after the commencement of this suit.[179] The court held that the 2% de minimis rule was not and has never been a part of

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[172] *Id.*

[173] *Sierra Club*, 430 F. 3d at 1341.

[174] *Id.* The opacity provision contains for exceptions to the 20% limitation:

> (1) an exception that allows any source to emit a plume with opacity of up to 40% for one six-minute period per hour; (2) a source-specific exception for 'startup, shutdown, load change, and rate change or other short, intermittent periods upon terms approved by the Director [of ADEM] and made a part of [the source's] permit;' (3) an exception that allows the Director of ADEM to adjust the opacity limitation for a source that discharges a pollutant for which there is no ambient air quality standard; and (4) a domestic source exception.

Id.

[175] *Id.* at 1341-42.

[176] *Id.* at 1342.

[177] *Id.*

[178] *Id.*

[179] *Id.*

Alabama's SIP because the EPA had never approved it.[180]

Finally, the court examined the credible evidence rule to determine its inclusion in the SIP.[181] The parties stipulated, and the court agreed, that the credible evidence rule permitted COMS data to establish opacity violations.[182] However, the court found that the credible evidence rule was not adopted and did not become effective until May 20, 1999.[183] Therefore, the use of COMS data regarding violations before this date was impermissible.[184] Since the Sierra Club and the AEC provided no other evidence of violations besides the COMS data for alleged violations before May 20, 1999, the court affirmed summary judgment for TVA on this issue.[185] The court did, however, permit COMS data to prove violations after the May 20th effective date, since it was effectively incorporated into the SIP via the credible evidence rule.[186]

Before turning to arguments on the merits, the court discussed the issue of standing.[187] TVA had raised the issue of standing in the district court.[188] Although the district court did not address the issue and TVA did not renew the argument on appeal, the court considered the issue by its own motion.[189] The court identified the elements of standing for both individuals and corporations.[190] In satisfaction of the first organizational standing requirement, the court found that each organization had individual members who had standing.[191] The court also held that the Sierra Club and AEC met the additional standing requirements because their actions furthered the organizational purposes and the presence of the

[180] *Id.*
[181] *Id.*
[182] *Id.* at 1343.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 1350.
[186] *Id.*
[187] *Id.* at 1344.
[188] *Id.*
[189] *Id.*
[190] *Id.* Organizational standing requires that (1) the individual members "would otherwise have standing to sue in their own right," (2) "the interests at stake are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*
[191] *Id.* at 1345. Individual standing requires that in order to sue, the individual have (1) injury in fact, (2) an injury is traceable to the alleged violation, and (3) the primary remedy sought will lessen the injury. *Id.*

individual members was not necessary to adjudication of the suit.[192]

After determining which provisions of the SIP had force in this suit, and making sure the parties had standing, the court next addressed the arguments on which summary judgment was based. The primary question was whether Alabama's 2% de minimis rule, followed as a practice by the ADEM, applied to excuse the alleged violations.[193] If the rule did apply, then the suit was over because no violations would have occurred.[194] The court determined that to be valid in determining violations of the opacity limitations, the SIP must have authorized or permitted the 2% de minimis rule.[195] The CAA requires that no state may modify or change any requirements in the SIPs without EPA approval.[196] Unless the EPA specifically adopted and approved the 2% de minimis rule, the rule could not be considered as an element of the plan or used to measure violations.[197] The court held the 2% de minimis rule was an unapproved modification to the opacity limitations in Alabama's SIP because the rule changed what would otherwise be considered violations into non-violations.[198] The court held the rule could not be construed and used to excuse the alleged violations.[199]

TVA countered this argument by alleging that the use of the 2% de minimis rule was really ADEM's interpretation and application of the credible evidence rule.[200] TVA reasoned that in adopting the credible evidence rule and allowing for COMS data to prove violations, the state increased the effectiveness of enforcement and thus also increased the stringency of the standard being enforced.[201] TVA argued that ADEM's 2% de minimis rule was necessary to offset the increased effectiveness of COMS in discovering violations of the 20% opacity rule, since Method 9 enforcement was never as precise or relentless as COMS.[202]

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[192] *Id.*
[193] *Id.* at 1346.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 1346-47.
[199] *Id.* at 1347.
[200] *Id.*
[201] *Id.* at 1348.
[202] *Id.*

The court soundly rejected TVA's argument, holding that a state's interpretation of its implementation plan could not change the CAA mandate of continuous compliance.[203] Again, the court reiterated that the 2% de minimis rule was never subject to EPA approval and thus could not be considered an exception to the 20% opacity limitations.[204] TVA again was not entitled to summary judgment on the grounds that the data did not show violations when viewed in light of the 2% rule.[205]

Next, the court reviewed the substantive arguments concerning the use of COMS data, the credible evidence rule, and existence of violations, all of which are intertwined.[206] The court determined that before the adoption of the credible evidence rule in May of 1999, Alabama state regulations provided that opacity "*shall* be determined by conducting observations in accordance with Reference Method 9."[207] The court held the language was unambiguous and required that opacity data be collected only by a field observer using Method 9 to determine compliance.[208] Moreover, the language of the rule did not require retroactive application, as the Sierra Club and the AEC argued.[209] Therefore, the court held COMS data could not be used to determine pre-May 1999 emissions violations.[210]

The Sierra Club and the AEC argued against this reasoning, contending that the federal evidence rule,[211] adopted in 1997, allowed for

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[203] *Id.* at 1348-49.
[204] *Id.* at 1349.
[205] *Id.* at 1350.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.* at 1351.
[210] *Id.*
[211] *Id.* The federal credible evidence rule provides:

> (c) *For purposes of Federal enforcement*, the following test procedures and methods shall be used, provided that for the purpose of establishing whether or not a person has violated or is in violation of any provision of the plan, nothing in this part shall preclude the use, including the exclusive use, of *any credible evidence or information,* relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test procedures or methods had been performed:
> (1) Sources subject to plan provisions which do not specify a test procedure and sources subject to provisions promulgated by the Administrator will be tested by means of the appropriate procedures and methods prescribed in part 60 of this chapter unless otherwise specified in this part.

the use of COMS data to prove opacity violations at the Colbert plant.[212] The Sierra Club and the AEC argued that with the adoption of the federal rule, the credible evidence rule automatically became a part of every SIP.[213] The Eleventh Circuit disagreed, holding that it was clear that each state was required to adopt its own individual credible evidence rule as part of each SIP.[214] Additionally, the court determined the plain language of the federal credible evidence rule made it unavailable to enforce emissions limitations in citizen suits.[215] Thus, the court affirmed the grant of summary judgment to TVA on the alleged opacity violations occurring before May 20, 1999.[216] However, the court did determine that the credible evidence rule and COMS data could be used to prove violations after May 20, 1999, and therefore reversed the grant of summary judgment to TVA for violations after this date, remanding the case to the district court for further proceedings on that issue.[217]

Finally, the court determined that TVA was entitled to summary judgment on the issue of civil penalties because TVA did not waive sovereign immunity.[218] The court carefully examined the text of the CAA to discern whether Congress waived sovereign immunity of federal agencies, like TVA, from liability for punitive fines in citizen suits.[219] This was an issue of first impression. The court compared the situation to that in *Department of Energy v. Ohio*,[220] where the Supreme Court held that the citizen suit provision of the Clean Water Act did not waive federal government sovereign immunity with respect to punitive fines for past conduct.[221] The Eleventh Circuit also looked at *City of Jacksonville v. Department of the Navy*,[222] which held that waivers of sovereign immunity

> (2) Sources subject to approved provisions of a plan wherein a test procedure is specified will be tested by the specified procedure.

40 C.F.R. § 52.12(c) (2006) (emphasis added).
[212] *Sierra Club*, 430 F. 3d at 1351.
[213] *Id.*
[214] *Id.* at 1351-52.
[215] *Id.* at 1352.
[216] *Id.* at 1353.
[217] *Id.* at 1357.
[218] *Id.* at 1353.
[219] *Id.*
[220] 503 U.S. 607 (1992).
[221] *Sierra Club*, 430 F. 3d at 1354.
[222] 348 F.3d 1307 (2003).

must be unequivocally expressed, and waivers will be strictly construed in favor of the sovereign.[223] In *City of Jacksonville*, the court found that under the CAA, the general waiver of sovereign immunity was limited only to coercive fines.[224] The statute refers to "persons," which, based on prior case law, the court held not applicable to the federal government.[225] The court read the statutory provision in a rational way to not waive sovereign immunity, as it was required to do.[226] The court held the CAA does not waive sovereign immunity against punitive fines for past conduct and affirmed the grant of summary judgment to TVA on the claim for civil penalties.[227]

V. COMMENT

The CAA clearly requires federal governmental agencies to comply with state regulatory schemes like any non-governmental agency, but the CAA is unclear how this compliance can be enforced in light of sovereign immunity.[228] This case and the legal progeny present an interesting issue of whether the CAA actually waived sovereign immunity. While the Eleventh Circuit came to the conclusion that sovereign immunity was not waived,[229] sticking closely to the precedent laid out by the Supreme Court, the Sixth Circuit came to the opposite conclusion and disavowed Supreme Court precedent.[230] The Sixth Circuit affirmed a lower court decision in *Tennessee Air Pollution* and found that the CAA unequivocally and unambiguously waived sovereign immunity to punitive civil penalties for past pollution.[231] The varying outcomes are a result of differing uses of legislative history, application of prior Supreme Court doctrine, and analysis of statutory language.

The Eleventh Circuit gave little deference to the legislative history of the CAA in determining whether the act waived sovereign immunity,

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[223] *Sierra Club*, 430 F. 3d at 1355.
[224] *Id.*
[225] *Id.* at 1356.
[226] *Id.*
[227] *Id.* at 1357.
[228] Schlegelmilch, *supra* note 5, at 933.
[229] *Sierra Club*, 430 F. 3d at 1355.
[230] *See Tennesee Air Pollution*, 185 F.3d 529.
[231] Schlegelmilch, *supra* note 5, at 933.

while the Sixth Circuit did give it consideration. Should a court really ignore legislative history in determining sovereign immunity issues? Consistently, the Supreme Court has answered that question affirmatively.[232] However, the Sixth Circuit ignored the Supreme Court mantra of ignoring legislative history, but did so because the CAA includes statutory language that is not present in the Clean Water Act.[233] The CAA contains section 7604(e), which states that nothing in that section shall restrict the rights of any person to seek enforcement under applicable air quality laws (state or federal) of emissions standards or any other relief or judicial action, including against the administrator, a state agency, or the United States or its agencies.[234]

The Sixth Circuit believed this difference in language made the waiver unambiguous and also different enough from *Department of Energy* to justify the difference in the holdings.[235] The court believed this statutory language expressly overruled the normal default of sovereign immunity.[236] The Sixth Circuit decision also seems to rest on the idea that statutory language is inherently imprecise, as Congress cannot anticipate ex ante every issue of statutory interpretation or application.[237] When two plausible alternative readings of the statute exist, as they do here with the issue of sovereign immunity, the legislative history is necessary to decide the outcome.

The Supreme Court's decision in *Department of Energy*, as applied to the CAA, makes the purported waiver provision of the CAA questionable, despite clear legislative history and the statute's stated purpose, and in some ways undermines the effect of the statute. To make waiver of sovereign immunity available, a court must strain to find a waiver in the statute's text, or else deny a remedy that clearly seems intended by the act.[238] The Supreme Court has left lower courts with a difficult cannon of interpretation, as evidenced by the conflicting results between the Clean Water Act and the CAA, as well as between different

[232] *Id.* at 940.
[233] *Id.* at 951.
[234] 42 U.S.C. § 7604(e) (2006).
[235] Schlegelmilch, *supra* note 5, at 955.
[236] *Id.*
[237] *Id.*
[238] *Id.*

circuits.

The issue of whether the CAA in fact waives sovereign immunity is an important one that needs immediate attention. If the CAA does not waive sovereign immunity, a citizen can sue federal agencies for compliance with the CAA but have little means of enforcing a court decision in their favor, since punitive penalties are not available. However, if the CAA explicitly waives sovereign immunity, citizen suits and subsequent judgments will have more bite, as federal agencies are subject to stiff penalties. An express waiver of sovereign immunity may give the statute more effect, especially against federal agencies. The risk of penalty would encourage compliance.

Ultimately this issue will have to be decided by the Supreme Court. In light of its decision in *Department of Energy v. Ohio*, the outcome under the CAA is likely to mirror the Court's outcome in interpreting the Clean Water Act—sovereign immunity will not be waived. However, the Court must reconsider the importance of legislative history and must give careful attention to the differences in statutory language between the Clean Water Act and the CAA. The best outcome seems to be that sovereign immunity should be waived in the case of the CAA and quite possibly in the case of other environmental statutes.[239]

Even if sovereign immunity waiver applies to citizen suits, citizen suit success is also affected by the individual state's implementation plan and the interplay of the credible evidence rule. Here, the Sierra Club was successful because the court found that Alabama's SIP did not incorporate the 2% de minimis rule.[240] The SIP allowed for changes to emissions standards, but only for times such as start up, shut down, or other limited time periods.[241] The 2% de minimis rule was too broad to be included in the SIP without EPA approval. However, it seems from the court's holding and the interpretation of the CAA and SIPs that the state could give more leeway in emissions to corporations if the change was limited to one of the defined time periods, regardless of how much more emissions output the change would allow. If the change in the SIP had been related to one of these times, the Sierra Club likely would not have prevailed.

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[239] *Id.* at 956.
[240] *Sierra Club*, 430 F. 3d at 1347.
[241] ALA. ADMIN. CODE r. 335-3-4-.01(1)(c) (2005).

The credible evidence rule, also adopted as part of an SIP, influences citizen suit success in a positive way. The credible evidence rule permits any evidence tending to prove violations to be permitted in proving actual violations.[242] The adoption of the credible evidence rule helps citizen suits but is harmful to the companies or utilities because it permits the company's own monitoring data to be used against it in proving violations.[243] Thus, citizens can use the companies own evidence of lack of compliance against it without the effort of searching for other outside data or official monitoring reports. This encourages companies to comply with the emissions standards and to redress noncompliance as soon as discovered.

VI. CONCLUSION

The Eleventh Circuit properly applied the statute to limit Alabama's 2% de minimis rule, as well as to allow the use of COMS data in the prosecution of the Tennessee Valley Authority by the Sierra Club. The Eleventh Circuit stretched Supreme Court precedent in dealing with the Clean Water Act to apply to the CAA and bar the Sierra Club from enforcing civil penalties, since the court held that sovereign immunity was not waived. While this seems to be the logical outcome, circuits are currently split on the issue. Disagreeing sister circuits raise important arguments of statutory interpretation and the role of legislative history in adopting an express waiver for sovereign immunity under the CAA. Ultimately the issue must be decided before the Supreme Court, but a waiver of sovereign immunity appears to be the best outcome in achieving the purpose and goals of the CAA.

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[242] ALA ADMIN. CODE r. 335-3-1-.13(2).
[243] Riesel, *supra* note 79.